British Columbia Utilities Commission

FortisBC Energy Inc. Application for Acceptance of Biomethane Purchase Agreements between FortisBC Energy Inc. and Tidal Energy Marketing Inc.

Oral Argument of

FortisBC Energy Inc.

SPEAKING NOTES

February 27, 2020

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A. INTRODUCTION

1. Thank you for the opportunity to make these submissions. I will endeavour to bring as much clarity as I can to the issues before the Commission this morning. I will focus on six points.

- First, my submission will be that FEI's BPAs with Tidal clearly meet the three-part legal test under section 2(3.8) of the Greenhouse Gas Reduction Regulation, which I will refer to as the GGRR. My submission is that this is sufficient to determine that the Tidal BPAs are prescribed undertakings.

- Second, my submission is that it would be an error of law to interpret section 18(1) of the *Clean Energy Act* as a fourth test that requires all the physical GHG emission reductions to be in British Columbia.

- Third, the true function of the purpose statement in section 18(1) of the *Clean Energy Act* is to work with section 35(n) of the *Clean Energy Act* and section 41 of the *Interpretation Act* to define the statutory mandate of the Lieutenant Governor in Council (or "LGIC") to prescribe undertakings in the GGRR. The GGRR must be in accord with this mandate to be valid.

- Fourth, the law is that a regulation is presumed to be valid, and that it is not the role of the Courts - or Commission - to second-guess the wisdom or efficacy of government policy choices, and that it would have

to be an egregious case for a Court to strike down a regulation such as the GGRR as invalid for reason of inconsistency with its statutory mandate.

- Fifth, in fact, section 2(3.8) of the GGRR and the Tidal BPAs are consistent with the purpose statement in the section 18(1) *Clean Energy Act* to reduce GHG emissions in BC.

- Sixth, the Ministry's letter supports FEI's innovative efforts to meet CleanBC targets, including the Tidal BPAs.

B. THE TIDAL BPAS CLEARLY MEET THE CRITERIA OF THE GGRR

2. First, as I have set out in my written submissions filed in this proceeding, it is clear cut that the Tidal BPAs meet each of the three parts of the test in section 2(3.8) of the GGRR.

3. I do not want to spend much time on this, but I will emphasis three points on why it is that the Tidal BPAs are an acquisition of RNG.

(a) First, the meaning of "acquire" is set out in section 29 of the Interpretation Act. The Interpretation Act states that, in an enactment, "acquire" means "to obtain by any method and includes accept, receive, purchase, be vested with, lease, take possession, control or occupation of, and agree to do any of those things, but does not include expropriate." The word "means" in the definition signals that this is what is

referred to as an exhaustive definition. That means it displaces any other meaning of "acquire" in ordinary usage.[1] In other words, you have to use the definition in the Interpretation Act, not any other definition. The definition is extremely broad - essentially any method of obtaining a thing, including purchasing, except expropriation. In the Tidal BPAs, FEI is acquiring renewable natural gas within the meaning of the definition of "acquire" because FEI is purchasing it.

(b) FEI is purchasing RNG in the same way that conventional natural gas is purchased. If the legislature intended that some novel form of acquisition was required for RNG then it would have needed to spell that out in the legislation. But it did not. Instead, it used the word "acquire" which is broadly defined to include essentially any method except expropriation.

(c) The GGRR includes the words "in BC" or "within BC" 12 times. There is no occurrence of those words in section 2(3.8) of the GGRR. That section simply states: "The public utility acquires renewable natural gas".

4. Simply put, FEI is obtaining renewable natural gas by buying it from Tidal. It is clear that this is an acquisition of renewable natural gas within the meaning of the GGRR.

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[1] See Sullivan, section 4.34, at Tab 4 of the Book of Authorities.

5. With that, I want to devote the rest of this submission to section 18(1) of the *Clean Energy Act*.

C. SECTION 18(1) OF CLEAN ENERGY ACT DOES NOT IMPOSE A FOURTH TEST

6. I believe the issue before the BCUC is how to interpret the words "prescribed for the purpose of reducing greenhouse gas emissions in British Columbia" in section 18(1).

7. It may be helpful to note that the word "prescribed" means "prescribed by regulation" per section 29 of the Interpretation Act. So, 18(1) is referring to a class of projects, programs, contracts or expenditures that are prescribed by regulation for the purpose of reducing greenhouse gas emissions in British Columbia. This purpose statement is explaining the purpose for which classes of undertakings are written into the regulations.

8. In my submission, it would be an error of law to interpret this explanation of the purpose for which undertakings are prescribed as a substantive legal test that FortisBC has to meet. Let me explain why.

9. First, Section 18(1) is a definition. Specifically, it is a definition of "prescribed undertaking". It is in fact referred to as a definition in section 35(n) of the *Clean Energy Act*.

10. I belabour the point because it is an established drafting convention that definitions are not intended to contain substantive law.[2]

[2] *Hrushka v. Canada (Foreign Affairs)*, 2009 FC 69, para. 16; ;

11. I have included at Tab 4 of the Book of Authorities, Sullivan on the Construction of Statutes, 6th Edition (Lexis Nexis Canada Inc., 2014), regarding definitions. At page 24 of the authorities, section 4.32 states:

> "It is well-established that statutory definitions should not be drafted so as to contain substantive law. Their purpose is limited to indicating the intended meaning or range of meaning attaching to a word or expression in a particular legislative context."[3]

12. This was considered by the Federal Court in the case of *Hrushka v. Canada (Foreign Affairs)*, 2009 FC 69. Hrushka is found in Tab 5 of the Book of Authorities.

13. In Hrushka, the Court was considering whether an adjudicator acted beyond their authority when they ordered that passport service be withheld from Mr. Hrushka for three years. One argument advanced by the Minister in defense was that the definition of "Passport Canada" of the Canadian Passport Order referred to withholding passports as one of the tasks charged to Passport Canada by the Minister.

14. The Court dismissed this argument because the function of a definition is to define a word or phrase, not to provide substantive content. At page 24 of the authorities, in paragraph 16 the Court says:[4]

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[3] Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6th ed (Lexis Nexis Canada Inc., 2014), §14.39.

[4] *Hrushka v. Canada (Foreign Affairs)*, 2009 FC 69, paras. 16-17.

[16] …the Respondent's argument runs contrary to the use and purpose of statutory definitions and recognized drafting conventions. As stated in Sullivan and Drieger on the Construction of Statutes, [Ruth Sullivan, Sullivan and Drieger on the Construction of Statutes (Vancouver: Butterworths, 2002), p. 51.] there are two kinds of statutory definitions, exhaustive and non-exhaustive. Exhaustive definitions are normally introduced with the term "means" and serve the following purposes: "to clarify a vague or ambiguous term; to narrow the scope of a word or expression; to ensure that the scope of a word or expression is not narrowed; and to create an abbreviation or other concise form of reference to a lengthy expression." Non-exhaustive definitions are normally introduced by the word "includes" and serve "to expand the ordinary meaning of a word or expression; to deal with borderline applications; and to illustrate the application of a word or expression by setting examples." Thus, it can be seen that a statutory definition does not typically have substantive content. Indeed, the inclusion of substantive content in a definition is viewed as a drafting error. As stated by Francis Bennion in *Statutory Interpretation*:

> *Definitions with substantive effect* It is a drafting error (less frequent now than formerly) to incorporate a substantive enactment in a definition. A definition is not expected to have

> operative effect as an independent enactment. If it is worded in that way, the courts will tend to construe it restrictively and confine it to the proper function of a definition.
>
> [17] Although intended to be used only as a guide, this same view is echoed in the Drafting Conventions of the Uniform Law Conference of Canada. Section 21(2) states that "[a] definition should not have any substantive content."

15. We can apply this to section 18(1) of the *Clean Energy Act.* Section 18(1) uses the word "means", so it is an exhaustive definition. It serves to create a concise form of reference to a lengthy expression. Section 18(1) identifies what a prescribed undertaking is, but should not be read as including substantive content, such as a legal test that requires a certain amount of physical GHG reductions to occur in BC.

16. Second, as I have noted, the words "for the purpose of reducing greenhouse gas emissions in British Columbia" are a purpose statement.

17. At Tab 6 of the Book of Authorities is Sullivan on the Construction of Statutes, 6th Edition (Lexis Nexis Canada Inc., 2014) on purpose statements. At page 40 of the authorities, section 14.39 states:

> "Purpose statements may reveal the purpose of legislation either by describing the goals to be achieved or by setting out governing principles, norms or policies. …Like definitions and application

> provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation - that do apply to facts - are to be interpreted".[5]

18. Sullivan goes on to cite the case of *Greater Vancouver Regional District v. British Columbia (Attorney General)*. In that case, the appellant argued that a purpose statement in British Columbia's *Local Government Act* created a binding manner and form requirement that obliged the provincial legislature to consult with the Regional District before passing legislation affecting the District. Sullivan sums up the result in that case as follows:

> The Regional District's argument did not succeed. As the British Columbia Court of Appeal rightly observed, statements of purpose and principle do not create legally binding rights or obligations, nor do they purport to do so. They merely state goals or principles that may be referred to in interpreting the rights and obligations that are created elsewhere in the legislation.

19. The same is true in this case. The purpose statement in 18(1) of the *Clean Energy Act* does not create legally binding rights and obligations. On its face, it does not purport to do so.

20. Third, I want to emphasize that the words "for the purpose of reducing greenhouse gas emissions in British Columbia" do not on their face impose any test. Section 18(1) simply does

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[5] Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6th ed (Lexis Nexis Canada Inc., 2014), §14.39.

not say that the GHG emission reductions from the classes of undertakings prescribed in the regulation must physically occur within BC and BC alone. The words are simply not written in that manner and they cannot be read in that manner.

21. Rather, on its face, section 18(1) is a definition that explains that certain undertaking are prescribed by regulation for the purpose reducing GHG emissions in BC. It describes the purpose for which they are prescribed in regulation. It does not impose a test that is required to be met by FortisBC in this case.

22. Therefore, in my submission, it would be an error of law to interpret section 18(1) of the *Clean Energy Act* as imposing an "in BC" requirement that must be applied in addition to the tests set out in the GGRR. Doing so would run contrary to the function of statutory definitions, the function of purpose statements, recognized drafting conventions and the plain language of the section.

D. PURPOSE STATEMENT IS THE STATUTORY MANDATE FOR THE LGIC

23. So what then is the function of the purpose statement in section 18(1)? The function of the purpose statement in section 18(1) needs to be considered in combination with section 35(n) of the *Clean Energy Act* and Section 41 of the *Interpretation Act*. Ultimately, the function of these provisions together is to provide the mandate to the Lieutenant Governor in Council when drafting the GGRR.

24. Section 35(n) of the *Clean Energy Act* is the GGRR's enabling provision. Section 35(n) provides that the Lieutenant

Governor in Council may make regulations "for the purposes of the definition of 'prescribed undertaking' in section 18".

25. Turning to Tab 3, page 21, of the Book of Authorities, Section 41(1)(a) of the Interpretation Act circumscribes the power of the LGIC to issue regulations:

> (1) If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to
>
> (a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it,

26. This makes it clear that the LGIC has power to pass regulations only according to the intent of the statute.

27. Section 18(1) makes the intent clear for the LGIC - it's for the purpose of reducing GHG emissions in BC. Section 18(1) is essentially an instruction or guide to the LGIC for drafting the GGRR.

28. The LGIC, in drafting the GGRR, is therefore setting out classes of undertakings that the LGIC believes are

- necessary and advisable,
- ancillary to the *Clean Energy Act*, and

- not inconsistent with the *Clean Energy Act*.

29. If the LGIC has not succeeded in doing this in some respect, then that aspect of the GGRR would be invalid, or "ultra vires" - that is, outside the jurisdiction of the LGIC.

30. In other words, although no one is arguing it in this proceeding (in fact, interveners supported the Application), if a Regulation such as the GGRR is shown to be inconsistent with the intent of the enabling statute or the scope of the statutory mandate, then it is can be struck down.

E. THE GGRR IS PRESUMED TO BE VALID

31. In the case of *Katz Group Canada Inc. v. Onatrio (Health and Long-Term Care),*[6] the Supreme Court of Canada has helpfully summarized the law as it relates to when a Court might find a regulation to be ultra vires. The Katz case is included at Tab 7 of the Book of Authorities.

32. The facts of the case are not important for our purposes, so I will just summarize them briefly. The context is legislative attempts by Ontario to control rising drug costs. Regulations were passed that banned the sale of so-called private label products, which was where pharmacies had a subsidiary which would buy the products and then sell to the pharmacies under its own label. One way or another, this appears to have been a scheme to avoid price controls. The pharmacies Shoppers and Katz challenged the Regulations on the grounds that they were

[6] 2013 SCC 64, [2013] 3 S.C.R. 810.

inconsistent with the purpose and mandate of the two enabling statutes. The Court disagreed.

33. The Court's description of the law is instructive.

34. First, the Court states that "a successful challenge to the of Regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate." As I have shown you, this is essentially what section 41 of the *Interpretation Act* requires.

35. The Court goes on to state at paragraph 25 (at page 62 of the Book of Authorities):

> [25] Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15:3200 and 15:3230).
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> [Emphasis added.]

36. Therefore, the GGRR is presumed to be valid. FortisBC does not have to demonstrate that it is valid. Rather, the burden would be on a challenger to the GGRR to show that they are invalid. There is no challenger to the validity of the GGRR in this proceeding.

37. Moreover, the presumption favours an interpretative approach that reconciles the regulation with its enabling statute. In other words, the Courts will not stretch to find inconsistencies between the statute and regulation. Rather, the Courts will favour an approach that reconciles the regulation and statute.

38. The Court goes on describing the law and paragraphs 27 and 28 are key. They say:

> [27] This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice" (*Jafari v. Canada (Minister of Employment and Immigration)*, 1995 CanLII 3592 (FCA), [1995] 2 F.C. 595 (C.A.), at p. 604). As explained in *Ontario Federation of Anglers& Hunters v. Ontario (Ministry of Natural Resources)* (2002), 2002 CanLII 14606 (ON CA), 211 D.L.R. (4th) 741 (Ont. C.A.):
>
> > . . . the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in

> the statute has not been observed. The motives for their promulgation are irrelevant. [para. 41]

[28] It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, 1983 CanLII 20 (SCC), [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*, 1978 CanLII 40 (SCC), [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 CanLII 175 (SCC), [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 1976 CanLII 739 (ON SC), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [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).

[Underlined added.]

39. The Supreme Court of Canada is clear. In considering the validity of a regulation, neither a court nor this Commission is to assess the policy merits of the legislation, or determine whether in its view the regulation will actually achieve the statutory objectives.

40. In other words, it is not the Commission's job to assess whether the prescribed undertakings will actually achieve GHG reductions in BC.

41. To strike down a portion of a regulation such the GGRR, the regulation must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose. As the Supreme Court of Canada says, it would have to be an egregious case to warrant striking down the GGRR as ultra vires.

F. THE GGRR IS CONSISTENT WITH THE CLEAN ENERGY ACT

42. While there is no party challenging the validity of section 2(3.8) of the GGRR, I do wish to provide the Commission comfort on how this all fits together and how the acquisition of RNG outside of the province pursuant to section 2(3.8) of the GGRR is in fact consistent with reducing GHG emissions in BC.

43. First, there is absolutely no inconsistency between creating physical GHG emissions reductions in Ontario and reducing GHG emissions in BC. In fact, reducing GHG emissions outside of BC is perfectly consistent - if not complementary to - reducing GHG emissions in BC.

44. In this respect, I note that when the *Clean Energy Act* was tabled in 2010, the Minister of Energy, Mines and Petroleum Products emphasized that the act would reduce greenhouse gas emissions by "enabling new utility programs to encourage the use of clean or renewable energy".[7] At second reading, which is at Tab 8, page 82, of the Book of Authorities, the Minister acknowledged that greenhouse gas emissions do not recognize artificial geographic divides:[8]

> *Greenhouse gas emissions don't recognize boundaries. They don't recognize the B.C.-Alberta boundary. They don't recognize the Canada-U.S. boundary.*

45. It is important not to lose sight of this fact. Reducing GHG emissions outside of BC is not inconsistent with the *Clean Energy Act*.

46. Second, in its evidence, FortisBC has described various ways in which the Tidal BPAs will reduce GHG emissions in BC.

(a) We have spoken of how transportation customers will be motivated to switch from higher GHG content fuels to natural gas if a RNG option is available.

(b) We have spoken about how under BC legislation end users in BC will be able to claim credit for reducing GHG emissions in BC. Two quick points on this:

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[7] British Columbia, *Official report of debates of the legislative assembly*, 39-2, vol 18 No 8 (28 April 2010) at p. 4969. Online: https://www.leg.bc.ca/content/Hansard/39th2nd/H0428pm-03.pdf.

[8] British Columbia, *Official report of debates of the legislative assembly*, 39-2, vol 18 No 8 (26 May 2010) at p. 5792. Online: https://www.leg.bc.ca/content/Hansard/39th2nd/H0526pm-08.pdf.

(i) As GHG emissions don't respect borders, it is difficult to separate the accounting of reductions and the actual physical reductions. It is almost more important who can claim the reduction, than where it occurs. For this reason, my submission is that legally recognized reductions in GHG emissions can satisfy the purpose of the *Clean Energy Act*.

(ii) We have shown in our evidence that there will be no double-counting of emissions reductions. The prohibition against double counting is a bedrock principle of GHG accounting schemes for obvious reasons. Double counting would undermine the very purpose of the legislation to reduce GHG emissions and would undermine markets for GHG reductions.

47. We can answer questions on these points, but right now I want to focus on a third point which has been made. That is, through the BPAs, FEI is fostering the development of a renewable gas market in BC, which will assist in achieving the overall goal of greater GHG emission reductions.[9]

48. I want to dwell on this one because Courts have previously found that fostering a market for renewable fuels has to be done in order to achieve the overall goal of greater GHG emissions reduction. This brings me to the last authority I wish

[9] Exhibit B-1, pp. 7 and 9; Exhibit B-2, BCUC IR 1.4.1; Exhibit B-3, BCSEA IR 1.3.1; Exhibit B-5, CEC IR 1.11.1.

to take you to - *Syncrude Canada Ltd. v. Canada (Attorney General)* at Tabs 9 and 10 of the Book of Authorities.

49. The Syncrude case was about Federal regulations that require that all diesel fuel produced, imported or sold in Canada contain at least 2% renewable fuel. Syncrude Canada Ltd. produced diesel fuel at its oil sands operations in Alberta, which it used in its vehicles and equipment. Syncrude argued that the regulations were invalid on the basis that the provision was ultra vires the regulation-making power of section 140 of Canadian Environmental Protection Act. Essentially, Syncrude claimed that the purpose of the statute was to reduce air pollution and the regulation wasn't going to accomplish that purpose. Syncrude claimed that the regulation was actually an economic measure aimed at the creation of a local market. Syncrude pointed to significant expenditures by the federal government to promote the renewable fuels industry as evidence.

50. At Tab 9, page 96, in *Syncrude*[10] the Federal Court emphasized that market demand must be created in order to achieve the overall goal of greater GHG emissions reductions:

> [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

[10] 2014 FC 776, affirmed on appeal 2016 FCA 160.

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."

…

[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.

…

[38] Syncrude recognizes at para 76 of its Amended Memorandum of Fact and Law that part of the objective of the [*Renewable Fuels Regulations*] 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.

[Emphasis added.]

51. The case was appealed to the Federal Court of Appeal. That court confirmed the Federal Court's ruling. At Tab 10, beginning at para. 64, the court stated:

> [64] … The reason the government hoped for the development of a renewable fuels market in Canada was because the availability of renewable fuels would lead to a long-term reduction of GHGs. The judge concluded that "these economic effects are part of a four-pronged Renewable Fuels Strategy" (emphasis in original).
>
> …
>
> [66] The environment and economy are intimately connected. Indeed, it is practically impossible to disassociate the two. This point was well-made in Friends of Oldman River Society v Canada (Ministry of Transport), [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1 where the Court said "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."
>
> [67] The 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. The inquiry does not end with proof of an incentive or market subsidy. Consistent with Ward,

> one must inquire as to the purpose and effect. For example, regulations under the Firearms Act, S.C. 1995, c. 39 could call for new, enhanced locking mechanisms. The fact that capital investments are made to assist the lock industry to transition to the new requirements would not detract from the dominate purpose being addressed to "peace, order, security, morality, health or some other purpose" (AHR at para. 43). Here, the RIAS (Canada Gazette, Part I, Vol. 145, No. 15, (July 20, 2011), p. 699) states the purpose of collateral investments in infrastructure costs related to the production of renewable fuels was "to generate greater environmental benefits in terms of GHG emission reductions."
>
> [68] The evidence demonstrates that part of the objective of the RFRs was to encourage next-generation renewable fuels production and to create opportunities for farmers in renewable fuels. However, <u>the evidence also demonstrates that a market demand and a market supply for renewable fuels and advanced renewable fuels technologies had to be created to achieve the overall goal of greater GHG emissions reduction.</u>
>
> [Emphasis added.]

52. Similarly, the acquisition of RNG may create market demand and supply for renewable fuels and advanced

renewable fuels technologies to achieve the overall goal of GHG reductions in BC.

53. In my submission, section 2(3.8) is valid as there are multiple ways in which the acquisition of RNG inside and outside of BC will result in GHG reductions in BC in the short and long term. Although FortisBC strongly believes that this is the right course of action and that the evidence is clearly there to support it, it is not FEI's burden to prove that it will be successful. Nor is it the role of the Commission to vet the necessity or efficacy of government policy choices. The Commission has to presume the GGRR is valid unless someone proves otherwise. There are many interpretations that reconcile the GGRR with the *Clean Energy Act*. The Commission must favour those interpretations.

G. THE MINISTRY'S LETTER IS SUPPORTIVE

54. The Ministry of Energy, Mines and Petroleum Resources has previously letters with the BCUC confirming that the policy position of the Government of BC is to support projects and initiatives that will lead to an increased renewable natural gas supply in BC. The Ministry confirmed the intent of the GGRR when it stated that "amendments were made to the Greenhouse Gas Reduction (Clean Energy) Regulation in the spring of 2017 to increase incentives for using renewable natural gas in transportation and to establish measures to increase the supply of RNG."[11]

[11] FortisBC Energy Inc. Application for Acceptance of the Biogas Purchase Agreement Between FortisBC Energy Inc. and the City of Vancouver ~ Project No. 1598977, Exhibit C1-2. Online: https://www.bcuc.com/Documents/Proceedings/2019/DOC_53500_C1-2-MEMPR-Letter-of-Comment.pdf.

55. In this proceeding, the Ministry has filed a letter which is also supportive of the Tidal BPAs. The Ministry:

(a) Affirms that RNG is a clean alternative which is a key pathway to achieve GHG reductions.

(b) States that FortisBC's RNG program is highly successful, but that demand exceeds supply.

(c) States that natural gas utilities require innovative approaches and significant flexibility to achieve GHG reduction targets.

(d) Expresses support for utilities to take a broad range of activities, actions and investments to reduce GHG emissions resulting from the natural gas sector in BC.

56. In the context of this application, which is new and innovative, this letter supports FortisBC's efforts and Application for approval of the Tidal BPAs.

H. SUMMARY

57. FEI's acquisition of renewable natural gas through the BPAs with Tidal meets the BCUC's three-part test for a prescribed undertaking under section 2(3.8) of the GGRR. This is sufficient to dispose of this case.

58. Interpreting section 18 as imposing a strict geographic requirement goes against rules of statutory interpretation, including the function of definitions and purpose statements and legislative drafting conventions.

59. The correct interpretation of the function of the purpose statement in 18(1) is that it works with section 35 of the *Clean Energy Act* and section 41 of the Interpretation Act to limit the discretion of the LGIC in prescribing undertakings. In other words, the GGRR cannot be inconsistent with this purpose. However, like all regulations, the GGRR is presumed to be valid, and the burden is on the challenger of a regulation to prove otherwise.

60. Nonetheless, a reasonable interpretation of the prescribed undertaking legislative framework is that in meeting the tests set out in the GGRR, the BPAs help achieve the overarching "purpose of reducing GHG emissions in British Columbia". The Tidal BPAs can help achieve this purpose through physical reductions by encouraging switching from higher carbon fuels, through legally recognized reductions under GHG accounting legislation, or reduced production of conventional natural gas. Or, as the Courts have previously found, by creating a market for renewable fuels that will in the long run achieve greater GHG reductions.

61. While we have explained how the GGRR is consistent with reducing GHG emission in BC, it is not FEI's burden to do so, nor is it the Commission's or the Court's role to question the wisdom or efficacy of government policy.

62. Given the passage of time since the signing of the BPA, FEI's counter party is anxious to proceed and FEI would like to acquire the RNG for its customers as soon as possible for customers who are demanding the product. FEI therefore

requests a speedy approval of the Tidal BPAs on the basis that they are prescribed undertakings under the *Clean Energy Act*.

63. Subject to any questions, that brings me to the conclusion of my submissions.

Dated: February 27, 2020 ***[original signed by C.R. Bystrom]***

Christopher R. Bystrom

Counsel for FortisBC Energy Inc.

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CLEAN ENERGY ACT

CHAPTER 22 [SBC 2010]

[includes 2019 Bill 19, c. 24 amendments (effective May 16, 2019)]

Contents

Definitions

(AM) May 16/19

1. (1) In this Act:

"acquire" , used in relation to the authority, means to enter into an energy supply contract;
"authority" has the same meaning as in section 1 of the *Hydro and Power Authority Act*;
"British Columbia's energy objectives" means the objectives set out in section 2;

"Burrard Thermal" means the gas-fired generation asset owned by the authority and located in Port Moody, British Columbia;

"clean or renewable resource" means biomass, biogas, geothermal heat, hydro, solar, ocean, wind or any other prescribed resource;

"demand-side measure" means a rate, measure, action or program undertaken

(a) to conserve energy or promote energy efficiency,

(b) to reduce the energy demand a public utility must serve, or

(c) to shift the use of energy to periods of lower demand,

but does not include

(d) a rate, measure, action or program the main purpose of which is to encourage a switch from the use of one kind of energy to another such that the switch would increase greenhouse gas emissions in British Columbia, or

(e) any rate, measure, action or program prescribed;

"electricity self-sufficiency" means electricity self-sufficiency as described in section 6 (2);

(AM) Nov 09/18 **"greenhouse gas"** has the same meaning as in section 1 of the *Climate Change Accountability Act*;

"heritage assets" means

(a) any equipment or facilities for the transmission or distribution of electricity in respect of which, on the date on which this Act receives First Reading in the Legislative Assembly, a certificate of public convenience and necessity has been granted, or has been deemed to have been granted, to the authority or the transmission corporation under the *Utilities Commission Act*,

(AM) May 31/12 (b) the authority's interests in the generation and storage assets identified in Schedule 1 of this Act, and

(AM) May 31/12 (c) the authority's interests in the equipment and facilities that are for the transmission or distribution of electricity and that are identified in Schedule 1 of this Act;

"transmission corporation" means British Columbia Transmission Corporation.

(2) Words and expressions used but not defined in this Act or the regulations, unless the context otherwise requires, have the same meanings as in the *Utilities Commission Act*.

2010-22-1; 2012-27-1; 2018-32-5,Sch. (B.C. Reg. 235/2018); 2019-24-1.

PART 1 — British Columbia's Energy Objectives

British Columbia's energy objectives

2. The following comprise British Columbia's energy objectives:

(a) to achieve electricity self-sufficiency;

(b) to take demand-side measures and to conserve energy, including the objective of the authority reducing its expected increase in demand for electricity by the year 2020 by at least 66%;

(c) to generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit that electricity;

(d) to use and foster the development in British Columbia of innovative technologies that support energy conservation and efficiency and the use of clean or renewable resources;

(e) to ensure the authority's ratepayers receive the benefits of the heritage assets and to ensure the benefits of the heritage contract under the *BC Hydro Public Power Legacy and Heritage Contract Act* continue to accrue to the authority's ratepayers;

(f) to ensure the authority's rates remain among the most competitive of rates charged by public utilities in North America;

(g) to reduce BC greenhouse gas emissions

(i) by 2012 and for each subsequent calendar year to at least 6% less than the level of those emissions in 2007,

(ii) by 2016 and for each subsequent calendar year to at least 18% less than the level of those emissions in 2007,

(iii) by 2020 and for each subsequent calendar year to at least 33% less than the level of those emissions in 2007,

(iv) by 2050 and for each subsequent calendar year to at least 80% less than the level of those emissions in 2007, and

(AM) Nov 09/18

(v) by such other amounts as determined under the *Climate Change Accountability Act*;

(h) to encourage the switching from one kind of energy source or use to another that decreases greenhouse gas emissions in British Columbia;

(i) to encourage communities to reduce greenhouse gas emissions and use energy efficiently;

(j) to reduce waste by encouraging the use of waste heat, biogas and biomass;

(k) to encourage economic development and the creation and retention of jobs;

(l) to foster the development of first nation and rural communities through the use and development of clean or renewable resources;

(m) to maximize the value, including the incremental value of the resources being clean or renewable resources, of British Columbia's generation and transmission assets for the benefit of British Columbia;

(n) to be a net exporter of electricity from clean or renewable resources with the intention of benefiting all British Columbians and reducing greenhouse gas emissions in regions in which British Columbia trades electricity while protecting the interests of persons who receive or may receive service in British Columbia;

(o) to achieve British Columbia's energy objectives without the use of nuclear power;

PART 5 — Energy Efficiency Measures and Greenhouse Gas Reductions

Smart meters

17. (1) In this section:

"private dwelling" means

(a) a structure that is occupied as a private residence, or

(b) if only part of a structure is occupied as a private residence, that part of the structure;

"smart grid" means the prescribed equipment;

"smart meter" means a meter that meets the prescribed requirements, and includes related components, equipment and metering and communication infrastructure that meet the prescribed requirements.

(2) Subject to subsection (3), the authority must install and put into operation smart meters and related equipment in accordance with and to the extent required by the regulations.

(3) The authority must complete all obligations imposed under subsection (2) by the end of the 2012 calendar year.

(4) The authority must establish a program to install and put into operation a smart grid in accordance with and to the extent required by the regulations.

(5) The authority may, by itself, or by its engineers, surveyors, agents, contractors, subcontractors or employees, enter on any land, other than a private dwelling, without the consent of the owner, for a purpose relating to the use, maintenance, safeguarding, installation, replacement, repair, inspection, calibration or reading of its meters, including smart meters, or of its smart grid.

(6) If a public utility, other than the authority, makes an application under the *Utilities Commission Act* in relation to smart meters, other advanced meters or a smart grid, the commission, in considering the application, must consider the government's goal of having smart meters, other advanced meters and a smart grid in use with respect to customers other than those of the authority.

2010-22-17.

(ADD)**Improvement financing**
Jun
02/11

17.1 (1) In this section:

"borrower" means an eligible person who receives financing under a financing agreement and includes a person to whom obligations are transferred as described in subsection (4) (a) or (6);

"eligible person" means a person who

(a) receives or will receive service in British Columbia from a prescribed public utility,

(b) has obtained an energy report from a qualified energy advisor, and

(c) meets the prescribed requirements, if any;

"energy report" means a report that

(a) is made and signed by a qualified energy advisor,

(b) evaluates the energy efficiency of a building, or a part of a building, owned or

occupied by an eligible person,

(c) includes recommendations by the qualified energy advisor for improving the energy efficiency of the building, or the part of the building, referred to in paragraph (b), and

(d) meets the other prescribed requirements, if any;

"financing agreement" means an agreement entered into as a result of an offer made under the program;

"landlord" means a landlord as defined in

(a) the *Residential Tenancy Act*, and

(b) the *Commercial Tenancy Act*;

"program" means a program established under subsection (2);

"qualified energy advisor" means an energy advisor who meets the prescribed qualifications;

"qualified person" means a person who meets the prescribed qualifications;

"tenant" means a tenant as defined in

(a) the *Residential Tenancy Act*, and

(b) the *Commercial Tenancy Act*.

(2) A prescribed public utility must establish and maintain a program to offer financing to eligible persons for improving the energy efficiency of a building, or a part of a building, owned or occupied by a borrower.

(3) Subject to subsection (4), a prescribed public utility may establish, in accordance with the prescribed requirements, if any, the criteria, terms and conditions on which offers under the program are to be made.

(4) A financing agreement must include the following terms:

(a) a borrower may transfer the borrower's obligations under a financing agreement to another person who has applied for service from the prescribed public utility at the building, or the part of the building, that is the subject of the financing agreement;

(b) a borrower's obligations under the borrower's financing agreement are not discharged until

(i) the full amount payable under the financing agreement has been paid,

(ii) the borrower has provided to the prescribed public utility a notice, in a form prescribed by the minister, of a transfer referred to in paragraph (a) or subsection (6), or

(iii) the obligations have been transferred under subsection (6) (a) or (b);

(c) a borrower who is a tenant must,

(i) before entering into the financing agreement, obtain written consent from the tenant's landlord to enter into the financing agreement, and

(ii) before obtaining the consent referred to in subparagraph (i), notify the landlord of the operation of subsection (6);

(d) an improvement financed under the financing agreement must be

(i) an improvement that is

(A) recommended in the energy report respecting the building, or the part of the building, owned or occupied by the borrower, and

(B) in a class of prescribed improvements, and

(ii) carried out by a qualified person.

(5) Subject to subsections (4) (b) and (6), if a borrower transfers a financing agreement to a person referred to in subsection (4) (a), the borrower's obligations under the financing agreement are transferred to the person on the date that the person begins to receive service from the prescribed public utility.

(6)

If a landlord either transfers obligations under a financing agreement to a tenant under subsection (4) (a) or grants to a borrower the written consent referred to in subsection (4) (c), certain of the borrower's obligations under the financing agreement are transferred as follows:

(a) obligations that become due on or after the date that the borrower's tenancy with the landlord ends are transferred from the borrower to the landlord on that date;

(b) subject to subsection (7), obligations that become due on or after the date that a person begins a subsequent tenancy with the landlord respecting the rental unit previously occupied by the borrower are transferred from the landlord to the person on that date.

(7) A landlord referred to in subsection (6) must provide notice, as prescribed, to prospective tenants of the rental unit referred to in that subsection advising those prospective tenants of the operation of subsection (6) (b).

(8) A prescribed public utility may not enter into a financing agreement if doing so would result in the prescribed public utility having an aggregate outstanding balance of all of its financing agreements that exceeds the prescribed amount in the prescribed period.

(9) In setting rates under the *Utilities Commission Act* for a prescribed public utility that has entered into a financing agreement, the commission must incorporate the financing agreement into those rates.

(10) A prescribed public utility has the same remedies in the event of a borrower's failure to pay an amount under a financing agreement that has been incorporated into its rates as it has for a borrower's failure to pay any other rates the borrower is obligated to pay as a customer of the public utility.

(11) Without limiting section 36 (1) (c),

(a) a requirement prescribed by the minister, and

(b) criteria, terms and conditions established by a prescribed public utility

made for the purposes of subsection (3) of this section may be made with respect to different regions and improvements and, in the case of a requirement prescribed by the minister, with respect to different prescribed public utilities.

2011-5-33.

Greenhouse gas reduction

18. (1) In this section, **"prescribed undertaking"** means a project, program, contract or expenditure that is in a class of projects, programs, contracts or expenditures prescribed for the purpose of reducing greenhouse gas emissions in British Columbia.

(2) In setting rates under the *Utilities Commission Act* for a public utility carrying out a prescribed undertaking, the commission must set rates that allow the public utility to collect sufficient revenue in each fiscal year to enable it to recover its costs incurred with respect to the prescribed undertaking.

(3) The commission must not exercise a power under the *Utilities Commission Act* in a way that would directly or indirectly prevent a public utility referred to in subsection (2) from carrying out a prescribed undertaking.

(4) A public utility referred to in subsection (2) must submit to the minister, on the minister's request, a report respecting the prescribed undertaking.

(5) A report to be submitted under subsection (4) must include the information the minister specifies and be submitted in the form and by the time the minister specifies.

2010-22-18.

Clean or renewable resources

19. (1) To facilitate the achievement of British Columbia's energy objective set out in section 2 (c), a person to whom this subsection applies

(a) must pursue actions to meet the prescribed targets in relation to clean or renewable resources, and

(b) must use the prescribed guidelines in planning for

(i) the construction or extension of generation facilities, and

(ii) energy purchases.

(2) Subsection (1) applies to

(a) the authority, and

(b) a prescribed public utility, if any, and a public utility in a class of prescribed public utilities, if any.

2010-22-19.

PART 8 — Regulations

Part 8: Division 1 – Regulations by Lieutenant Governor in Council

General

34. (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) In making a regulation under this Act, the Lieutenant Governor in Council may do one or more of the following:

(a) delegate a matter to a person;

(b) confer a discretion on a person;

(c) make different regulations for different persons, places, things, decisions, transactions or activities.

2010-22-34.

Regulations

35. Without limiting section 34 (1), the Lieutenant Governor in Council may make regulations as follows:

(a) respecting forecasts for the purposes of the definition of "electricity supply obligations" in section 6 (1);

(b) adding a heritage asset to Schedule 1 of this Act;

(c) prescribing water conditions for the purposes of the definition of "heritage energy capability" in section 6 (1);

(d) modifying or adding to British Columbia's energy objectives, except for the objective specified in section 2 (g);

(e) for the purposes of sections 44.1, 44.2, 46 and 71 of the *Utilities Commission Act*, respecting the application of British Columbia's energy objectives to public utilities other than the authority;

(f) establishing factors or guidelines the commission must follow in respect of British Columbia's energy objectives, including guidelines regarding the relative priority of the objectives set out in section 2;

(REP) May 16/19

(g) and (h) *Repealed.* [2019-24-7]

(AM) May 31/12

(i) respecting the authority's obligation under section 6 (3), including, without limitation, regulations permitting the authority to enter into contracts respecting the electricity referred to in section 6 (2) and prescribing the terms and conditions on which, and the volume of electricity about which, the contracts may be entered into;

(j) respecting the program referred to in section 9, including prescribing classes of customers and terms;

(k) prescribing storage capability for the purposes of the definition of "prohibited projects" in section 10, including, without limitation, prescribing storage capability in terms of time, impoundment, mechanism or area;

(l) respecting the standing offer program to be established under section 15, including, without limitation, regulations that

(i) prescribe requirements, technologies, generation facilities and classes of generation facilities for the purposes of the definition of "eligible facility" in section 15 (1),

(ii) prescribe a capacity for the purposes of the definition of "maximum nameplate capacity" in section 15 (1),

(iii) prescribe circumstances for the purposes of section 15 (2), and

(iv) prescribe requirements for the purposes of section 15 (3);

(REP) May 16/19

(m) *Repealed.* [2019-24-7]

(n) for the purposes of the definition of "prescribed undertaking" in section 18, prescribing classes of projects, programs, contracts or expenditures that encourage

(i) the use of

(A) electricity, or

(B) energy directly from a clean or renewable resource

instead of the use of other energy sources that produce higher greenhouse gas emissions, or

(AM) Oct 31/18

(ii) the use of natural gas, hydrogen or electricity in vehicles, and the construction and operation of infrastructure for natural gas or hydrogen fuelling or electricity charging.

2010-22-35; 2012-27-3; 2018-39-4; 2019-24-7.

Part 8: Division 2 – Regulations by Minister

General

36. (1) In making a regulation under this Act, the minister may do one or more of the following:

(a) delegate a matter to a person;

(b) confer a discretion on a person;

(c) make different regulations for different persons, places, things, decisions, transactions or activities.

(2) The minister may make a regulation defining, for the purposes of this Act, a word or expression used but not defined in this Act.

2010-22-36.

Regulations

37. The minister may make regulations as follows:

(a) prescribing resources for the purposes of the definition of "clean or renewable resource" in section 1 (1);

(b) prescribing exclusions for the purposes of the definition of "demand-side measure" in section 1 (1);

(AM) May 16/19

(c) authorizing the authority for the purposes of sections 6 and 13;

(d) describing the projects, programs, contracts and expenditures referred to in section 7 (1), including, without limitation, by specifying the property, interests, rights, activities, contracts and rates that comprise the projects, programs, contracts and expenditures;

GREENHOUSE GAS REDUCTION (CLEAN ENERGY) REGULATION 102/2012

B.C. Reg. 102/2012

[includes B.C. Reg. 84/2018 amendments (effective April 20, 2018)]

Contents

[Provisions of the *Clean Energy Act*, SBC 2010, c. 22, relevant to the enactment of this regulation: section 35 (n)]

Definitions

1. In this regulation:

"Act" means the *Clean Energy Act*;

(SUB) Aug 19/16 **"eligible vehicle or machine"** means

(a) a specified vehicle,
(b) a marine vehicle,
(c) an asphalt paver,
(d) a fracture pump unit,
(e) a mine haul truck, and
(f) a locomotive

that uses, as a fuel source, compressed natural gas or liquefied natural gas;

(AM) Jun 03/15 **"heavy-duty vehicle"** means a truck, other than a mine haul truck, or tractor-trailer with a manufacturer's gross vehicle weight rating of 11 793 kg or more;

"medium-duty vehicle" means a vehicle, including a waste-haulage truck, with a manufacturer's gross vehicle weight rating of more than 5 360 kg but less than 11 793 kg;

(ADD) Mar 22/17 **"non-bypass customer"** means a customer of a public utility that receives service under a rate that is not specific to the customer;

(ADD) Aug 19/16 **"operating costs"** in relation to a fuelling station or to distribution or storage infrastructure, means

(a) operating and maintenance expenses,
(b) electricity expenses,
(c) interest expenses,
(d) taxes, including property taxes,
(e) return on equity,
(f) extraordinary retirement costs, and

LNG distribution and storage infrastructure, other than liquefied natural gas fuelling stations, in British Columbia, including LNG rail tank cars, ISO containers and shore-side assets, for the purpose of reducing greenhouse gas emissions;

(AM) Mar 22/17 (b) total expenditures on the undertaking during the undertaking period, including expenditures on administration, marketing, training and education, do not exceed $40 million, and

(c) at least

(i) 80% of the forecast total operating costs of the distribution and storage infrastructure for the first 5 years of the operation are recovered from one or more persons under a take-or-pay agreement with a minimum term of 5 years, or

(ii) 60% of the forecast total operating costs of the distribution and storage infrastructure for the first 7 years of the operation are recovered from one or more persons under a take-or-pay agreement with a minimum term of 7 years.

(ADD) Mar 22/17 (3.5) A public utility's undertaking that is in the class defined in subsection (3.6) is a prescribed undertaking for the purposes of section 18 of the Act.

(ADD) Mar 22/17 (3.6) The public utility, during the undertaking period, expends amounts on feasibility and development costs in relation to shore-side assets that do not exceed $5 million.

(ADD) Mar 22/17 (3.7) A public utility's undertaking that is in the class defined in subsection (3.8) is a prescribed undertaking for the purposes of section 18 of the Act.

(ADD) Mar 22/17 (3.8) The public utility acquires renewable natural gas

(a) for which the public utility pays no more than $30 per GJ, and

(b) that, subject to subsection (3.9), in a calendar year, does not exceed 5% of the total volume of natural gas provided by the public utility to its non-bypass customers in 2015.

(ADD) Mar 22/17 (3.9) The volume referred to in subsection (3.8) (b) does not include renewable natural gas acquired by the public utility that the public utility provides to a customer in accordance with a rate under which the full cost of the following is recovered from the customer:

(a) the acquisition of the renewable natural gas;

(b) the service related to the provision of the renewable natural gas.

(AM) Aug 19/16 (4) In subsections (1), (2), (3), (3.1), (3.2) and (3.4) **"expenditures"** includes, except with respect to expenditures on administration and marketing, binding commitments to incur expenditures in the future.

[am. B.C. Regs. 235/2013; 98/2015; 214/2016; 114/2017; 84/2018.]

(REP) Nov 28/13 **Repealed**

3. *Repealed.* [B.C. Reg. 235/2013]

(ADD) Mar 02/17 **Prescribed undertaking – electrification**

4. (1) In this section:

"benefit" , in relation to an undertaking in a class defined in subsection (3) (a) or (b) means all revenues the public utility reasonably expects to earn as a result of implementing the undertaking, less revenues that would have been earned from the supply of undertaking

INTERPRETATION ACT

CHAPTER 238 [RSBC 1996]

[includes 2018 Bill 7, c. 5 (B.C. Reg. 272/2018) amendments (effective January 1, 2019)]

Contents

-- Sections 1 - 10 --

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-- Sections 1 - 10 --

Definitions

1. In this Act, or in an enactment:

"Act" means an Act of the Legislature, whether referred to as a statute, code or by any other name, and, when referring to past legislation, includes an ordinance or proclamation made before 1871, that has the force of law;
"enact" includes to issue, make, establish or prescribe;

"enactment" means an Act or a regulation or a portion of an Act or regulation;

"public officer" includes a person in the public service of British Columbia;

"regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation, letters patent, commission, warrant, bylaw or other instrument enacted

(a) in execution of a power conferred under an Act, or

(b) by or under the authority of the Lieutenant Governor in Council,

but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons;
"repeal" includes to revoke, cancel or rescind.

RS1979-206-1.

Application

2. (1) Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

(2) The provisions of this Act apply to this Act.

(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable to it and not inconsistent with this Act.

RS1979-206-2.

Date of commencement

3. (1) In this section, **"the date of assent"** for an Act reserved for the signification of the Governor General's pleasure, means the date of the signification by the Lieutenant Governor that the Governor General in Council assented to the Act.

(2) The date of the commencement of an Act or of a portion of it for which no other date of commencement is provided in the Act is the date of assent to the Act.

(3) If an Act contains a provision that the Act or a portion of it is to come into force on a day other than the date of assent to the Act or on proclamation or by regulation of the Lieutenant Governor in Council, that provision and the title of the Act are deemed to have come into force on the date of assent to the Act.

(ADD) Apr 29/04

(3.1) If an Act contains a provision to the effect that the Act, or a portion of it, comes into force on a date that is earlier than the date of assent, that Act or portion referred to in the provision

(a) comes into force in accordance with the terms of the provision, and

(b) on coming into force, is deemed to have come into force on the earlier date referred to in the provision and is retroactive to the extent necessary to give it

Use of forms and words

(AM) Dec 01/07

28. (1) If a form is prescribed under an enactment, deviations from it not affecting the substance or calculated to mislead, do not invalidate the form used.

(2) Gender specific terms include both genders and include corporations.

(3) In an enactment words in the singular include the plural, and words in the plural include the singular.

(4) If a word or expression is defined in an enactment, other parts of speech and grammatical forms of the same word or expression have corresponding meanings.

RS1979-206-28; 1992-55-5; 2007-14-201 (B.C. Reg. 354/2007).

Expressions defined

29. In an enactment:

"acquire" means to obtain by any method and includes accept, receive, purchase, be vested with, lease, take possession, control or occupation of, and agree to do any of those things, but does not include expropriate;

"affidavit" or **"oath"** includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act,* or under the *Canada Evidence Act;* and the word "swear" includes solemnly declare or affirm;

"bank" or **"chartered bank"** means a bank to which the *Bank Act* (Canada) applies;

(SUB) Dec 31/98

"barrister" or **"solicitor"** or **"barrister and solicitor"** means a practising lawyer as defined in section 1 (1) of the *Legal Profession Act*;

"British Columbia land surveyor" means a person entitled to practise as a land surveyor under the *Land Surveyors Act*;

"calendar year" , see **"year"**

"Canada" , see **"government of Canada"**

(AM) Dec 04/06

"Cascade Mountains" means the line described in the Schedule to this Act;

"chartered bank" , see **"bank"**

"civil engineer" , see **"professional engineer"**

"commencement" , with reference to an enactment, means the date on which the enactment comes into force;

"commercial paper" includes a bill of exchange, cheque, promissory note, negotiable instrument, conditional sale agreement, lien note, hire purchase agreement, chattel mortgage, bill of lading, bill of sale, warehouse receipt, guarantee, instrument of assignment, things in action and any document of title that passes ownership or possession and on which credit can be raised;

"consolidated revenue fund" , **"consolidated revenue"** or **"consolidated revenue fund of the Province"** means the consolidated revenue fund of British Columbia;

"corporation" means an incorporated association, company, society, municipality or other incorporated body, where and however incorporated, and includes a corporation sole other than Her Majesty or the Lieutenant Governor;

"correctional centre" means a correctional centre under the *Correction Act*;

"county" means a county constituted and defined in the *County Boundary Act*;

"Court of Appeal" means the court continued by the *Court of Appeal Act*;

(SUB) Dec 31/04

"credit union" means a credit union or extraprovincial credit union authorized to carry on business under the *Financial Institutions Act*;

"Criminal Code" means the *Criminal Code* (Canada);

"Crown, the" , see **"Her Majesty"**

(AM) Nov 02/17

"deliver" , with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person's mailbox or receptacle at the person's residence or place of

business;

"Deputy Provincial Secretary" includes the Deputy Provincial Secretary and Deputy Minister of Government Services;

"dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

(AM) Apr 18/01 **"electoral district"** means an electoral district referred to in section 18 of the *Constitution Act*;

"Executive Council" means the Executive Council appointed under the *Constitution Act*;

(AM) May 14/15 **"Gazette"** means The British Columbia Gazette published under the *Queen's Printer Act*;

"government" or **"government of British Columbia"** means Her Majesty in right of British Columbia;

"government agent" means a person appointed under the *Public Service Act* as a government agent;

"government of Canada" or **"Canada"** means Her Majesty in right of Canada or Canada, as the context requires;

"Governor" , **"Governor of Canada"** or **"Governor General"** means the Governor General of Canada and includes the Administrator of Canada;

"Governor in Council" or **"Governor General in Council"** means the Governor General acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada;

"Great Seal" means the Great Seal of the Province;

"Her Majesty" , **"His Majesty"**, **"the Queen"**, **"the King"**, **"the Crown"** or **"the Sovereign"** means the Sovereign of the United Kingdom, Canada, and Her other realms and territories, and Head of the Commonwealth;

(AM) Dec 04/06 **"herein"** used in a section or part of an enactment must be construed as referring to the whole enactment and not to that section or part only;

"holiday" includes

(a) Sunday, Christmas Day, Good Friday and Easter Monday,

(AM) May 31/12 (b) Canada Day, Victoria Day, British Columbia Day, Labour Day, Remembrance Day, Family Day and New Year's Day,

(c) December 26, and

(d) a day set by the Parliament of Canada or by the Legislature, or appointed by proclamation of the Governor General or the Lieutenant Governor, to be observed as a day of general prayer or mourning, a day of public rejoicing or thanksgiving, a day for celebrating the birthday of the reigning Sovereign, or as a public holiday;

"insurance company" means

(a) an insurance company, or

(b) an extraprovincial insurance corporation

authorized to carry on insurance business under the *Financial Institutions Act*;

"judicial district" means a judicial district defined in the *Supreme Court Act*;

(RET) Apr 01/08 **"justice"** means a justice of the peace and includes a judicial justice or a judge of the Provincial Court;

"King, the" , see **"Her Majesty"**

"land" includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning;

"land title legislation" , prior to October 31, 1979 means the *Land Registry Act* and after October 30, 1979 means the *Land Title Act*;

(ADD) Dec 31/98 **"lawyer"** means a practising lawyer as defined in section 1 (1) of the *Legal Profession Act*;

"Legislative Assembly" means the Legislative Assembly of British Columbia constituted under the *Constitution Act*;

"Legislature" means the Lieutenant Governor acting by and with the advice and consent of the Legislative Assembly;

"Lieutenant Governor" means the Lieutenant Governor of British Columbia and includes the Administrator of British Columbia;

"Lieutenant Governor in Council" means the Lieutenant Governor acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Executive Council;

"mail" refers to the deposit of the matter to which the context applies in the Canada Post Office at any place in Canada, postage prepaid, for transmission by post, and includes deliver;

"may" is to be construed as permissive and empowering;

(SUB) Jun 01/09 **"medical practitioner"** means a registrant of the College of Physicians and Surgeons of British Columbia entitled under the *Health Professions Act* to practise medicine and to use the title "medical practitioner";

(SUB) Nov 15/99 **"mentally disordered person"** , **"mentally incompetent person"**, **"mentally ill person"** or **"person with a mental disorder"** means a person with a mental disorder as defined in section 1 of the *Mental Health Act*;

"mining engineer" , see **"professional engineer"**

"minister" means that member of the Executive Council charged by order of the Lieutenant Governor in Council with the administration of the enactment;

"minor" means a person under the age of majority;

"month" means a period calculated from a day in one month to a day numerically corresponding to that day in the following month, less one day;

(SUB) Jan 01/04 **"municipality"** means, as applicable,

(a) the corporation into which the residents of an area are incorporated as a municipality under the *Local Government Act*, the *Vancouver Charter* or any other Act, or

(b) the geographic area of the municipal corporation;

"must" is to be construed as imperative;

(AM) Apr 29/04 **"newspaper"** , in a provision requiring publication in a newspaper, means a printed publication in sheet form, intended for general circulation, published regularly at intervals of not longer than a week, consisting in great part of news of current events of general interest;

"now" must be construed as referring to the time of commencement of the enactment containing the word;

(ADD) Aug 01/12 **"nurse practitioner"** means a person who is authorized under the bylaws of the College of Registered Nurses of British Columbia to practise nursing as a nurse practitioner and to use the title "nurse practitioner";

"oath" , see **"affidavit"**

"obligation" includes a duty and a liability;

"peace officer" includes

(a) a mayor, sheriff and sheriff's officer,

(AM) Apr 01/04 (b) a warden, correctional officer, and any other officer or permanent employee of a penitentiary, prison, correctional centre or youth custody centre, and

(c) a police officer, police constable, constable or other person employed for the preservation and maintenance of the public peace;

"person" includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law;

"personal representative" includes an executor of a will and an administrator with or without will annexed of an estate, and, if a personal representative is also a trustee of part or all of the estate, includes the personal representative and trustee;

"prescribed" means prescribed by regulation;

"proclamation" means a proclamation of the Lieutenant Governor under the Great Seal issued under an order of the Lieutenant Governor in Council;

"professional engineer" , **"civil engineer"** or **"mining engineer"** or words implying recognition of any person as a professional engineer or member of the engineering profession means a person registered or licensed under the *Engineers and Geoscientists Act*;

"property" includes any right, title, interest, estate or claim to or in property;

"Province" means the Province of British Columbia or Her Majesty in right of British Columbia as the context requires;

(AM) Oct 29/09 **"province"** , when used as meaning a part of Canada, includes the Northwest Territories, Yukon and Nunavut;

"Province" means the Province of British Columbia or Her Majesty in right of British Columbia as the context requires;

"Provincial Court" means the Provincial Court of British Columbia;

(AM) Apr 01/04 **"Provincial Treasurer"** or **"Treasurer"** means the Minister of Finance and includes the Deputy Minister of Finance;

(AM) Apr 01/04 **"Provincial Treasury"** or **"Treasury"** means the Ministry of Finance constituted under the *Financial Administration Act*;

"Queen, the" , see **"Her Majesty"**

"Railway Belt" means the land on the mainland of British Columbia expressed to be granted to Canada by section 2 of chapter 14 of the Statutes of British Columbia, 1884;

"record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise;

(SUB) Jan 01/04 **"regional district"** means a regional district as defined in the *Local Government Act*;

"registered mail" includes certified mail;

"registrar" of a court includes the clerk of the court;

(AM) Mar 29/04 **"Registrar of Companies"** means the person appointed to that office under the *Business Corporations Act*;

"Registrar of Titles" or **"registrar"** means the registrar of a land title district appointed to that office under the *Land Title Act*;

"right" includes a power, authority, privilege and licence;

"Rules of Court" , when used in relation to a court, means rules made under

(a) the *Court Rules Act*, or

(RET) Apr 21/97 (b) any other enactment that empowers the making of rules governing practice and procedure in that court;

(SUB) Jan 01/04 **"rural area"** means territory that is not in a municipality;

"savings institution" means

(a) a bank,

(b) a credit union,

(AM) Dec 04/06 (c) an extraprovincial trust corporation authorized to carry on deposit business under the *Financial Institutions Act*, or

(d) a corporation that is a subsidiary of a bank and is a loan company to which the *Trust and Loan Companies Act* (Canada) applies.

(REP) Nov 12/13 (e) *Repealed.* [2004-18-23 (B.C. Reg. 226/2013)]

"school district" means a school district as defined in the *School Act*;

"security" includes a security as defined in the *Securities Act*; [see also **"sureties"**]

"shall" is to be construed as imperative;

"solicitor" , see **"barrister"**

"Sovereign, the" , see **"Her Majesty"**

"Supreme Court" means the Supreme Court of British Columbia;

"sureties" means sufficient sureties, and **"security"** means sufficient security, and one person is sufficient for either unless otherwise expressly required;

(ADD) Jan 20/05 **"Surveyor General"** or **"Surveyor General of British Columbia"** means the Surveyor General appointed under the *Land Title and Survey Authority Act*;

"swear" , see **"affidavit"**

"Treasurer" , see **"Provincial Treasurer"**

"Treasury" , see **"Provincial Treasury"**

(SUB) Dec 31/04 **"trust company"** means

(a) a trust company authorized under the *Financial Institutions Act* to carry on trust business, or

(b) an extraprovincial trust corporation authorized under the *Financial Institutions Act* to carry on trust business, deposit business or both;

(AM) Mar 31/14 **"will"** means a will as defined in the *Wills, Estates and Succession Act*;

"words" includes figures, punctuation marks, and typographical, monetary and mathematical symbols;

"writing" , **"written"**, or a term of similar import includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form;

"year" means any period of 12 consecutive months; but a reference to a **"calendar year"** means a period of 12 consecutive months beginning on January 1, and a reference by number to a dominical year means a period of 12 consecutive months beginning on January 1 of that dominical year;

(ADD) Apr 01/04 **"youth custody centre"** means a youth custody centre as defined in the *Youth Justice Act*.

RS1979-206-29; 1981-15-111; 1987-25-104; 1989-22-13; 1989-40-116; 1989-47-372; 1990-33-4; 1992-59-53; 1992-55-6; 1993-55-14; 1994-34-41; 1998-9-101; 1999-15-13; 1999-12-10; 2000-7-191, Sch; 1999-31-16; 2003-52-131 (B.C. Reg. 465/2003); 2003-70-203; 2003-54-27; 2003-85-63; 2004-23-20; 2004-48-134; 2004-66-55; B.C. Reg. 335/2006; 2008-42-21; 2006-23-32 (B.C. Reg. 423/2008); 2009-22-52; 2012-24-4; 2011-24-8 (B.C. Reg. 121/2012); 2004-23-21 (B.C. Reg. 226/2013); 2009-13-225(b) (B.C. Reg. 148/2013); B.C. Reg. 263/2014; 2015-23-70; 2017-10-61,Sch. 2.

(ADD) Apr 03/09 Definitions in relation to treaty first nations

29.1 (1) Insofar as they can be applied, the following definitions apply in all enactments relating to treaty first nation matters:

(AM) Apr 05/16 (SUB) Apr 05/16 **"final agreement"** , except in references to the Nisga'a Final Agreement, means a treaty and land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act*, 1982

(a) among a first nation, the Province and Canada, and

41. (1) If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to

(a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it,

(b) provide for administrative and procedural matters for which no express, or only partial, provision has been made,

(c) limit the application of a regulation in time or place or both,

(d) prescribe the amount of a fee authorized by the enactment,

(e) provide, for a regulation made by or with the approval of the Lieutenant Governor in Council, that its contravention constitutes an offence, and

(f) provide that a person who is guilty of an offence created under paragraph (e) is liable to a penalty not greater than the penalties provided in the *Offence Act*.

(2) A regulation made under the authority of an enactment has the force of law.

RS1979-206-41.

Subdivisions of Act

42. (1) A section is divided into subdivisions known in descending order as subsections, paragraphs, subparagraphs and clauses.

(2) In an enactment enacted before July 1, 1974

(a) a reference to a clause is deemed to be a reference to a paragraph,

(b) a reference to a paragraph is deemed to be a reference to a subparagraph, and

(c) a reference to a subparagraph is deemed to be a reference to a clause.

RS1979-206-43.

(SUB)Citation of Acts

Mar 14/13

43. An Act may be cited as follows:

(a) by reference to its chapter number in the volume of Acts for the year of regnal year in which it was enacted;

(b) by reference to its title, with or without reference to its chapter number;

(c) in the case of an Act that is a revised statute included in a general revision, by reference to its chapter number in the Revised Statutes of British Columbia;

(d) in the case of an Act that is a limited revision, by reference to its chapter number in the volume of Acts for the year or regnal year in which it was enacted and as a Revised Statute of British Columbia for that year.

2013-12-29.

Mutatis mutandis

44. If an enactment provides that another enactment applies, it applies with the necessary changes and so far as it is applicable.

RS1979-206-45.

SULLIVAN
ON THE
CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

"sale" had a clear meaning, which was for him the more appropriate meaning in this context.[55]

§4.28 The meaning of the word "sale" was again before the Court in *Celgene Corp. v. Canada (Attorney General)*,[56] this time in the context of paragraph 80(1)(b) of the *Patent Act*, which required patentees to provide the Patented Medicine Prices Review Board with information about the price at which its patented medicines are "sold in any market in Canada". The patentee argued that "sold" is a legal term of art and therefore "sold in any market in Canada" should be understood to refer to contracts of sale occurring in Canada. This time a unanimous Court opted for the ordinary meaning. Abella J. wrote:

> I accept that ... words like 'sold' may well have a commercial law meaning in some statutory contexts, including, for example, in other parts of the *Patent Act*....[57]
>
> But that does not mean that the Board misinterpreted the words 'sold' and 'selling' in the context of ss. 80(1)(b), 83(1) and 85. In rejecting the technical commercial law definition, the Board was guided by the consumer protection goals of its mandate....[58]

The Board's choice was also supported by the legislative history of the provisions.

§4.29 ***"Plain" legal meanings.*** In the *Will-Kare Paving* case, Major J. appears to assume that a "plain meaning interpretation" is possible only if the meaning is ordinary rather than technical or legal.[59] Similarly in a dissenting judgment in *Manulife Bank of Canada v. Conlin*, L'Heureux-Dubé J. wrote:

> It is quite obvious that where courts expound judicial interpretations of "legal terms of art" using such external aids as legal textbooks, the resulting outcome cannot appropriately be labelled a "plain meaning" definition.[60]

Yet there are many cases in which a court labels a legal meaning ordinary or plain or both. In *Credit Suisse Canada v. 1133 Yonge Street Holdings Ltd.*,[61] for example, the Court had to interpret a clause in an assignment of rents registered under Ontario's *Personal Property Security Act* which declared the mortgagor to

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55 *Ibid.*, at 939-40.

56 [2011] S.C.J. No. 1, [2011] 1 S.C.R. 3 (S.C.C.).

57 In support of this proposition, the Court cited *Dole Refrigerating Products Ltd. v. Canadian Ice Machine Co.* (1957), 28 C.P.R. 32 (Ex. Ct.); *Domco Industries Ltd. v. Mannington Mills, Inc.*, [1990] F.C.J. No. 269, 29 C.P.R. (3d) 481 (F.C.A.), leave to appeal refused, [1990] S.C.C.A. No. 243, [1990] 2 S.C.R. vi (S.C.C.).

58 *Celgene Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 1, [2011] 1 S.C.R. 3, paras. 24-25 (S.C.C.). See also *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*), [2008] S.C.J. No. 46, [2008] 2 S.C.R. 604, at paras. 17-20 (S.C.C.).

59 See the passage quoted above at §4.27.

60 [1996] S.C.J. No. 101, [1996] 3 S.C.R. 415, at 440-41 (S.C.C.).

61 [1998] O.J. No. 4468, 41 O.R. (3d) 632 (Ont. C.A.).

"be entitled to ... all rents and other amounts" due or afterwards accruing unde certain leases until a certain condition was met. Relying on definitions of "enti tle" and "entitlement" in two law dictionaries, Blair J. wrote:

> The word "entitlement" must be given its plain and ordinary meaning, namely, "to give a rightful claim", or "to give a right or legal title".[62]

In characterizing this meaning as "ordinary", is the Court claiming that the law dictionary definitions describe the ordinary meaning of "entitle" as opposed to a technical legal meaning? In characterizing the meaning as "plain", does the Court mean to invoke the plain meaning rule? Probably not. More likely the intention is to indicate that "entitlement" has a fixed meaning that is clear. The whole point of technical terminology is to provide users with precise, unambiguous tools of communication. If the meaning of a term of art is not plain, it cannot fulfil its function.[63]

§4.30 A blurring of the distinction between ordinary and legal meanings sometimes occurs when interpreters rely indiscriminately on both ordinary and legal dictionaries, even though the ordinary and legal meanings of the word in question are not the same. Such practices rarely undermine the validity or force of the interpretive exercise, but they do add to the terminological confusion noted above.[64]

PART 3 STATUTORY DEFINITIONS

§4.31 ***Statutory definitions.*** Legal terms of art have technical meanings because of their conventional use by lawyers and judges. When a word is defined by statute, the binding character of the stipulated meaning depends not on shared linguistic convention among lawyers and judges, but on legislative sovereignty. The legislature dictates that, for the purpose of interpreting certain legislation, the defined term is to be given the stipulated meaning. This meaning may closely resemble the conventional meaning of the defined term (whether ordinary or technical) or it may effect a significant departure[65] (although too much of a departure would violate current drafting standards). In either case, interpreters are bound to apply the meaning stipulated by the law-maker, which may or may not incorporate conventional meaning.

§4.32 It is well-established that statutory definitions should not be drafted so as to contain substantive law. Their purpose is limited to indicating the intended

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62 *Ibid.*, at 637.

63 However, some terms of art have more than one sense. See, for example, *H.L. v. Canada (Attorney General)*, [2005] S.C.J. No. 24, [2005] 1 S.C.R. 401, at paras. 173-176 (S.C.C.), where Bastarache J., dissenting in part, identifies three different senses of the term "rehearing".

64 At §4.2-4.3.

65 For an example of a definition that departs significantly from ordinary meaning, see the definition of "cattle" in s. 2 of the *Criminal Code*, R.S.C. 1985, c. C-46, which includes not only animals of the bovine species but also pigs, sheep and goats.

meaning or range of meaning attaching to a word or expression in a particular legislative context.[66]

§4.33 Statutory definitions are conventionally classified as exhaustive or non-exhaustive, and the courts rely on this distinction in interpreting them. The distinction itself is simple enough: exhaustive definitions displace the ordinary (or technical) meaning of the defined term whereas non-exhaustive definitions do not. As illustrated below, however, this classification does not fully capture the complexity of statutory definitions and can be misleading.

§4.34 ***Exhaustive definitions***. Exhaustive definitions declare the complete meaning of the defined term and completely displace whatever meanings the defined term might otherwise bear in ordinary or technical usage.[67] An exhaustive definition is generally introduced by the verb "means". For example, in Part 2 of the *Canada Transportation Act*,[68] "'tariff' means a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services." This definition resembles the ordinary meaning of "tariff" in the context of air transportation. Nonetheless, the statutory definition displaces any understanding of the term based on dictionary definitions or linguistic intuition.[69]

§4.35 Definitions that are introduced by "means" and that repeat the defined term in the definition, although they appear to be exhaustive, are more appropriately classified as non-exhaustive because they rely on rather than displace the ordinary (or technical) meaning of the defined term. For example, in the federal *Cultural Property Export and Import Act*, "institution" means "an institution that is publicly owned and is operated solely for the benefit of the public, that is established for educational or cultural purposes and that conserves objects and exhibits them or otherwise makes them available to the public".[70] In this provision, "institution" must be given its ordinary meaning and then read down in accordance with the qualifiers set out in the definition.

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66 Rule 21(2) of the Drafting Conventions prepared by the Uniform Law Conference of Canada states: "A definition should not have any substantive content." See also *Hrushka v. Canada (Minister of Foreign Affairs)*, [2009] F.C.J. No. 94, 2009 FC 69, at paras. 16-18 (F.C.).

67 See *R. v. A.D.H.*, [2013] S.C.J. No. 28, 2013 SCC 28, at para. 43 (S.C.C.): "The words 'abandon' and 'expose' are not given an exhaustive definition in s. 214 the *Code* and therefore their ordinary grammatical meanings remain relevant to their interpretation."

68 *Canada Transportation Act*, S.C. 1996, c. 10, s. 55.

69 See *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] S.C.J. No. 72, [1988] 2 S.C.R. 175, at 194 (S.C.C.); *Yellow Cab Ltd. v. Alberta (Industrial Relations Board)*, [1980] S.C.J. No. 100, [1980] 2 S.C.R. 761, at 762 (S.C.C.); *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, [1994] F.C.J. No. 1540, 175 N.R. 341, at 347 (F.C.A.); *R. v. Moore*, [1985] N.S.J. No. 479, 67 N.S.R. (2d) 241, at 243-44 (N.S.C.A.); *R. v. Verma*, [1996] O.J. No. 4418, 31 O.R. (3d) 622, at 630 (Ont. C.A.).

70 R.S.C. 1985, c. C-51, s. 2.

§4.36 Exhaustive definitions are used to clarify vague or ambiguous terms, to narrow or enlarge the normal scope of terms or to ensure that their normal scope is not narrowed or enlarged. They are also used to create short-form references to office holders, institutions, texts or concepts. In the *Financial Services Commission of Ontario Act, 1997*, for example, "'actuary' means a Fellow of the Canadian Institute of Actuaries" and "'Commission' means the Financial Services Commission of Ontario established under section 2."[71]

§4.37 Although the use of "means" to introduce an exhaustive definition is common, it does not preclude other drafting approaches. Furthermore, not all definitions appear in the formal definition sections of legislation. Consider the following:

> For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration ... that may have an immediate or long-term harmful effect on the environment....[72]

This provision has the same effect as a definition in conventional form: In this Part, "toxic substance" means a substance that is entering or may enter the environment in a quantity or concentration that ...."

§4.38 ***Non-exhaustive definitions***. Non-exhaustive definitions do not purport to displace the meaning that the defined term would have in ordinary usage; they simply add to, subtract from or exemplify that meaning.[73] Non-exhaustive definitions are generally introduced by "includes" or "does not include", as in the following examples:

> "sell" includes agree to sell, or offer, advertise, keep, expose, transmit, send, convey or deliver for sale, or agree to exchange or to dispose of to any person in any manner for a consideration.[74]

> "annuity" does not include any pension payment or any payment under a plan, arrangement or contract described in subparagraphs (a)(i) to (ix) of the definition 'pension'....[75]

However, as mentioned above,[76] definitions introduced by "means" that repeat the defined term are also non-exhaustive. Non-exhaustive definitions are used to expand or narrow the ordinary meaning of terms, to deal with borderline appli-

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71 S.O. 1997, c. 28, s. 1.

72 This is part of a provision from a former *Canadian Environmental Protection Act*, considered in *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.).

73 This point is made in *R. v. A.D.H.*, [2013] S.C.J. No. 28, 2013 SCC 28, at para. 43 (S.C.C.), where the majority in commenting on the definition of "abandon or expose" in s. 214 of the *Criminal Code*, wrote: "The words 'abandon' and 'expose' are not given an exhaustive definition in s. 214 the *Code* and therefore their ordinary grammatical meanings remain relevant to their interpretation."

74 *Plant Breeders' Rights Act*, S.C. 1990, c. 20, s. 2(1).

75 *Income Tax Conventions Interpretation Act*, R.S.C. 1985, c. I-4, s. 5.

76 At §4.35.

cations of terms or to illustrate their range of application by setting out examples.

§4.39 While examples generally help to clarify legislative intent, they can lead to confusion as well. The purpose of a list of examples following the word "including" is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included. Ironically, when faced with a list of examples, interpreters sometimes disregard the general language the examples are meant to illustrate and rely on the examples to read down the scope of the general language. To preclude this possibility, drafters sometimes rely on the phrase "without limiting the generality of the foregoing" or words to that effect.[77] But even in the absence of such a phrase, there is no justification for ignoring the general words that precede "includes" or reading them down to align with the examples that follow unless there is a basis for appealing to the limited class rule.[78]

§4.40 ***Means ... and includes ...*** A statutory definition stating that a defined term "means and includes" something would be confusing since it would imply that the definition both displaced ordinary meaning (means) and relied on it (includes). However, a definition that first uses "means" to stipulate a definition that displaces ordinary meaning and then uses "includes" to enlarge, clarify or illustrate the stipulated definition makes sense and is a conventional drafting technique. In such a case, anything that comes within the stipulated definition is within the meaning of the defined term regardless of whether it also comes within the list that follows "includes"; similarly, anything that comes within that list is within the meaning of the defined term regardless of whether it comes within the stipulated definition. Such definitions are properly considered exhaustive.

§4.41 It is not always obvious whether a list that follows "includes" is meant to expand the scope of the stipulated definition or merely illustrate it. The Supreme Court of Canada divided on this point in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*.[79] At issue was the definition of "copyright" in s. 3(1) of the *Copyright Act*:

> For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work... and includes the sole right
>
> (a) to produce, reproduce, perform or publish any translation of the work;
>
> ...

---

77 The effect of this phrase is discussed below at §4.43.

78 This rule, historically referred to as the *ejusdem generis* maxim, is discussed in Chapter 8 and the possibility of applying it to a list of examples following the word "including" is discussed at §8.76-8.78.

79 [2012] S.C.J. No. 34, 2012 SCC 34 (S.C.C.).

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication;

...

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied ....

§4.42 Speaking for the majority, Abella J. analyzed the definition in the following way:

> ... This definition of 'copyright' is exhaustive, as the term 'means' confines its scope. The paragraph concludes by stating that copyright "includes"several other rights, set out in subsections (*a*) through (*i*). As a result, the rights in the introductory paragraph provide the basic structure of copyright. The enumerated rights listed in the subsequent subparagraphs are simply illustrative. ... The rental rights in s. 3(1)(*i*) referred to by Justice Rothstein, for example, can fit comfortably into the general category of reproduction rights.[80]

In a dissenting judgment, Rothstein J. wrote:

> While the use of the word "includes" could indicate that the rights listed in subparagraphs (*a*) to (*i*) are instances of one of the rights in the opening words of s. 3(1), the context indicates otherwise. Several of the listed rights are clearly outside of the right to produce or reproduce, perform or publish. For example, paragraph (*i*) provides for the right to rent out a sound recording embodying a musical work. It is difficult to see how this right fits within the right to produce or reproduce, perform or publish the work. ...
>
> This interpretation of the English version of s. 3(1) is consistent with the French version of the text, which states that '*[l]e droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire, [représenter ou publier] l'œuvre; ce droit comporte, en outre, [les droits énumérés aux alinéas* (*a*) à (*i*)].' The use of the phrase '*en outre*' — in addition — indicates paras. (*a*) to (*i*) are in addition to those in the opening words.[81]

This difference of opinion turns on a difference in the scope of the stipulated definition as understood by the majority and the dissent. If "includes" merely introduces illustrative examples, that definition must be broad enough to embrace all the examples and must also include anything else that would come within that broad interpretation. However, that is not the case if the paragraphs following "includes" enlarge the scope of the stipulated definition.

§4.43 ***Means... but does not include ...*** The expression "does not include" is used to carve exceptions out of the scope of the stipulated definition following "means". As s. 3 of the federal *Privacy Act* shows, it can also be used to carve

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80 *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] S.C.J. No. 34, 2012 SCC 34, at para. 42 (S.C.C.).

81 *Ibid.*, at paras. 91-92.

Date: 20090123

Docket: T-2193-07

Citation: 2009 FC 69

Ottawa, Ontario, January 23, 2009

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

DAVID ALLAN HRUSHKA

Applicant

and

THE MINISTER OF FOREIGN AFFAIRS AND PASSPOST CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] A Passport Canada Adjudicator ordered that passport services be withheld from the Applicant for a period of three years. In these reasons, I conclude that the decision must be set aside.

Facts

[2] As the determinative issue centres on the authority of the Adjudicator to make such an order, only a brief summary of the facts is necessary. Passport Canada issued a passport to the Applicant on October 23, 2002. In June 2005, the United States Secret Service alerted Passport Canada that copies of the Applicant's passport were found in the possession of an individual being investigated for fraud. In June 2007, law enforcement officials in Ireland reported that copies of the Applicant's passport had been used by an individual attempting to commit acts of fraud. In July 2007, the Canadian Border Services Agency notified Passport Canada that copies of the Applicant's passport had been found on a laptop seized from an individual who had entered Canada illegally.

[3] In July 2007, the Applicant submitted an application to renew his passport that was due to expire on October 23, 2007. On August 22, 2007, the Security Bureau of Passport Canada (Bureau) informed the Applicant that he was the subject of an investigation relating to the posting of the biographical information page (the bio-page) of his passport on a website.

[4] Subsequent correspondence between the Applicant and Passport Canada reveals that the Applicant had been mugged in April 2000 and his identification was stolen. The Applicant then encountered difficulties with the fraudulent use of his identification. The Applicant claims he was advised by a lawyer to post copies of his personal identification including the bio-page of his passport on his website in an attempt to thwart further episodes of identity theft.

[5] As a result of its investigation, the Bureau forwarded the file for adjudication to the Passport Canada Adjudicator on October 15, 2007. The Bureau recommended to the Adjudicator that the Applicant's passport be revoked pursuant to paragraph 10(2)(c) of the Canadian Passport Order, SI/81-86 (Order) and that passport services be withheld from the Applicant for five years.

[6] In his November 6, 2007 decision, the Adjudicator determined that although the grounds to revoke the passport had been met, the Bureau's recommendation in this regard had been rendered moot in light of the expiration of the passport. However, based on the circumstances of the case, he ordered that passport services be withheld from the Applicant for three years.

[7] In written submissions and at the outset of the hearing, the Respondent took the position that the application should be struck based upon the absence of a proper evidentiary record. After hearing the submissions of the parties, I was satisfied that a complete record was before the Court and that the Respondent was not prejudiced by the deficiencies in the Application Record. I advised the parties that I would hear the application on its merits.

Issue

[8] The determinative issue in this proceeding is whether in ordering that passport services be withheld from the Applicant for three years the Adjudicator acted beyond his authority.

Submissions of the Parties

[9] The Applicant's primary argument is that the Adjudicator lacked authority in ordering that passport services be withheld from the Applicant.

[10] The Respondent's position may be summarized as follows. The Respondent disputes the Applicant's assertion that Passport Canada's authority is limited to either a refusal to grant a passport under section 9 of the Order or to revoke a passport under section 10 of the Order. Relying on section 2 of the Order, the Respondent submits that Passport Canada has been charged by the Minister of Foreign Affairs and International Trade with "the issuing, refusing, revoking, withholding, recovery and use of passports." The Respondent argues that further support for this broader authority is found in the fact that passports remain the property of Her Majesty the Queen in Right of Canada and are issued on the conditions that the passport holder properly use and safeguard the passport.

[11] As the Adjudicator determined that there were grounds to revoke the passport pursuant to paragraph 10(2)(c) of the Order, the expiration of the passport prior to the Adjudicator's decision did not limit Passport Canada's authority to withhold passport services.

[12] The Respondent maintains that the authority to withhold passport services flows logically from the authority to revoke a passport in order to give practical effect to the revocation. The Respondent submits that determining an individual's entitlement to passport services is not a singular occurrence. Rather, the authority of Passport Canada to exercise the powers described in

section 2 of the Order permits assessment of an individual's entitlement to passport services on an ongoing basis. Finally, in contrast to the authority of issuing, refusing to issue, and revoking a passport, the authority of withholding passport services found in section 2 of the Order is not limited to any specific circumstances.

Standard of Review

[13] The parties agree and I accept that the standard of review in relation to Passport Canada's authority to impose a particular sanction is correctness.

Analysis

[14] Section 2 of the Order, in part, states:

> "Passport Canada" means a section of the Department of Foreign Affairs and International Trade, wherever located, that has been charged by the Minister with the issuing, refusing, revoking, withholding, recovery and use of passports. (*Passport Canada*)

[15] Turning first to the language of the provision itself, it is simply descriptive of a section within the Department of Foreign Affairs and International Trade "that has been" charged with certain responsibilities by the Minister. The language does not purport to confer on Passport Canada the authority to take any of the actions enumerated in the provision. Instead, the source of Passport Canada's discretionary authority is found within specific provisions of the Order. For example, Passport Canada's broad authority to require specific documentation or materials relevant to the issuance of a passport or the provision of passport services is provided in sections 6 and 8 of the Order. Similarly, and of particular relevance to the present judicial review, the authority and

the basis upon which Passport Canada may refuse or revoke a passport are described in paragraphs 9 and 10 of the Order, respectively. In contrast, the Order does not explicitly describe the scope or conditions for the proper exercise of the purported authority to withhold passport services as a stand alone sanction. The absence of these details in the Order indicates that Passport Canada has not been empowered to withhold passport services as an independent penalty for misuse of a passport.

[16] Second, the Respondent's argument runs contrary to the use and purpose of statutory definitions and recognized drafting conventions. As stated in *Sullivan and Drieger on the Construction of Statutes*, [Ruth Sullivan, *Sullivan and Drieger on the Construction of Statutes* (Vancouver: Butterworths, 2002), p. 51.] there are two kinds of statutory definitions, exhaustive and non-exhaustive. Exhaustive definitions are normally introduced with the term "means" and serve the following purposes: "to clarify a vague or ambiguous term; to narrow the scope of a word or expression; to ensure that the scope of a word or expression is not narrowed; and to create an abbreviation or other concise form of reference to a lengthy expression." Non-exhaustive definitions are normally introduced by the word "includes" and serve "to expand the ordinary meaning of a word or expression; to deal with borderline applications; and to illustrate the application of a word or expression by setting examples." Thus, it can be seen that a statutory definition does not typically have substantive content. Indeed, the inclusion of substantive content in a definition is viewed as a drafting error. As stated by Francis Bennion in *Statutory Interpretation*:

> *Definitions with substantive effect* It is a drafting error (less frequent now than formerly) to incorporate a substantive enactment in a definition. A definition is not expected to have operative effect as an independent enactment. If it is worded in that way, the courts will tend to construe it restrictively and confine it to the proper function of a definition.

[17] Although intended to be used only as a guide, this same view is echoed in the *Drafting Conventions of the Uniform Law Conference of Canada*. Section 21(2) states that "[a] definition should not have any substantive content."

[18] Accordingly, I reject the Respondent's argument that Passport Canada's authority to withhold passport services is found in section 2 of the Order.

[19] As noted above, the Respondent also argues that the authority to withhold passport services flows logically from the authority to revoke a passport in order to give practical effect to the revocation. Without deciding whether this assertion is sound in law, it does not assist the Respondent in the circumstances of the present case. In my opinion, there is a distinction to be drawn between the withholding of passport services for a specified period of time in conjunction with a refusal or a revocation decision and the withholding of passport services as a stand alone sanction. Accordingly, powers associated with revocation may not be relied upon as the source of an independent sanction of withholding passport services.

[20] Finally, the Respondent also argues that the authority to withhold passport services found in section 2 is not limited to any specific circumstance. However, as this argument is reliant upon the assumption that section 2 confers a power to withhold passport services as a stand alone sanction it may be disregarded for the above reasons.

[21] For these reasons, I conclude that the Order does not authorize the imposition of the withholding of passport services as a stand alone sanction.

[22] While I fully appreciate the importance of maintaining the integrity of the passport program, the comments of Justice Phelan in *Khadr v. Canada (Attorney General)* 2006 FC 727, [2007] 2 F.C.R. 218 are equally important. At paragraph 4 he stated:

> 4 For the reasons which follow, I have concluded that, in this case, every citizen is entitled to be treated, procedurally at least, in the manner in which the government says his or her rights or interests will be dealt with. It is part of our law of procedural fairness that in order to know the case one must meet, one is entitled to know who will decide and on what criteria the decision may be based.

Conclusion

[23] As the Order does not empower the Adjudicator to impose the stand alone sanction of withholding passport services, the decision will be set aside and remitted for a redetermination. While I have concluded that the decision must be set aside, but for the Applicant's conduct during the investigation, the matter may well have been resolved at that stage. Accordingly, in the exercise of my discretion, no costs will be awarded to the Applicant.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed, the November 6, 2007 decision is set aside, and the matter is remitted for redetermination by a different Adjudicator.

2. No costs are awarded.

"Dolores M. Hansen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2193-07
STYLE OF CAUSE:	DAVID ALLAN HRUSHKA AND THE MINISTER OF FOREIGN AFFAIRS AND PASSPORT CANADA
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	September 9, 2008
REASONS FOR JUDGMENT:	Hansen J.
DATED:	January 23, 2009

APPEARANCES:

Mr. J. Cameron Prowse	FOR THE APPLICANT
Ms. Stacey Dej Ms. Yolande Viau	FOR THE RESPONDENTS

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SULLIVAN
ON THE
CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

Because resort to the remedial constructive trust would tend to promote the legislatively approved conception of marriage, its retention was considered justified.

§14.37 Sometimes the weight of a preamble is affected by provisions in the Act which expressly or implicitly invoke it. Under s. 56 of the *Official Languages Act*, for example, the Commissioner of Official Languages has jurisdiction to determine whether a federal institution has complied with "the spirit and intent" of the Act. In *St-Onge v. Canada (Commissioner of Official Languages)*,[66] in reviewing a decision of the Commissioner under s. 56, the Federal Court of Appeal relied heavily on the preamble to the Act to give meaning to the words "spirit and intent".

PURPOSE STATEMENTS

§14.38 ***Definition of purpose statement.*** Strictly speaking a purpose statement (or a policy statement or a statement of principles)[67] is not a descriptive component, but rather is a type of interpretation provision. Its function is to set out the principles or policies the legislation is meant to implement or the objectives it is meant to achieve. Purpose statements are found near the beginning of Acts and at the beginning of Divisions, Parts or particular provisions within Acts. Some are explicit and begin with the words "The purposes of this Act are ..." or "The following principles shall be applied in interpreting this Act." Others simply recite the principles or policies that the legislature wishes to declare without introductory fanfare. Purpose statements are a relatively recent innovation in Canadian statutes and are not mentioned in either the federal or provincial Interpretation Acts.

§14.39 Purpose statements may reveal the purpose of legislation either by describing the goals to be achieved or by setting out governing principles, norms or policies. Unlike preambles, purpose statements come after the enacting clause of the statute and are part of what is enacted into law. This makes them binding in the sense that they carry the authority and weight of duly enacted law. However, like definitions and application provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation — that do apply to facts — are to be interpreted.

§14.40 This essential point was overlooked by the appellant in *Greater Vancouver Regional District v. British Columbia (Attorney General)*,[68] when it ar-

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332, at para. 3 (S.C.C.); *Bruno v. Samson Cree Nation*, [2006] F.C.J. No. 1051, 2006 FCA 249, at paras. 34-35 (F.C.A.).

66 [1992] F.C.J. No. 567, 3 F.C. 287 (F.C.A.).

67 Statements of purpose, policy and principle all have the same status and perform similar functions in legislation. Assertions about purpose statements in cases and in the text apply equally to policy statements and statements of principle.

68 [2011] B.C.J. No. 1549, 2011 BCCA 345 (B.C.C.A.).

gued that a purpose statement in British Columbia's *Local Government Act* created a binding manner and form requirement[69] that obliged the provincial legislature to consult with the Regional District before passing legislation affecting the District. The purpose statement in question was in the following terms:

> The relationship between regional districts and the Provincial government in relation to this Act is based on the following principles:
>
> ...
>
> (c) notice and consultation is needed for Provincial government actions that directly affect regional district interests....

The Regional District's argument did not succeed. As the British Columbia Court of Appeal rightly observed, statements of purpose and principle do not create legally binding rights or obligations, nor do they purport to do so.[70] They merely state goals or principles that may be referred to in interpreting the rights and obligations that are created elsewhere in the legislation.

§14.41 ***Function of purpose statement.*** Purpose statements play an important role in modern "program" legislation.[71] Such legislation establishes a general framework within which administrative and legislative powers are conferred to achieve particular goals or to give effect to particular policies. Purpose statements expressly set out these policies and goals. They give context for the entire Act.[72]

§14.42 In some cases purpose statements point in a single direction and guide interpreters toward a particular outcome. In *LeBlanc v. LeBlanc*,[73] for example, the Supreme Court of Canada considered s. 2 of New Brunswick's *Marital Property Act*. La Forest J. wrote:

> Section 2 is an interpretative provision in the nature of a preamble announcing the general framework and philosophy of the legislation.... The provisions of ss. 3 and 7, *inter alia*, work this framework out in detail....

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69 A manner and form requirement is a requirement that a law-making body must observe in order to make valid law.

70 *Greater Vancouver Regional District v. British Columbia (Attorney General)*, [2011] B.C.J. No. 1549, 2011 BCCA 345 at paras. 43 and 45 (B.C.C.A.). Given the court's emphasis on this point, it is somewhat surprising that it later, at para. 47, expresses concern that local governments in British Columbia might have been misled by the legislative statements of purpose and principles.

71 For discussion of the distinctive features of modern program legislation, see Chapter 9, at §9.19-9.21. As Gonthier J. wrote in *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] S.C.J. No. 38, [1999] 3 S.C.R. 134, at para. 26 (S.C.C.): "A regulatory scheme will have a defined regulatory purpose. A purpose statement contained in the legislation may provide assistance to the court in this regard."

72 *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] S.C.J. No. 15, [2007] 1 S.C.R. 650, at para. 287 (S.C.C.).

73 [1988] S.C.J. No. 6, [1988] 1 S.C.R. 217 (S.C.C.).

> In common with similar provisions in other jurisdictions, s. 2 establishes the general principle that each spouse is entitled to an equal share of marital property.... The principle must be respected. In applying that principle, courts are not permitted to engage in measurements of the relative contributions of spouses to a marriage....[74]

The Court here understands the legislature to have used the purpose statement to introduce a new approach to the definition and distribution of matrimonial property, one that it was bound to adopt in interpreting and applying the provisions of the Act.

§14.43 In *Medovarski v. Canada (Minister of Citizenship and Immigration)*, the purpose statement relied on by the Court mentioned a number of concerns and objectives, not all of them complementary. However, the Court was able to discern a legislative priority, especially when it compared the purpose statement of the newly enacted *Immigration and Refugee Protection Act* to the purpose statement in the former *Immigration Act*. McLachlin C.J. wrote:

> The objectives as expressed in the IRPA indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: *e.g.*, see s. 3(1)(i) of the IRPA versus s. 3(j) of the former Act; s. 3(1)(e) of the IRPA versus s. 3(d) of the former Act; s. 3(1)(h) of the IRPA versus s. 3(i) of the former Act. Viewed collectively, the objectives of the IRPA and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.[75]

§14.44 Not all purpose statements establish a unified and coherent philosophy. Sometimes a purpose statement sets out a number of competing principles or policies which interpreters are to weigh and balance in applying the legislation to particular cases. This approach is illustrated in the judgment of the Supreme Court of Canada in *R. v. T. (V.)*.[76] The issue was whether the *Young Offenders Act* conferred a discretion on youth court judges to dismiss charges on the ground that the conduct complained of was trivial and charges should never have been laid. In support of this interpretation the respondent relied on a paragraph in the purpose statement which declared that "where it is not inconsistent with the protection of society, taking no measures [of any sort against the accused] ... should be considered." Speaking for the Court, L'Heureux-Dubé J. wrote:

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74 *Ibid.*, at 221-22. See also *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, [2012] F.C.J. No. 157, 2012 FCA 40, at para. 117 (F.C.A.).

75 [2005] S.C.J. No. 31, [2005] 2 S.C.R. 539, at para. 10 (S.C.C.).

76 [1992] S.C.J. No. 29, [1992] 1 S.C.R. 749 (S.C.C.).

> I am unable to accede to the submission of the appellant that s. 3(1) is merely a "preamble" and does not carry the same force one would normally attribute to substantive provisions, especially since Parliament has chosen to include the section in the body of the Act. Yet, I am equally unable to attribute to that section the clarity necessary to accept the respondent's interpretation. Section 3(1)(*d*) admittedly advocates the taking of no measures in certain circumstances. However, this subsection must be read in conjunction with the rest of s. 3 which states, *inter alia*, that "young persons who commit offences should nonetheless bear responsibility for their contraventions" (3(1)(*a*)), and that "society must ... be afforded the necessary protection from illegal behaviour" (3(1)(*b*)). These statements, on their face, would both militate against the action advocated by the Court of Appeal just as much as s. 3(1)(*d*) is said to militate in favour of it.[77]

L'Heureux-Dubé J. went on to note that the disparate character of the principles recited in s. 3 of the *Young Offenders Act* reflects the complex and multi-dimensional character of the problems addressed by the Act. She quoted the following text with approval:

> While the [s. 3] declaration as a whole defines the parameters for juvenile justice in Canada, each principle is not necessarily relevant to every situation. The weight to be attached to a particular principle will be determined in large measure by the nature of the decision being made and the specific provisions of the YOA that govern the situation.[78]

L'Heureux-Dubé J. concluded that because the declaration set out competing principles, as opposed to a single clear philosophy, it did not constitute persuasive evidence of Parliament's intention to change a long-standing common law rule.

§14.45 ***Purpose statements define limits of discretion.*** Another important function of purpose statements is to define the limits of discretion conferred by legislation. This function is evident when purpose statements are contained in provisions that confer discretion on administrative boards and tribunals. Such provisions may confer powers to be exercised generally "for the purposes of this Act" or for particular purposes mentioned in the text of the provision.

§14.46 This function of purpose statements was discussed by L'Heureux-Dubé J. in *Canadian Assn. of Industrial, Mechanical & Allied Workers, Local 14 v. Paccar of Canada Ltd.*[79] The issue in the case was whether the Labour Relations Board of British Columbia had exceeded its jurisdiction under the provincial *Labour Code*. Section 27(1) of the Code contained a purpose statement which

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77 *Ibid.*, at 765.

78 Nicholas Bala and Mary-Anne Kirvan, "The Statute: Its Principles and Provisions and Their Interpretation by the Courts" in ed. Alan W. Leschied, Peter G. Jaffe and Wayne Willis, *The Young Offenders Act: A Revolution in Canadian Juvenile Justice* (Toronto: University of Toronto Press, 1991), at pp. 80-81, quoted in *R. v. T. (V.)*, [1992] S.C.J. No. 29, [1992] 1 S.C.R. 749 at 766 (S.C.C.).

79 [1989] S.C.J. No. 107, [1989] 2 S.C.R. 983 (S.C.C.).

instructed the board to exercise its powers and duties "so as to develop effective industrial relations" having regard to a number of specific purposes and objects set out in the section. L'Heureux-Dubé J. found that because the Board had ignored the goals of its mandate as set out in its purpose clause, it had reached a patently unreasonable solution and so exceeded its jurisdiction. She wrote:

> General purpose clauses such as s. 27(1) of the *Labour Code* not only aim to provide guidance to the administrative agency; they also identify the limits of the discretion it enjoys in the exercise of its statutory powers....
>
> Purposes and objects clauses find their historical roots in the common law. In *Padfield v. Minister of Agriculture, Fisheries and Food*, Lord Reid explained why the fundamental objects of the enabling legislation restrict the delegation of discretionary powers:[80]
>
> > ... Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court....[81]

L'Heureux-Dubé J. then reviewed Canadian cases establishing the same point, namely, the purpose for which discretion is conferred defines the limits of the discretion. She concluded:

> ... [G]eneral purposes and objects clauses such as s. 27(1) of the *Labour Code* are not enacted in a juridical vacuum. Such clauses codify the common law duty to exercise delegated powers in strict accordance with the fundamental dictates of the enabling statute. In this historical context, s. 27(1) amounts to more than a simple guide to the board; it constitutes a statutory direction to carefully consider the goal of developing effective industrial relations having regard to certain specific purposes and objects.[82]

Because the purpose clause considered in the *Paccar* case was specific and explicitly addressed to the board, its role in limiting discretion was evident. However, the reasoning relied on by L'Heureux-Dubé J. applies to all purpose statements and justifies a purposive approach to all statutory discretion.

§14.47 ***Weight of purpose statements.*** In *R. v. T. (V.)*,[83] the Supreme Court of Canada suggested that it was prepared to take purpose statements seriously. It rejected the suggestion that a purpose statement is merely a preamble that does not carry the same force as a substantive provision. However, the weight given to a purpose statement depends on a number of considerations: how specific the goals, principles or policies are, their relation to one another, what directives (if any) are given by the legislature respecting their use, whether there are other

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80 [1968] 1 All E.R. 694, [1968] A.C. 997, at 1030 (H.L.).

81 *Canadian Assn. of Industrial, Mechanical & Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] S.C.J. No. 107, [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437 at 465-66 (S.C.C.).

82 *Ibid.*, at 467.

83 See *R. v. T. (V.)*, [1992] S.C.J. No. 29, [1992] 1 S.C.R. 749 at 765 (S.C.C.).

indicators of legislative purpose and so on. Because purpose statements are enacted as a provision of the legislation, they carry significant weight. However, because they are interpretive in character, they carry less weight than a substantive provision.

§14.48 A striking illustration of this last point is found in *National Farmers Union v. Prince Edward Island (Potato Marketing Council)*.[84] In 1988, the legislature of Prince Edward Island enacted the *Judicial Review Act*. The court was asked to determine whether it was still possible after the coming into force of the Act to apply for an order in the nature of *certiorari*. Section 2 of the Act provided:

> 2. The purpose of this Act is to substitute an application for judicial review for the following existing proceedings:
>
> (*a*) proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari;

The only other section to mention *certiorari* was s. 10 which provided:

> 10. A reference in any other enactment to a writ or order in the nature of certiorari, prohibition or mandamus is deemed *also* to refer to an application for judicial review.

After setting out the purpose statement in s. 2, McQuaid J. wrote:

> That, of course, is not substantive legislation; it is merely expressive of the intention of Parliament when it enacted the legislation. It is the substantive legislation itself which is determinative whether Parliament did, in fact, accomplish its purpose or whether the reach of Parliament exceeded its grasp.[85]

§14.49 McQuaid J. then examined s. 10 and found that "whether by design or misadvertence," by using the word "also" in s. 10, the legislature had perpetuated rather than abolished *certiorari*.[86] Although the stated purpose of the legislature was clear, so too was the substantive provision, and in the view of McQuaid J. any conflict between the two must be resolved in favour of the latter:

> The stated purpose of a statute is the signpost by means of which the legislature indicates the road which it proposes to follow to reach its indicated destination. The words which the legislature actually uses are the road which it does in fact follow. Whether, indeed, that road, and those words, do lead to that New Jerusalem envisioned by the legislature will depend upon the propriety and aptness of those words.[87]

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84 [1989] P.E.I.J. No. 14, 56 D.L.R. (4th) 753 (P.E.I.S.C.).

85 *Ibid.*, at 756.

86 *Ibid.*, at 757.

87 *Ibid.*, at 756-57.

Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. and Pharmx Rexall Drug Stores Ltd. *Appellants*

v.

Minister of Health and Long-Term Care, Lieutenant Governor-in-Council of Ontario and Attorney General of Ontario *Respondents*

- and -

Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited and Sanis Health Inc. *Appellants*

v.

Minister of Health and Long-Term Care, Lieutenant Governor-in-Council of Ontario and Attorney General of Ontario *Respondents*

Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. et Pharmx Rexall Drug Stores Ltd. *Appelantes*

c.

Ministre de la Santé et des Soins de longue durée, Lieutenant-gouverneur en conseil de l'Ontario et procureur général de l'Ontario *Intimés*

- et -

Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited et Sanis Health Inc. *Appelantes*

c.

Ministre de la Santé et des Soins de longue durée, Lieutenant-gouverneur en conseil de l'Ontario et procureur général de l'Ontario *Intimés*

INDEXED AS: KATZ GROUP CANADA INC. *v.* ONTARIO (HEALTH AND LONG-TERM CARE)

2013 SCC 64

File Nos.: 34647, 34649.

2013: May 14; 2013: November 22.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Food and drugs — Regulations — Validity — Province of Ontario enacting Regulations to effectively ban the sale of private label drugs by pharmacies — Purpose of Regulations to reduce drug prices — Whether Regulations are ultra vires on the ground that they are inconsistent with the statutory scheme and mandate — Drug Interchangeability and Dispensing Fee Act Regulation, R.R.O. 1990, Reg. 935, s. 9 — Ontario Drug Benefit Act Regulation, O. Reg. 201/96, s. 12.0.2.

RÉPERTORIÉ : KATZ GROUP CANADA INC. *c.* ONTARIO (SANTÉ ET SOINS DE LONGUE DURÉE)

2013 CSC 64

N^os^ du greffe : 34647, 34649.

2013 : 14 mai; 2013 : 22 novembre.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver et Wagner.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Aliments et drogues — Règlements — Validité — Adoption, par la province de l'Ontario, de règlements ayant pour effet d'interdire effectivement la vente, par les pharmacies, de médicaments sous marque de distributeur — Règlements ayant pour objectif de réduire les prix des médicaments — Les règlements sont-ils ultra vires au motif qu'ils sont incompatibles avec l'objet et le mandat de la loi? — Drug Interchangeability and Dispensing Fee Act Regulation, R.R.O. 1990, Règl. 935, art. 9 — Ontario Drug Benefit Act Regulation, O. Reg. 201/96, art. 12.0.2.

For decades, Ontario has been involved in an ongoing struggle to control rising drug costs. Generic drugs have been a key part of the strategy for dealing with this problem. Persistent market practices, however, have kept generic prices high. In Ontario, the result has been an episodic and totemic tug-of-war between regulators and those engaged in the manufacture, distribution and sale of generic drugs.

In 1985, two complementary and intersecting statutes were introduced together to address the problem of rising drug prices for consumers: the *Drug Interchangeability and Dispensing Fee Act* and the *Ontario Drug Benefit Act*. The *Drug Interchangeability and Dispensing Fee Act* empowers the Ministry to designate a cheaper generic drug as "interchangeable" with a more expensive brand-name drug. Pharmacists must dispense the cheaper interchangeable generic to customers unless the prescribing physician specifies "no substitution" or the customer agrees to pay the extra cost of the brand name. This statute also limits the dispensing fees that pharmacies can charge private customers.

The *Ontario Drug Benefit Act* governs the Ontario Drug Benefit Program whereby the province reimburses pharmacies when they dispense prescription drugs at no charge to "eligible persons" — primarily seniors and persons on social assistance. All drugs for which Ontario will provide reimbursement, along with the price that Ontario will pay for them, are listed in the Formulary. When a pharmacy dispenses a listed drug to an eligible person, the *Ontario Drug Benefit Act* requires Ontario to reimburse the pharmacy for an amount based on the Formulary price of the drug plus a prescribed mark-up and prescribed dispensing fee. This legislative scheme effectively creates two markets in Ontario for brand name and generic drugs. The private market consists of individuals buying drugs at their own expense or for reimbursement by private drug insurance plans. The "public market" is the government-funded Ontario Drug Benefit Program. Generic drugs reach consumers in Ontario's private and public markets through a supply chain that involves several participants regulated at the federal level, the provincial level, or both. They are: fabricators, who make the generic drugs; manufacturers, who sell generic drugs under their own name to wholesalers or directly to pharmacies; wholesalers, who buy drugs from manufacturers to distribute to pharmacies; and

Depuis des décennies, l'Ontario lutte constamment en vue de contrôler la hausse des prix des médicaments. Les médicaments génériques ont constitué un élément clé de la stratégie visant à contrer ce problème. Des pratiques commerciales persistantes ont toutefois maintenu à des niveaux élevés les prix des médicaments génériques. En Ontario, on a ainsi assisté à des affrontements épisodiques et totémiques entre les organismes de réglementation et les entreprises chargées de la fabrication, de la distribution et de la vente des médicaments génériques.

En 1985, deux lois qui se complètent et se recoupent ont été adoptées ensemble afin de remédier au problème de la hausse des prix des médicaments pour les consommateurs : la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* et la *Loi sur le régime de médicaments de l'Ontario*. La *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* habilite le ministère à désigner un médicament générique moins coûteux comme étant « interchangeable » avec un médicament de marque plus coûteux. Les pharmaciens doivent délivrer aux clients le produit générique interchangeable moins coûteux à moins que le médecin qui prescrit n'indique « pas de remplacement » ou que le client accepte de payer le coût plus élevé du médicament de marque. La loi limite également les honoraires de préparation que les pharmacies peuvent demander à leurs clients privés.

La *Loi sur le régime de médicaments de l'Ontario* régit le Programme de médicaments de l'Ontario, par lequel la province rembourse les pharmacies qui délivrent sans frais des médicaments sur ordonnance à des « personnes admissibles » — essentiellement les personnes âgées et les prestataires de l'aide sociale. Le Formulaire des médicaments énumère tous les médicaments remboursables par l'Ontario et indique les prix que la province paye pour ces médicaments. Lorsqu'une pharmacie délivre à une personne admissible un médicament énuméré, la *Loi sur le régime de médicaments de l'Ontario* oblige la province à rembourser à cette pharmacie un montant calculé en fonction du prix du médicament prévu au Formulaire des médicaments, auquel s'ajoutent une majoration prescrite ainsi que les honoraires de préparation prescrits. Ce régime législatif a pour effet de créer en Ontario deux marchés pour les médicaments de marque et les médicaments génériques. Le marché privé est composé de particuliers qui achètent des médicaments à leurs frais ou se font rembourser par leur régime d'assurance-médicaments privé. Le « marché public » correspond au Programme de médicaments de l'Ontario financé par le gouvernement ontarien. Les médicaments génériques sont dispensés aux consommateurs ontariens sur le marché public et sur le

pharmacies, who buy drugs from wholesalers or manufacturers and dispense them to their customers.

Before 2006, the price at which manufacturers could apply to list generic drugs in the Formulary was capped by regulations under the two statutes. In order to be competitive, manufacturers would, however, give pharmacies a substantial rebate to induce them to buy their products. The price that manufacturers charged — and customers paid — was thereby artificially increased to the extent of the rebates. In 2006, in order to stop this inflationary effect on generic drug prices, the two statutes and the Regulations under them were amended to prohibit rebates. The expected savings did not occur and manufacturers continued to charge high prices for generic drugs. Instead of the rebates, manufacturers were now paying pharmacies $800 million annually in professional allowances. Amendments were therefore introduced in 2010 eliminating the "professional allowances" exception.

The Regulations to the two statutes were also amended to prevent pharmacies from controlling manufacturers who sell generic drugs under their own name but do not fabricate them. This was done by creating a category designated as "private label products", which includes products sold but not fabricated by a manufacturer which does not have an arm's length relationship with drug wholesalers or pharmacies. Under the Regulations, private label products cannot be listed in the Formulary or designated as interchangeable.

Sanis Health Inc., a subsidiary of Shoppers Drug Mart, was incorporated by Shoppers for the purpose of buying generic drugs from third party fabricators and selling them under the Sanis label in Shoppers Drug Mart stores. Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. and Pharmx Rexall Drug Stores Ltd. also operate pharmacies

marché privé au moyen d'une chaîne d'approvisionnement qui fait intervenir plusieurs participants assujettis à la réglementation fédérale et à la réglementation provinciale, ou à l'une ou l'autre. Il s'agit des participants suivants : les manufacturiers, qui fabriquent les médicaments génériques; les fabricants, qui vendent des médicaments génériques en leur propre nom à des grossistes ou directement aux pharmacies; les grossistes, qui achètent des médicaments aux fabricants en vue de leur distribution aux pharmacies; et les pharmacies, qui achètent les médicaments aux grossistes ou aux fabricants et les délivrent à leurs clients.

Avant 2006, le prix auquel les fabricants pouvaient demander que leurs médicaments génériques soient énumérés au Formulaire des médicaments était plafonné par les règlements d'application des deux lois. Pour être concurrentiels, les fabricants consentaient toutefois aux pharmacies des rabais substantiels pour les inciter à acheter leurs produits. Le prix que les fabricants demandaient — et que les clients payaient — était par conséquent artificiellement augmenté dans la même proportion que ces rabais. Pour stopper cette inflation des prix des médicaments génériques, les deux lois et leurs règlements d'application ont été modifiés en 2006 afin d'interdire les rabais. Les économies prévues ne se sont pas matérialisées et les fabricants ont continué à demander des prix élevés pour les médicaments génériques. Au lieu d'accorder des rabais, les fabricants payaient désormais aux pharmacies 800 millions de dollars par année en remises aux professionnels. Des modifications ont donc été introduites en 2010 pour supprimer l'exception relative aux « remises aux professionnels ».

Les règlements d'application des deux lois ont également été modifiés pour empêcher les pharmacies de contrôler les fabricants qui vendent des médicaments génériques en leur propre nom sans les fabriquer eux-mêmes. Le législateur a créé à cette fin une catégorie appelée « produits sous marque de distributeur » qui englobe les produits vendus mais non fabriqués par un fabricant qui a un lien de dépendance avec des grossistes ou des pharmacies. Aux termes des règlements, les produits sous marque de distributeur ne peuvent être énumérés au Formulaire des médicaments ni être désignés comme étant interchangeables.

Sanis Health Inc., une filiale de Shoppers Drug Mart, a été constituée en personne morale par Shoppers en vue d'acheter des médicaments génériques de manufacturiers tiers et de les vendre sous la marque Sanis dans les magasins Shoppers Drug Mart. Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. et Pharmx Rexall

in Ontario and, like Shoppers, have taken steps to set up their own "private label" manufacturer. In 2010, Sanis applied to list several generic drugs in the Formulary and have them designated as "interchangeable". Its application was rejected, however, because those generic drugs were "private label products". Shoppers and Katz challenged the Regulations that banned the sale of private label products as being *ultra vires* on the grounds that they were inconsistent with the purpose and mandate of the statutes. The challenge succeeded in the Divisional Court. The Court of Appeal reversed the decision.

Held: The appeal should be dismissed.

A successful challenge to the *vires* of Regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate. Regulations benefit from a presumption of validity. This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations rather than on regulatory bodies to justify them; and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*. Both the challenged regulation and the enabling statute should be interpreted using a broad and generous approach consistent with this Court's approach to statutory interpretation generally. This inquiry does not involve assessing the policy merits of the Regulations to determine whether they are necessary, wise or effective in practice. Nor is it an inquiry into the underlying political, economic, social or partisan considerations.

In this case, the original legislative intent animating the two statutes was to control the cost of prescription drugs in Ontario without compromising safety. As the legislative history shows, attempts were made to promote transparent pricing and eliminate price inflation along the drug supply chain, all in pursuit of the ultimate objective of lowering drug costs. The purpose of the 2010 Regulations banning private label products was to prevent another possible mechanism for circumventing the ban on the rebates that had kept drug prices inflated. If pharmacies were permitted to create their own affiliated manufacturers whom they controlled, they would be

Drug Stores Ltd. exploitent elles aussi des pharmacies en Ontario et, à l'instar de Shoppers, ont entrepris des démarches en vue d'établir leur propre fabricant de médicaments génériques « sous marque de distributeur ». En 2010, Sanis a demandé que plusieurs médicaments génériques soient énumérés au Formulaire des médicaments et qu'ils soient désignés comme « interchangeables ». Sa demande a toutefois été rejetée parce que ces médicaments génériques étaient des « produits sous marque de distributeur ». Shoppers et Katz ont contesté les règlements interdisant la vente de produits sous marque de distributeur, les qualifiant d'*ultra vires* au motif qu'ils étaient incompatibles avec l'objet et le mandat de la loi. Elles ont obtenu gain de cause devant la Cour divisionnaire. La Cour d'appel a infirmé cette décision.

Arrêt : Le pourvoi est rejeté.

Pour contester avec succès la validité d'un règlement, il faut démontrer qu'il est incompatible avec l'objectif de sa loi habilitante ou avec le cadre du mandat prévu par la Loi. Les règlements jouissent d'une présomption de validité. Cette présomption comporte deux aspects : elle impose à celui qui conteste le règlement le fardeau de démontrer que celui-ci est invalide, plutôt que d'obliger l'organisme de réglementation à en justifier la validité; ensuite, la présomption favorise une méthode d'interprétation qui concilie le règlement avec sa loi habilitante de sorte que, dans la mesure du possible, le règlement puisse être interprété d'une manière qui le rend *intra vires*. Il convient de donner au règlement contesté et à sa loi habilitante une interprétation téléologique large compatible avec l'approche générale adoptée par la Cour en matière d'interprétation législative. Cette analyse ne comporte pas l'examen du bien-fondé du règlement pour déterminer s'il est nécessaire, sage et efficace dans la pratique. L'analyse ne s'attache pas aux considérations sous-jacentes d'ordre politique, économique ou social ni à la recherche, par les gouvernements, de leur propre intérêt.

En l'espèce, l'intention du législateur à l'origine des deux lois était de contrôler le coût des médicaments délivrés sur ordonnance en Ontario sans en compromettre l'innocuité. Comme le démontre l'historique législatif, on a tenté de promouvoir des méthodes de fixation des prix transparentes et de contrer la flambée des prix le long de la chaîne d'approvisionnement des médicaments, le tout en vue d'atteindre l'objectif ultime de réduire le coût des médicaments. Les règlements de 2010 interdisant les produits sous marque de distributeur visaient à empêcher un autre mécanisme susceptible de contourner l'interdiction des rabais qui maintenaient les prix des médicaments

directly involved in setting the Formulary prices and have strong incentives to keep those prices high.

The 2010 private label Regulations contribute to the legislative pursuit of transparent drug pricing. They fit into this strategy by ensuring that pharmacies make money exclusively from providing professional health care services, instead of sharing in the revenues of drug manufacturers by setting up their own private label subsidiaries. The Regulations were therefore consistent with the statutory purpose of reducing drug costs.

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Ontario Drug Benefit Act, R.S.O. 1990, c. O.10, ss. 0.1, 1(1), 1.2(2)(a), 1.3, 11.5, 18(1), (6).

R.R.O. 1990, Reg. 935, ss. 2, 9(1), (2) "private label product" [ad. O. Reg. 221/10, s. 5].

Transparent Drug System for Patients Act, 2006, S.O. 2006, c. 14.

élevés. Si l'on permettait aux pharmacies de créer leurs propres fabricants affiliés et de les contrôler, elles participeraient directement à la fixation des prix affichés au Formulaire des médicaments, ce qui les inciterait fortement à maintenir des prix élevés.

Les règlements de 2010 relatifs aux produits sous marque de distributeur contribuent à l'atteinte de l'objectif législatif de transparence du prix des médicaments. Ils s'inscrivent dans cette stratégie en assurant que les pharmacies tirent leurs revenus exclusivement de la prestation de services professionnels de santé plutôt que de la part des revenus des fabricants qu'elles touchent en mettant sur pied des filiales qui offrent des médicaments sous leur propre marque. Les règlements étaient par conséquent conformes à l'objectif législatif consistant à réduire les prix des médicaments.

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Terrence J. O'Sullivan and *M. Paul Michell*, for the appellants Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. and Pharmx Rexall Drug Stores Ltd.

Mahmud Jamal, *Craig T. Lockwood*, *Eric Morgan* and *W. David Rankin*, for the appellants Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited and Sanis Health Inc.

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Terrence J. O'Sullivan et *M. Paul Michell*, pour les appelantes Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. et Pharmx Rexall Drug Stores Ltd.

Mahmud Jamal, *Craig T. Lockwood*, *Eric Morgan* et *W. David Rankin*, pour les appelantes Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited et Sanis Health Inc.

Lise G. Favreau, Kim Twohig and *Kristin Smith*, for the respondents.

The judgment of the Court was delivered by

[1] ABELLA J. — Canada spends more on prescription drugs per capita than almost all members of the Organisation for Economic Co-operation and Development.[1] Prescription drugs are the second largest area of health care spending.[2] Drug costs accounted for approximately 9.5% of government health care expenses in 1985. By 2010, that number had risen to 15.9%.[3]

[2] A key part of the strategy for controlling drug costs has been to replace brand-name drugs with generic drugs, in the expectation that generic drugs would be significantly cheaper. Those expectations were, however, challenged by persistent market practices that kept generic prices high. In Ontario, the result has been an episodic tug-of-war between regulators and those engaged in the manufacture, distribution and sale of generic drugs. This appeal arises out of one of those regulatory episodes.

Background

[3] The sale and pricing of generic drugs is provincially regulated. In Ontario, two complementary and intersecting statutes were introduced together in 1985 to address the problem of rising drug prices: the *Drug Interchangeability and*

1 *Health at a Glance 2009: OECD Indicators* (2009) (online), at p. 167.

2 Competition Bureau of Canada, *Benefiting from Generic Drug Competition in Canada: The Way Forward* (2008) (online), at p. 7.

3 Canadian Institute for Health Information, *National Health Expenditure Trends, 1975 to 2012* (2012), at p. 21.

Lise G. Favreau, Kim Twohig et *Kristin Smith*, pour les intimés.

Version française du jugement de la Cour rendu par

[1] LA JUGE ABELLA — Le Canada dépense davantage par habitant pour les médicaments délivrés sur ordonnance que presque tous les autres pays membres de l'Organisation de coopération et de développement économiques[1]. Les produits pharmaceutiques vendus sur ordonnance sont, en importance, la deuxième composante du coût des soins de santé[2]. En 1985, le coût des médicaments représentait environ 9,5 p. 100 du total des dépenses de santé du gouvernement. En 2010, cette proportion avait grimpé à 15,9 p. 100[3].

[2] Un élément clé de la stratégie de contrôle du coût des médicaments a consisté à remplacer les médicaments de marque par des médicaments génériques dans l'espoir que ces derniers soient beaucoup moins coûteux. Ces espoirs se sont toutefois estompés en raison de pratiques commerciales persistantes qui ont maintenu les prix des médicaments génériques à des niveaux élevés. En Ontario, on a ainsi assisté à des affrontements épisodiques entre les organismes de réglementation et les entreprises chargées de la fabrication, de la distribution et de la vente des médicaments génériques. Le présent pourvoi découle de l'un de ces épisodes conflictuels en matière de réglementation.

Contexte

[3] La vente et la fixation des prix des médicaments génériques sont réglementées par les provinces. En Ontario, deux lois qui se complètent et se recoupent ont été adoptées ensemble en 1985 afin de remédier au problème de la hausse des prix

1 *Panorama de la santé 2009 : Les indicateurs de l'OCDE* (2009) (en ligne), p. 167.

2 Bureau de la concurrence du Canada, *Pour une concurrence avantageuse des médicaments génériques au Canada : Préparons l'avenir* (2008) (en ligne), p. 7.

3 Institut canadien d'information sur la santé, *Tendances des dépenses nationales de santé, 1975 à 2012* (2012), p. 23.

Dispensing Fee Act, R.S.O. 1990, c. P.23, and the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10 ("*Acts*").

[4] The *Drug Interchangeability and Dispensing Fee Act* ensures that patients in Ontario receive generic drugs rather than equivalent but more expensive brand-name drugs. It does so by empowering the Executive Officer of the Ministry of Health and Long-Term Care to designate a generic drug as "interchangeable" with a brand-name drug. Pharmacists must dispense the cheaper interchangeable generic to customers unless the prescribing physician specifies "no substitution" or the customer agrees to pay the extra cost of the brand-name. The *Act* also limits the dispensing fees that pharmacies can charge private customers.

[5] The *Ontario Drug Benefit Act* governs the Ontario Drug Benefit Program, whereby the province reimburses pharmacies when they dispense prescription drugs at no charge to "eligible persons" — primarily seniors and persons on social assistance. The list of all drugs for which Ontario will provide reimbursement, along with the price that Ontario will pay for them, is called the Formulary. The Executive Officer is responsible for listing drugs in the Formulary and setting their price by agreement with the drugs' manufacturers. When a pharmacy dispenses a listed drug to an eligible person, the *Ontario Drug Benefit Act* requires Ontario to reimburse the pharmacy for an amount based on the Formulary price of the drug plus a prescribed mark-up and prescribed dispensing fee.

[6] This legislative scheme effectively creates two markets in Ontario for brand-name and generic drugs. The "private market" consists of individuals buying drugs at their own expense or for reimbursement by private drug insurance plans. This market

des médicaments : la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*, L.R.O. 1990, ch. P.23, et la *Loi sur le régime de médicaments de l'Ontario*, L.R.O. 1990, ch. O.10 (« *Lois* »).

[4] La *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* fait en sorte que les patients ontariens reçoivent des médicaments génériques à la place de médicaments de marque, équivalents mais plus coûteux. À cette fin, cette loi habilite l'administrateur du ministère de la Santé et des Soins de longue durée à désigner un médicament générique comme étant « interchangeable » avec un médicament de marque. Les pharmaciens doivent préparer et délivrer aux clients le produit générique interchangeable moins coûteux, à moins que le médecin qui prescrit n'indique « pas de remplacement » ou que le client accepte de payer le coût plus élevé du médicament de marque. La *Loi* limite également les honoraires de préparation que les pharmacies peuvent demander à leurs clients privés.

[5] La *Loi sur le régime de médicaments de l'Ontario* régit le Programme de médicaments de l'Ontario, par lequel la province rembourse les pharmacies qui préparent et délivrent sans frais des médicaments sur ordonnance à des « personnes admissibles » — essentiellement les personnes âgées et les prestataires de l'aide sociale. Le Formulaire des médicaments énumère tous les médicaments remboursables par l'Ontario et indique les prix que la province paye pour ces médicaments. L'administrateur est chargé d'énumérer les médicaments au Formulaire des médicaments et d'en fixer les prix avec l'accord des fabricants des médicaments. Lorsqu'une pharmacie délivre à une personne admissible un médicament énuméré, la *Loi sur le régime de médicaments de l'Ontario* oblige la province à rembourser à cette pharmacie un montant calculé en fonction du prix du médicament prévu au Formulaire des médicaments, auquel s'ajoutent une majoration prescrite ainsi que les honoraires de préparation prescrits.

[6] Ce régime législatif a pour effet de créer en Ontario deux marchés pour les médicaments de marque et les médicaments génériques. Le « marché privé » est composé de particuliers qui achètent des médicaments à leurs frais ou se font rembourser

includes employer benefit plans, which in 2010 provided drug coverage for 8.6 million Ontario employees and their families at a cost of $4 billion to employers. Generic drugs, in order to be in the private market, must receive Health Canada approval for safety and effectiveness, and must be designated as "interchangeable" by Ontario's Executive Officer.

[7] The "public market" is the government-funded Ontario Drug Benefit Program. To be in this market, generic drugs must be approved by Health Canada, designated by Ontario as interchangeable, *and* listed in the province's Formulary. In 2010, the Ontario Drug Benefit Program provided drug coverage for 2.5 million people for the purchase of 3,300 drugs listed in the Formulary at a cost of $3.7 billion.

[8] Generic drugs reach consumers in Ontario's private and public markets through a supply chain that involves several participants regulated at the federal level, the provincial level, or both. They are:

- Fabricators, who make the generic drugs. Fabricators are licensed federally under the *Food and Drug Regulations*, C.R.C., c. 870.

- Manufacturers, who are licensed under the federal *Food and Drug Regulations* to sell generic drugs under their own name to wholesalers or directly to pharmacies. Manufacturers are responsible for regulatory compliance: having the drug approved by Health Canada, and having it designated as interchangeable and listed in the Formulary. A manufacturer can either make drugs itself, in which case it is also

par leur régime d'assurance-médicaments privé. Ce marché englobe les régimes d'avantages sociaux des employeurs qui, en 2010, permettaient à 8,6 millions d'employés ontariens et aux membres de leur famille de bénéficier d'une assurance-médicaments, au coût de quatre milliards de dollars pour les employeurs. Les médicaments génériques peuvent se retrouver sur le marché privé s'ils ont reçu l'approbation de Santé Canada quant à leur innocuité et leur efficacité et si l'administrateur ontarien les a désignés comme étant « interchangeables ».

[7] Le « marché public » correspond au Programme de médicaments de l'Ontario financé par le gouvernement ontarien. Les médicaments génériques accessibles sur ce marché doivent être approuvés par Santé Canada, être désignés par l'Ontario comme étant des médicaments interchangeables *et* être énumérés au Formulaire des médicaments de la province. En 2010, le Programme de médicaments de l'Ontario offrait une assurance-médicaments à 2,5 millions de personnes pour l'achat de 3 300 médicaments énumérés au Formulaire des médicaments, au coût de 3,7 milliards de dollars.

[8] Les médicaments génériques sont offerts aux consommateurs ontariens sur le marché public et sur le marché privé au moyen d'une chaîne d'approvisionnement qui fait intervenir plusieurs participants assujettis à la réglementation fédérale et à la réglementation provinciale, ou à l'une ou l'autre. Il s'agit des participants suivants :

- Les manufacturiers, qui fabriquent les médicaments génériques. Le gouvernement fédéral leur délivre des licences en vertu du *Règlement sur les aliments et drogues*, C.R.C., ch. 870.

- Les fabricants, qui sont autorisés en vertu du *Règlement sur les aliments et drogues* à vendre des médicaments génériques en leur propre nom à des grossistes ou directement aux pharmacies. Les fabricants sont chargés de faire respecter la réglementation en faisant approuver les médicaments par Santé Canada, en les faisant désigner comme interchangeables et en les faisant énumérer au Formulaire des médicaments.

regulated as a fabricator, or it can buy the drugs from a fabricator. The price at which manufacturers sell the drugs to wholesalers or pharmacies is regulated under the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act*. The price at which manufacturers buy drugs from fabricators is not regulated.

- Wholesalers, who are licensed under the federal *Food and Drug Regulations* to buy drugs from manufacturers to distribute to pharmacies. The prices at which wholesalers buy and sell drugs are regulated under the Ontario *Acts*. Their role is not implicated in the particular issue before this Court.

- Pharmacies, who buy drugs from wholesalers or manufacturers and dispense them to their customers. The term is used in these reasons to refer to pharmacy operators and to companies that own, operate or control pharmacies. The prices at which pharmacies buy drugs and dispense them to customers are regulated under the Ontario *Acts*.

[9] The *Drug Interchangeability and Dispensing Fee Act* and the *Ontario Drug Benefit Act* give the Lieutenant Governor in Council the authority to make regulations, including the authority to prescribe the conditions drugs must meet in order to be sold in Ontario. Ontario has used that regulatory authority to impose price controls along the drug supply chain.

[10] Prior to 2006, the price at which manufacturers could apply to list generic drugs in the Formulary was capped by regulations under the *Acts* at effectively 63% of the price of the brand-name drug. Pharmacies would buy drugs from manufacturers

Un fabricant peut soit fabriquer les médicaments lui-même, auquel cas il est également assujetti à la réglementation en tant que manufacturier, soit les acheter à un manufacturier. Les prix auxquels les fabricants vendent les médicaments aux grossistes ou aux pharmacies sont réglementés par la *Loi sur le régime de médicaments de l'Ontario* et la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*. Les prix auxquels les fabricants achètent des médicaments aux manufacturiers ne sont pas réglementés.

- Les grossistes, qui sont autorisés aux termes du *Règlement sur les aliments et drogues* fédéral à acheter des médicaments aux fabricants en vue de leur distribution aux pharmacies. Les prix auxquels les grossistes achètent et vendent des médicaments sont réglementés par les *Lois* ontariennes. Leur rôle n'est pas en jeu dans la question en litige soumise à notre Cour.

- Les pharmacies, qui achètent les médicaments aux grossistes ou aux fabricants et les délivrent à leurs clients. Ce terme s'entend, dans les présents motifs, des exploitants de pharmacies et des sociétés qui possèdent, exploitent ou contrôlent des pharmacies. Les prix que les pharmacies paient pour acheter des médicaments et pour les délivrer à leurs clients sont réglementés par les *Lois* ontariennes.

[9] La *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* et la *Loi sur le régime de médicaments de l'Ontario* confèrent au lieutenant-gouverneur en conseil le pouvoir de prendre des règlements, et notamment celui de préciser les conditions que les médicaments doivent respecter pour qu'ils puissent être vendus en Ontario. L'Ontario a utilisé ce pouvoir de réglementation pour imposer des mesures de contrôle des prix dans la chaîne d'approvisionnement des médicaments.

[10] Avant 2006, le prix auquel les fabricants pouvaient demander que leurs médicaments génériques soient énumérés au Formulaire des médicaments était plafonné par les règlements d'application des *Lois* à 63 p. 100 du prix demandé pour les médicaments de

at the Formulary price, and dispense them to customers at the Formulary price, plus regulated mark-ups and dispensing fees. In order to be competitive, manufacturers would, however, give pharmacies a substantial rebate so that they would buy their products. The price that manufacturers charged — and customers paid — was thereby artificially increased to the extent of the rebates. The rebates were up to $600-800 million annually, and were said to account for 40% of the price manufacturers charged for drugs.

[11] In order to stop this inflationary effect on generic drug prices, in 2006, the *Ontario Drug Benefit Act*, the *Drug Interchangeability and Dispensing Fee Act*, and the Regulations under them were amended to prohibit rebates.[4] The amendments were introduced as the *Transparent Drug System for Patients Act, 2006*, S.O. 2006, c. 14. They also added a "Principles" clause to the *Ontario Drug Benefit Act*,[5] which stated that the public drug system "aims to operate *transparently* to the extent possible for all persons with an interest in the system, including . . . consumers, *manufacturers*, wholesalers *and pharmacies*" and "aims to consistently achieve value-for-money and ensure the best use of resources at every level of the system".

[12] The legislature sought to terminate one major source of revenue for pharmacies — payments from drug manufacturers — and replace it with government reimbursement for providing professional health care services. The amendments made the reimbursement of pharmacies for professional services a function of the Executive

4 *Ontario Drug Benefit Act*, s. 11.5, and O. Reg. 201/96, s. 1; *Drug Interchangeability and Dispensing Fee Act*, s. 12.1, and R.R.O. 1990, Reg. 935, s. 2.

5 *Ontario Drug Benefit Act*, s. 0.1.

marque. Les pharmacies achetaient les médicaments aux fabricants au prix prévu au Formulaire des médicaments et les vendaient à leurs clients au prix indiqué au Formulaire des médicaments, majoré d'un supplément et des honoraires de préparation prescrits. Pour être concurrentiels, les fabricants consentaient toutefois aux pharmacies des rabais substantiels pour les inciter à acheter leurs produits. Le prix que les fabricants demandaient — et que les clients payaient — était par conséquent artificiellement augmenté dans la même proportion que ces rabais. Ces rabais représentaient entre 600 et 800 millions de dollars par année et auraient représenté environ 40 p. 100 du prix que les fabricants demandaient pour leurs médicaments.

[11] Pour stopper cette inflation des prix des médicaments génériques, la *Loi sur le régime de médicaments de l'Ontario*, la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* et leurs règlements d'application ont été modifiés en 2006 afin d'interdire les rabais[4]. Ces modifications ont été apportées par l'adoption de la *Loi de 2006 sur un régime de médicaments transparent pour les patients*, L.O. 2006, ch. 14. Elles ont aussi inséré dans la *Loi sur le régime de médicaments de l'Ontario*[5] une disposition relative aux « principes » affirmant que le régime public de médicaments « vise dans la mesure du possible *la transparence* envers les personnes qui ont un intérêt dans le régime, notamment [. . .] les consommateurs, *les fabricants*, les grossistes et *les pharmacies* » et qu'il « vise à réaliser constamment l'optimisation des ressources et leur meilleur emploi possible à chaque niveau ».

[12] Le législateur cherchait à tarir une source importante de revenus pour les pharmacies — les sommes versées par les fabricants de médicaments — et à y substituer les sommes que le gouvernement remboursait pour la prestation de services professionnels de santé. Les modifications ont confié à l'administrateur le paiement aux pharmacies

4 *Loi sur le régime de médicaments de l'Ontario*, art. 11.5, et O. Reg. 201/96, art. 1; *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*, art. 12.1, et R.R.O. 1990, Règl. 935, art. 2.

5 *Loi sur le régime de médicaments de l'Ontario*, art. 0.1

Officer, established a Pharmacy Council to advise the Minister primarily on this issue, and created a new regulation-making power allowing the Lieutenant Governor in Council to govern all aspects of professional services. Ontario also increased the prescribed dispensing fees in the public market.

[13] In the expectation that the elimination of rebates would lead manufacturers to lower their prices, the Ontario government also reduced the price cap imposed by the Regulations to 50% in the public market and removed the cap entirely in the private market. Manufacturers could, however, give pharmacies "professional allowances" for direct patient care programs.

[14] But the expected savings did not occur and manufacturers continued to charge high prices for generic drugs. Ontario's Ministry of Health and Long-Term Care found in 2007 that some of the leading generic drugs were three times more expensive in Ontario than in France, Germany and the United Kingdom, five times more expensive than in the United States, and twenty-two times more expensive than in New Zealand. In fact, as a Competition Bureau Report concluded, new generic drugs were entering the uncapped private market at a price higher than the previous cap of 63% (*Benefiting from Generic Drug Competition in Canada: The Way Forward* (2008), at p. 10).

[15] In addition, instead of the rebates, manufacturers were now paying pharmacies $800 million annually in professional allowances. As a result, the professional allowance exception was identified as yet another inflationary loophole. Audits of 206 pharmacies showed that all of them were in violation of the rules pertaining to professional allowances, and 70% of the funds provided by manufacturers on this basis went towards higher salaries and store profits, instead of being used for patient care. The then Minister of Health,

des services professionnels qu'ils dispensent, elles ont établi un Conseil des pharmaciens chargé de conseiller le ministre principalement sur cette question et ont instauré un nouveau pouvoir de réglementation permettant au lieutenant-gouverneur en conseil de régir tous les aspects de la prestation des services professionnels. L'Ontario a également augmenté les honoraires de préparation des médicaments vendus sur le marché public.

[13] Dans l'espoir que la suppression des rabais incite les fabricants à diminuer leurs prix, le gouvernement ontarien a également ramené le plafond des prix imposés par le règlement à 50 p. 100 dans le cas du marché public et a supprimé entièrement le plafond dans le cas du marché privé. Les fabricants pouvaient toutefois accorder aux pharmacies des « remises aux professionnels » dans le cas de programmes de soins directs aux patients.

[14] Mais les économies prévues ne se sont pas matérialisées et les fabricants ont continué à demander des prix élevés pour les médicaments génériques. Le ministre ontarien de la Santé et des Soins de longue durée a constaté en 2007 que certains des médicaments génériques les plus en demande coûtaient trois fois plus cher en Ontario qu'en France, en Allemagne et au Royaume-Uni, cinq fois plus cher qu'aux États-Unis et vingt-deux fois plus cher qu'en Nouvelle-Zélande. En fait, un rapport publié par le Bureau de la concurrence a conclu que les nouveaux médicaments génériques se vendaient sur le marché privé à des prix plus élevés qu'à leurs prix antérieurs plafonnés à 63 p. 100 (*Pour une concurrence avantageuse des médicaments génériques au Canada : Préparons l'avenir* (2008), p. 12).

[15] De plus, au lieu d'accorder des rabais, les fabricants payaient désormais aux pharmacies 800 millions de dollars par année en remises aux professionnels. On a donc constaté que l'exception relative aux remises aux professionnels constituait une autre faille qui avait pour effet de gonfler les prix. Des vérifications effectuées auprès de 206 pharmacies ont permis de constater que la totalité d'entre elles contrevenaient aux règles relatives aux remises aux professionnels et que 70 p. 100 des sommes fournies par les fabricants à ce chapitre

the Hon. Deborah Matthews, concluded that the continuing payments by drug manufacturers to pharmacies were the major reason Ontario still had inflated generic drug prices relative to comparable countries. In her view, drug prices could be cut by 50% if the payments were eliminated (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, Nos. 13, 19 and 23, 2nd Sess., 39th Parl., April 12, 21 and 28, 2010).

[16] Amendments were therefore introduced in 2010 to both *Acts* and to the Regulations, eliminating the "professional allowances" exception. Together with the 2006 ban on rebates, this prevented manufacturers from giving pharmacies any benefits for purchasing their drugs other than small prescribed discounts. At the same time, Ontario reduced the price cap imposed by the Regulations to 25% in the public market and reintroduced the price cap in the private market. Ontario also amended the Regulations to provide more reimbursement to pharmacies for professional services by further increasing the prescribed dispensing fees in the public market, and by directing the Executive Officer to pay an additional service fee on most claims in the public market until March 31, 2013 in "recognition of the transition to a pharmacy reimbursement model aimed at supporting professional services" (O. Reg. 220/10, s. 1(1)). The government also allocated $100 million in funding for the development of professional services by pharmacies.

[17] The Regulations to the *Ontario Drug Benefit Act*[6] and the *Drug Interchangeability and Dispensing Fee Act*[7] were also amended to prevent pharmacies from controlling manufacturers who sell generic drugs under their own name but do not

6 O. Reg. 201/96.

7 R.R.O. 1990, Reg. 935.

servaient à payer des salaires plus élevés et à gonfler les profits des entreprises au lieu de bénéficier aux patients. La ministre de la Santé et des Soins de longue durée de l'époque, M[me] Deborah Matthews, a conclu que les prix des médicaments génériques étaient toujours aussi élevés en Ontario par rapport à des pays semblables parce que les fabricants de médicaments continuaient à faire ce genre de paiement aux pharmacies. À son avis, les prix des médicaments pouvaient être réduits de 50 p. 100 si ces paiements étaient supprimés (Assemblée législative de l'Ontario, *Journal des débats (Hansard)*, n[os] 13, 19 et 23, 2[e] sess., 39[e] lég., 12, 21 et 28 avril 2010).

[16] Par conséquent, des modifications apportées en 2010 aux deux *Lois* et à leurs règlements d'application ont supprimé l'exception relative aux « remises aux professionnels ». En plus de l'interdiction de 2006 relative aux rabais, cette mesure a eu pour effet d'empêcher les fabricants d'accorder aux pharmacies quelque avantage que ce soit en contrepartie de l'achat de leurs médicaments, si ce n'est de modestes rabais autorisés par les règlements. En même temps, l'Ontario a ramené à 25 p. 100 le plafond des prix imposé par règlement dans le cas du marché public et a réintroduit le plafond des prix dans le cas du marché privé. L'Ontario a également modifié les règlements pour accorder un remboursement plus élevé aux pharmacies au titre des services professionnels en augmentant les honoraires de préparation prescrits à l'égard du marché public et en obligeant l'administrateur à payer, jusqu'au 31 mars 2013, des honoraires de services additionnels pour la plupart des demandes présentées sur le marché public [TRADUCTION] « compte tenu de la transition vers un modèle de remboursement des pharmacies visant à appuyer les services professionnels » (Règl. de l'Ont. 220/10, par. 1(1)). Le gouvernement a également alloué un financement de 100 millions de dollars pour le développement des services professionnels par les pharmacies.

[17] Les règlements d'application de la *Loi sur le régime de médicaments de l'Ontario*[6] et de la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*[7] ont également été modifiés pour empêcher les pharmacies de contrôler les fabricants qui

6 O. Reg. 201/96.

7 R.R.O. 1990, Règl. 935.

fabricate them. This was done by creating a category designated as "private label products", which were defined in both sets of Regulations as follows:

"private label product" includes a drug product in respect of which,

(a) the manufacturer applying for the designation of the product as a listed drug product does not directly fabricate the product itself, and,

(i) is not controlled by a person that directly fabricates the product, or

(ii) does not control the person that directly fabricates the product, and

(b) either,

(i) the manufacturer does not have an arm's-length relationship with a wholesaler, an operator of a pharmacy or a company that owns, operates or franchises pharmacies, or

(ii) the product is to be supplied under a marketing arrangement associating the product with a wholesaler or one or more operators of pharmacies or companies that own, operate or franchise pharmacies.

(O. Reg. 220/10, s. 3; O. Reg. 221/10, s. 5)

[18] Private label products cannot be listed in the Formulary[8] or designated as interchangeable.[9] These restrictions essentially ban the sale of private label drugs in the private and public markets in Ontario and are at the heart of this appeal.

[19] Sanis Health Inc., a subsidiary of the Canadian public company Shoppers Drug Mart Corp., is a manufacturer of private label products. It was incorporated by Shoppers for the purpose of buying generic drugs from third party fabricators and selling them under the Sanis label in Shoppers

8 *Ontario Drug Benefit Act* Regulation, O. Reg. 201/96, s. 12.0.2(1).

9 *Drug Interchangeability and Dispensing Fee Act* Regulation, R.R.O. 1990, Reg. 935, s. 9(1).

vendent des médicaments génériques en leur propre nom sans les fabriquer eux-mêmes. Le législateur a créé à cette fin une catégorie appelée « produits sous marque de distributeur », une expression définie comme suit dans les deux règlements :

[TRADUCTION] « produit sous marque de distributeur » S'entend notamment d'un produit médicamenteux à l'égard duquel les conditions suivantes sont réunies :

(a) le fabricant qui demande que le produit soit désigné comme un produit médicamenteux énuméré ne fabrique pas directement le produit lui-même, et

(i) il n'est pas contrôlé par une personne qui fabrique directement le produit, ou

(ii) il ne contrôle pas la personne qui fabrique directement le produit, et

(b) soit que

(i) le fabricant a un lien de dépendance avec un grossiste, un exploitant d'une pharmacie ou une société qui possède, exploite ou franchise des pharmacies, ou

(ii) le produit doit être offert aux termes d'une entente de commercialisation associant le produit à un grossiste ou à un ou plusieurs exploitants de pharmacies ou sociétés qui possèdent, exploitent ou franchisent des pharmacies.

(O. Reg. 220/10, art. 3; O. Reg. 221/10, art. 5)

[18] Les produits sous marque de distributeur ne peuvent être énumérés au Formulaire des médicaments[8] ni être désignés comme étant interchangeables[9]. Ces restrictions ont essentiellement pour effet d'interdire la vente de produits sous marque de distributeur sur le marché privé et le marché public en Ontario, et elles sont au cœur du présent pourvoi.

[19] Sanis Health Inc., une filiale de la société publique canadienne Shoppers Drug Mart Corp., est un fabricant de produits sous marque de distributeur. Elle a été constituée en personne morale par Shoppers en vue d'acheter des médicaments génériques de manufacturiers tiers et de les vendre

8 *Loi sur le régime de médicaments de l'Ontario*, O. Reg. 201/96, par. 12.0.2(1).

9 *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*, R.R.O. 1990, Règl. 935, par. 9(1).

Drug Mart stores. Sanis entered into cross-licensing and fabrication agreements with Cobalt Pharmaceuticals Inc. and Mylan Pharmaceuticals ULC, two manufacturers which currently fabricate generic drugs and sell them in Ontario. Pursuant to these arrangements, Sanis would rely on Cobalt and Mylan to fabricate generic drugs for it and would piggy-back onto their regulatory submissions as manufacturers to obtain its own Health Canada approval.

[20] In 2010, Sanis applied to the Executive Officer to list several generic drugs in the Formulary and have them designated as interchangeable. The Executive Officer rejected its application for the following reasons:

As you may be aware, the ministry recently posted a notice of proposed regulations on April 8, 2010 to amend the regulations under the [*Drug Interchangeability and Dispensing Fee Act*] and the [*Ontario Drug Benefit Act*]. These regulations propose that it is a condition of being designated under the [*Drug Interchangeability and Dispensing Fee Act*] that a product is not a private label product, and it is a condition of a product being a listed drug product under the [*Ontario Drug Benefit Act*] that it not be a private label product. These regulations will come into effect on July 1, 2010.

It seems to me that [Sanis' products] would be "private label products" as defined in the regulations. Sanis does not directly fabricate the Products and it does not have an arm's length relationship with a company that owns, operates or franchises pharmacies.

The purpose of the regulations is to prevent a pharmacy-controlled or related entity purchasing drug products from a person that actually makes the product at lower prices than the drug benefit price on the ODB Formulary without providing any price reduction to patients, insurers, employers, the Government of Ontario, or other payors.

The government's amendments to Ontario's drug regulations seek to encourage manufacturers to provide

sous la marque Sanis dans les magasins Shoppers Drug Mart. Elle a conclu des ententes de fabrication et d'échange de licences avec Cobalt Pharmaceuticals Inc. et Mylan Pharmaceuticals ULC, deux entreprises qui fabriquent présentement des médicaments génériques et les vendent en Ontario. Aux termes de ces ententes, Sanis s'en remet à Cobalt et à Mylan pour fabriquer des médicaments génériques en son nom et se sert des présentations réglementaires qu'elles ont déposées comme fabricants pour obtenir sa propre approbation de Santé Canada.

[20] En 2010, Sanis a demandé à l'administrateur d'énumérer au Formulaire des médicaments plusieurs médicaments génériques et de les faire désigner comme interchangeables. L'administrateur a refusé sa demande pour les raisons suivantes :

[TRADUCTION] Vous savez peut-être que le Ministère a récemment annoncé, le 8 avril 2010, un projet de règlement visant à modifier les règlements d'application de la [*Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*] et de la [*Loi sur le régime de médicaments de l'Ontario*]. Ces règlements proposent comme condition préalable à sa désignation sous le régime de la [*Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*] qu'un produit ne soit pas un produit sous marque de distributeur, et comme condition préalable à sa désignation comme produit médicamenteux énuméré au sens de la [*Loi sur le régime de médicaments de l'Ontario*] qu'il ne soit pas un produit sous marque de distributeur. Ces règlements entreront en vigueur le 1er juillet 2010.

Il me semble que [les produits de Sanis] seraient des « produits sous marque de distributeur » au sens de ces règlements. Sanis ne fabrique pas directement les produits et elle a un lien de dépendance avec une compagnie qui est propriétaire, exploitant ou franchiseur de pharmacies.

Les règlements en question ont pour objet d'empêcher une entité contrôlée par une société pharmaceutique ou par une entité connexe d'acheter des produits médicamenteux d'une personne qui fabrique effectivement le produit à un prix inférieur au prix au titre du régime de médicaments indiqué dans le Formulaire des médicaments de l'Ontario sans accorder de réduction de prix aux patients, aux assureurs, aux employeurs, au gouvernement de l'Ontario ou à tout autre payeur.

Les modifications que le gouvernement propose d'apporter aux règlements ontariens relatifs aux

lower prices to Ontario patients. With private label products, the price reductions that Sanis presumably enjoys would not be passed onto end-payors such as government, insurers and patients. Instead, it seems that profits would be retained within pharmacy-controlled organizations without benefiting consumers. While that would not be a "rebate" as defined in the legislation, it is a similar problem that the provisions against rebates seek to prevent. Further, there is a concern that Shoppers Drug Mart pharmacies could have an interest in dispensing [Sanis products] in preference to others, which raises the potential for a conflict of interest.

médicaments visent à inciter les fabricants à offrir des prix moins élevés aux patients ontariens. Dans le cas des produits sous marque de distributeur, les réductions de prix dont Sanis bénéficierait vraisemblablement ne seraient pas transmises à ceux qui les payent en bout de ligne comme le gouvernement, les assureurs et les patients. Il semble plutôt que les entreprises contrôlées par les pharmacies conserveraient les profits sans en faire bénéficier les consommateurs. Même s'il ne s'agirait pas d'un « rabais » au sens de la loi, le problème ressemble à celui que les dispositions interdisant les rabais visent à éviter. De plus, il y a lieu de craindre qu'il soit dans l'intérêt des pharmacies de la chaîne Shoppers Drug Mart de vendre [les produits Sanis] de préférence à tout autre, ce qui soulève la possibilité d'un conflit d'intérêts.

As a result, I do not intend to designate the Products as interchangeable under the [*Drug Interchangeability and Dispensing Fee Act*] or as listed drug products under the [*Ontario Drug Benefit Act*].

Par conséquent, je n'ai pas l'intention de désigner les produits comme des produits interchangeables au sens de la [*Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*] ou comme des produits médicamenteux énumérés au sens de la [*Loi sur le régime de médicaments de l'Ontario*].

[21] Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. and Pharmx Rexall Drug Stores Ltd. operate the Pharma Plus and Rexall pharmacies in Ontario and, like Shoppers, have taken steps to set up their own private label manufacturer. They have indicated that they intend to follow the same general business model as Sanis.

[21] Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. et Pharmx Rexall Drug Stores Ltd. exploitent les pharmacies Pharma Plus et Rexall en Ontario et, à l'instar de Shoppers, ont entrepris des démarches en vue d'établir leur propre fabricant de médicaments génériques sous marque de distributeur. Elles ont indiqué avoir l'intention de suivre le même modèle d'entreprise que celui de Sanis.

[22] Shoppers and Katz challenged the private label regulations as being *ultra vires* on the grounds that they were inconsistent with the statutory purpose and mandate. They succeeded in the Divisional Court, where Molloy J. concluded that the private label regulations were neither consistent with the purposes of the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act*, nor authorised by the regulation-making provisions. This decision was reversed in the Court of Appeal, where a majority (MacPherson and Karakatsanis JJ.A.) found that the private label regulations were *intra vires*.

[22] Shoppers et Katz ont contesté les règlements relatifs aux produits sous marque de distributeur, les qualifiant d'*ultra vires* au motif qu'ils étaient incompatibles avec l'objet et le mandat de la loi. Elles ont obtenu gain de cause devant la Cour divisionnaire, où la juge Molloy a conclu que les règlements relatifs aux produits sous marque de distributeur n'étaient pas compatibles avec l'objet de la *Loi sur le régime de médicaments de l'Ontario* et de la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* et qu'ils n'étaient pas autorisés par les dispositions de ces lois relatives à la prise de règlements. Cette décision a été infirmée par la Cour d'appel, qui a jugé à la majorité (les juges MacPherson et Karakatsanis) que les règlements relatifs aux produits sous marque de distributeur étaient *intra vires*.

[23] I agree with MacPherson and Karakatsanis JJ.A. and would dismiss the appeal.

[23] Je suis d'accord avec les juges MacPherson et Karakatsanis et je suis d'avis de rejeter le pourvoi.

Analysis

[24] A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate (Guy Régimbald, *Canadian Administrative Law* (2008), at p. 132). This was succinctly explained by Lysyk J.:

> In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or objects(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.

(*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266, at p. 292)

[25] Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15:3200 and 15:3230).

[26] Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach . . . consistent with this Court's approach to statutory interpretation generally" (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 8; see also Brown and Evans, at 13:1310; Keyes, at pp. 95-97; *Glykis v.*

Analyse

[24] Pour contester avec succès la validité d'un règlement, il faut démontrer qu'il est incompatible avec l'objectif de sa loi habilitante ou encore qu'il déborde le cadre du mandat prévu par la Loi (Guy Régimbald, *Canadian Administrative Law* (2008), p. 132). Ainsi que le juge Lysyk l'a expliqué de manière succincte :

> [TRADUCTION] Pour déterminer si le texte législatif subordonné contesté est conforme aux exigences de la loi habilitante, il est essentiel de cerner la portée du mandat conféré par le législateur en ce qui a trait à l'intention ou à l'objet de la loi dans son ensemble. Le simple fait de démontrer que le délégataire a respecté littéralement le libellé (souvent vague) de la loi habilitante lorsqu'il a pris le texte législatif subordonné n'est pas suffisant pour satisfaire au critère de la conformité à la loi. Le libellé de la disposition habilitante doit être interprété comme comportant l'exigence primordiale selon laquelle le texte législatif subordonné doit respecter l'intention et l'objet de la loi habilitante prise dans son ensemble.

(*Waddell c. Governor in Council* (1983), 8 Admin. L.R. 266, p. 292)

[25] Les règlements jouissent d'une présomption de validité (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 458). Cette présomption comporte deux aspects : elle impose à celui qui conteste le règlement le fardeau de démontrer que celui-ci est invalide, plutôt que d'obliger l'organisme réglementaire à en justifier la validité (John Mark Keyes, *Executive Legislation* (2e éd. 2010), p. 544-550); ensuite, la présomption favorise une méthode d'interprétation qui concilie le règlement avec sa loi habilitante de sorte que, *dans la mesure du possible*, le règlement puisse être interprété d'une manière qui le rend *intra vires* (Donald J. M. Brown et John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (feuilles mobiles), 15:3200 et 15:3230).

[26] Il convient de donner au règlement contesté et à sa loi habilitante une « interprétation téléologique large [. . .] compatible avec l'approche générale adoptée par la Cour en matière d'interprétation législative » (*United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, 2004 CSC 19, [2004] 1 R.C.S. 485, par. 8; voir également Brown et Evans, 13:1310; Keyes, p. 95-97; *Glykis c.*

Hydro-Québec, 2004 SCC 60, [2004] 3 S.C.R. 285, at para. 5; Sullivan, at p. 368; *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64).

[27] This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice" (*Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.), at p. 604). As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.):

> . . . the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. [para. 41]

[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).

[29] The grants of authority relevant to the private label regulations are, under the *Drug Interchangeability and Dispensing Fee Act*:

Hydro-Québec, 2004 CSC 60, [2004] 3 R.C.S. 285, par. 5; Sullivan, p. 368; *Loi de 2006 sur la législation*, L.O. 2006, ch. 21, ann. F, art. 64).

[27] Cette analyse ne comporte pas l'examen du bien-fondé du règlement pour déterminer s'il est « nécessaire, sage et efficace dans la pratique » (*Jafari c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1995] 2 C.F. 595 (C.A.), p. 604). Comme le tribunal l'a expliqué dans l'arrêt *Ontario Federation of Anglers & Hunters c. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (C.A. Ont.) :

> [TRADUCTION] . . . le contrôle judiciaire des règlements, contrairement à celui des décisions administratives, se limite normalement à la question de leur incompatibilité avec l'objet de la loi ou à l'inobservation d'une condition préalable prévue par la loi. Les raisons qui ont motivé la prise du règlement ne sont pas pertinentes. [par. 41]

[28] L'analyse ne s'attache pas aux considérations sous-jacentes « d'ordre politique, économique ou social [ni à la recherche, par les gouvernements, de] leur propre intérêt » (*Thorne's Hardware Ltd. c. La Reine*, [1983] 1 R.C.S. 106, p. 113). La validité d'un règlement ne dépend pas non plus de la question de savoir si, de l'avis du tribunal, il permettra effectivement d'atteindre les objectifs visés par la loi (*CKOY Ltd. c. La Reine*, [1979] 1 R.C.S. 2, p. 12; voir également *Jafari*, p. 602; Keyes, p. 266). Pour qu'il puisse être déclaré *ultra vires* pour cause d'incompatibilité avec l'objet de la loi, le règlement doit reposer sur des considérations « sans importance », doit être « non pertinent » ou être « complètement étranger » à l'objet de la loi (*Alaska Trainship Corp. c. Administration de pilotage du Pacifique*, [1981] 1 R.C.S. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Cour div.); *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, p. 280; *Jafari*, p. 604; Brown et Evans, 15:3261). En réalité, bien qu'il soit possible de déclarer un règlement *ultra vires* pour cette raison, comme le juge Dickson l'a fait observer, « seul un cas flagrant pourrait justifier une pareille mesure » (*Thorne's Hardware*, p. 111).

[29] Les dispositions de la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* qui confèrent le pouvoir de prendre des règlements relatifs aux produits sous marque de distributeur sont formulées comme suit :

14. – (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing conditions to be met by products or by manufacturers of products in order to be designated as interchangeable with other products;

(b) prescribing conditions to be met for a product to continue to be designated as interchangeable;

Under the *Ontario Drug Benefit Act*, they are:

18. – (1) The Lieutenant Governor in Council may make regulations,

. . .

(b) prescribing conditions to be met for a drug product to be designated as a listed drug product;[10]

(b.1) prescribing conditions to be met for a listed drug product to continue to be designated as a listed drug product;

. . .

(m) respecting any matter considered necessary or advisable to carry out the intent and purposes of this Act.

[30] To start the analysis, we must determine the purposes of the enabling statutes.

[31] The original legislative intent animating the two *Acts* was to combat high drug prices caused by manufacturers quoting artificially high Formulary prices while providing hidden discounts to pharmacies. When the statutes were first introduced in 1985, the then Minister of Health, the Hon. Murray J. Elston, explained that they were intended to address the problem of "unrealistic" drug pricing:

10 A "listed drug product" is a drug listed in the Formulary by the Executive Officer (ss. 1(1), 1.2(2)(a) and 1.3).

14 (1) Le lieutenant-gouverneur en conseil peut, par règlement :

a) prescrire les conditions auxquelles doivent répondre les produits ou les fabricants de produits pour que ces produits puissent être désignés comme étant interchangeables avec d'autres produits;

b) prescrire les conditions auxquelles il doit être satisfait pour qu'un produit continue d'être désigné comme étant interchangeable;

La *Loi sur le régime de médicaments de l'Ontario* prévoit ce qui suit :

18 (1) Le lieutenant-gouverneur en conseil peut, par règlement :

. . .

b) prescrire les conditions auxquelles il doit être satisfait pour qu'un produit médicamenteux soit désigné comme produit médicamenteux énuméré[10];

b.1) prescrire les conditions auxquelles il doit être satisfait pour qu'un produit médicamenteux énuméré continue d'être désigné comme produit médicamenteux énuméré;

. . .

m) traiter de toute question qu'il considère utile ou nécessaire pour réaliser l'objet de la présente loi.

[30] Au début de l'analyse, il nous faut préciser en quoi consistent les objectifs visés par les lois habilitantes.

[31] L'intention du législateur à l'origine des deux *Lois* était de lutter contre les prix élevés des médicaments du fait que les fabricants affichaient au Formulaire des médicaments des prix artificiellement élevés tout en accordant des rabais cachés aux pharmacies. Lorsque les projets de loi ont été présentés pour la première fois en 1985, le ministre de la Santé de l'époque, M. Murray J. Elston, a expliqué qu'ils visaient à s'attaquer au problème des prix [TRADUCTION] « irréalistes » des médicaments :

10 Un « produit médicamenteux énuméré » est un médicament énuméré dans le Formulaire des médicaments par l'administrateur (par. 1(1), al. 1.2(2)a) et art. 1.3).

[The] formulary . . . lists the prices at which government will reimburse pharmacies for drugs dispensed under the program. These formulary prices are based on quotes received from drug manufacturers. They are not set by government.

Some manufacturers realized that by quoting artificially high prices for the formulary, prices higher than what pharmacies were actually paying for drugs, there was an incentive for pharmacies to purchase their products. Government reimbursements for drugs dispensed under the ODB are, as a result, higher than the cost of many drugs to pharmacies.

It can be easily seen how this resulted in excess costs to the Ontario drug benefit plan. This practice of price spreading, and the fact that it was allowed to continue for so long by the previous government, represents an unnecessary burden on all Ontario taxpayers.

. . . since the Ontario Drug Benefit Formulary is used as a pricing guide for prescription drug sales in the cash market, its artificially high prices have resulted in excess costs for cash customers and for those on other drug plans as well. [Emphasis added.]

(Legislative Assembly, *Hansard – Official Report of Debates*, No. 41, 1st Sess., 33rd Parl., November 7, 1985, p. 1446)

[32] In other words, the overarching purpose of the statutory scheme is, as Molloy J. explained, "to control the cost of prescription drugs in Ontario without compromising safety".

[33] The *Acts* and the Regulations under them represent a series of deliberate and aspirational responses to what has proven to be a tenacious problem over the past 25 years: manufacturers charging exceptionally high prices for generic drugs flowing not from the actual cost of the drugs, but from the manufacturers' cost in providing financial incentives to pharmacies to induce them to purchase their

[TRADUCTION] [Le] Formulaire des médicaments [. . .] indique les prix auxquels le gouvernement remboursera les pharmacies pour les médicaments vendus dans le cadre du Programme. Les prix indiqués au Formulaire des médicaments sont calculés en fonction des chiffres fournis par les fabricants de médicaments. Ils ne sont pas fixés par le gouvernement.

Certains fabricants ont constaté qu'en fixant des prix artificiellement élevés pour les médicaments énumérés — des prix plus élevés que ceux que les pharmacies payaient effectivement pour les médicaments —, les pharmacies étaient incitées à acheter leurs produits. Le montant que le gouvernement rembourse pour les médicaments vendus en vertu du Programme des médicaments de l'Ontario est par conséquent plus élevé que le coût que payent effectivement les pharmacies pour bon nombre des médicaments.

On peut aisément comprendre comment ce système a pu engendrer des coûts excessifs pour le Programme de médicaments de l'Ontario. Cette pratique d'écart des prix et le fait que le gouvernement précédent ait permis qu'elle se poursuive aussi longtemps a imposé un fardeau inutile à l'ensemble des contribuables ontariens.

. . . étant donné que le Formulaire des médicaments du Programme des médicaments de l'Ontario sert de guide d'établissement des prix pour la vente de médicaments sur ordonnance sur le marché au comptant, les prix artificiellement élevés qu'il prévoit ont entraîné des coûts excessifs pour les clients qui paient au comptant tout autant que pour ceux qui bénéficient d'autres régimes d'assurance-médicaments. [Italiques ajoutés.]

(Assemblée législative, *Hansard — Official Report of Debates*, nº 41, 1re sess., 33e lég., 7 novembre 1985, p. 1446)

[32] En d'autres termes, l'objet prépondérant du régime législatif est, comme l'a expliqué la juge Molloy, [TRADUCTION] « de contrôler le coût des médicaments délivrés sur ordonnance en Ontario sans en compromettre l'innocuité ».

[33] Les *Lois* et leurs règlements d'application s'inscrivent dans la foulée d'une série de mesures énergiques et ambitieuses prises en réaction à ce qui s'est avéré un problème tenace au cours des 25 dernières années — les fabricants exigent des prix exceptionnellement élevés pour les médicaments génériques en raison non pas du coût réel de ces médicaments, mais du coût qu'assument

products. The government has repeatedly tried to end these hidden benefits. As the legislative history shows, attempts were made to promote transparent pricing and eliminate price inflation along the drug supply chain, all in pursuit of the ultimate objective of lowering drug costs. The legislature also exerted control over the sources of pharmacy revenue, attempting to shift pharmacy revenues away from drug sales and towards the delivery of professional services. Of necessity, these legislative and regulatory responses have been incremental.

[34] The purpose of the 2010 Regulations banning private label products was to prevent another possible mechanism for circumventing the ban on the rebates that kept drug prices inflated. As previously noted, the problem with rebates was that they inflated the Formulary price. In banning rebates, the expectation was that manufacturers would lower Formulary prices, and that pharmacies would pass these savings on to consumers. If pharmacies were permitted to create their own affiliated manufacturers whom they controlled, they would be directly involved in setting the Formulary prices and have strong incentives to keep these prices high. Rather than receiving a rebate financed by inflated drug prices, the pharmacy would share in the manufacturers' profits from those prices. This was expected to keep the price of drugs to consumers high.

[35] These concerns found their way into the June 2010 explanatory letter from the Executive Officer to Sanis. The relevant portions are repeated here for ease of reference:

The purpose of the regulations is to prevent a pharmacy-controlled or related entity purchasing drug products from a person that actually makes the product at lower

les fabricants pour inciter financièrement les pharmacies à acheter leurs produits. Le gouvernement a cherché sans relâche à supprimer ces avantages cachés. Comme le démontre l'historique législatif, on a tenté de promouvoir des méthodes de fixation des prix transparentes et de contrer la flambée des prix le long de la chaîne d'approvisionnement des médicaments, le tout en vue d'atteindre l'objectif ultime de réduire le coût des médicaments. Le législateur a également exercé un contrôle sur la provenance des revenus des pharmacies, en tentant de faire en sorte que les revenus des pharmacies proviennent moins de la vente de médicaments et plus de la prestation des services professionnels. Par la force des choses, ces mesures législatives et réglementaires ont été prises graduellement.

[34] Les règlements de 2010 interdisant les produits sous marque de distributeur visaient à empêcher un autre mécanisme susceptible de contourner l'interdiction des rabais qui maintenaient les prix des médicaments élevés. Comme je l'ai déjà signalé, les rabais étaient problématiques parce qu'ils gonflaient les prix indiqués au Formulaire des médicaments. En interdisant les rabais, on s'attendait à ce que les fabricants baissent les prix affichés au Formulaire des médicaments et que les pharmacies, à leur tour, transmettent aux consommateurs les économies ainsi réalisées. Si l'on permettait aux pharmacies de créer leurs propres fabricants affiliés et de les contrôler, elles participeraient directement à la fixation des prix affichés au Formulaire des médicaments, ce qui les inciterait fortement à maintenir des prix élevés. Au lieu de recevoir des rabais financés à même les prix gonflés des médicaments, les pharmacies participeraient aux profits que ces prix engendrent pour les fabricants. On s'attendait à ce que cette pratique maintienne les prix élevés que paient les consommateurs pour les médicaments.

[35] Ces préoccupations ont été reprises dans la lettre explicative adressée par l'administrateur à Sanis en juin 2010. Les extraits pertinents de cette lettre sont reproduits ici par souci de commodité :

[TRADUCTION] Les règlements en question ont pour objet d'empêcher une entité contrôlée par une société pharmaceutique ou par une entité connexe d'acheter des

prices than the drug benefit price on the ODB Formulary without providing any price reduction to patients, insurers, employers, the Government of Ontario, or other payors.

The government's amendments to Ontario's drug regulations seek to encourage manufacturers to provide lower prices to Ontario patients. With private label products, the price reductions that Sanis presumably enjoys would not be passed onto end-payors such as government, insurers and patients. Instead, it seems that *profits would be retained within pharmacy-controlled organizations without benefiting consumers. While that would not be a "rebate" as defined in the legislation, it is a similar problem that the provisions against rebates seek to prevent.* [Emphasis added.]

[36] The private label Regulations also contribute to the legislative pursuit of transparent drug pricing. The Regulations are consistent with a recommendation in the 2008 Competition Bureau Report that "reimbursement of pharmacy services should be provided separately from reimbursement of drug costs". The Bureau's rationale was that provincial governments have difficulty setting appropriate fees for pharmacy services as long as pharmacies continue to receive massive payments from drug manufacturers and can use those revenues to offset under-funding for services and inefficient service delivery (*Benefiting from Generic Drug Competition*, at pp. 20-22 and 32). Weaning pharmacies off drug manufacturer revenues and transitioning them to a business model based on reimbursement for providing professional services has therefore been an important strategy pursued in the 2006 and 2010 amendments to the *Acts* and Regulations.

[37] The private label Regulations fit into this strategy by ensuring that pharmacies make money exclusively from providing professional health care

produits médicamenteux d'une personne qui fabrique effectivement le produit à un prix inférieur au prix au titre du régime de médicaments indiqué dans le Formulaire des médicaments de l'Ontario sans accorder de réduction de prix aux patients, aux assureurs, aux employeurs, au gouvernement de l'Ontario ou à tout autre payeur.

Les modifications que le gouvernement propose d'apporter aux règlements ontariens relatifs aux médicaments visent à inciter les fabricants à offrir des prix moins élevés aux patients ontariens. Dans le cas des produits sous marque de distributeur, les réductions de prix dont Sanis bénéficierait vraisemblablement ne seraient pas transmises à ceux qui les payent en bout de ligne comme le gouvernement, les assureurs et les patients. Il semble plutôt que *les entreprises contrôlées par les pharmacies conserveraient les profits sans en faire bénéficier les consommateurs. Même s'il ne s'agirait pas d'un « rabais » au sens de la loi, le problème ressemble à celui que les dispositions interdisant les rabais visent à éviter.* [Italiques ajoutés.]

[36] Les règlements relatifs aux produits sous marque de distributeur contribuent aussi à atteindre l'objectif législatif de transparence du prix des médicaments. Ils sont conformes à ce que le Bureau de la concurrence avait recommandé en 2008, soit que « le remboursement des services pharmaceutiques devrait être distinct du remboursement du coût des médicaments ». Le Bureau de la concurrence estimait que les gouvernements provinciaux ont de la difficulté à fixer des honoraires convenables pour les services pharmaceutiques dès lors que les pharmacies continuent à recevoir des fabricants de médicaments des sommes faramineuses qui leur permettent de compenser le sous-financement des services professionnels et une prestation de services inefficace (*Pour une concurrence avantageuse des médicaments génériques*, p. 25-28 et 40). Amener les pharmacies à renoncer aux revenus que leur procurent les fabricants de médicaments et à passer à un modèle d'entreprise axé sur le remboursement de leurs services professionnels constituait donc une importante stratégie poursuivie dans les modifications apportées en 2006 et 2010 aux *Lois* et aux règlements.

[37] Les règlements sur les produits sous marque de distributeur s'inscrivent dans cette stratégie en assurant que les pharmacies tirent leurs revenus

services, instead of sharing in the revenues of drug manufacturers by setting up their own private label subsidiaries. In this way too, the Regulations correspond to the statutory purpose of reducing drug costs since disentangling the cost of pharmacy services from the cost of drugs puts Ontario in a better position to regulate both.

[38] The 2010 private label Regulations were therefore part of the regulatory pursuit of lower prices for generic drugs and are, as a result, consistent with the statutory purpose.

[39] Shoppers and Katz argued, however, that the private label Regulations were inconsistent with the statutory purpose because they neither could nor would reduce drug prices. This, with respect, misconstrues the nature of the review exercise. The animating concern of the ban is that private label manufacturers' affiliation to pharmacies could make them more resistant to Ontario's efforts to promote lower prices. The Regulations are therefore connected to the statutory purpose of controlling — and reducing — drug prices. Whether they will ultimately prove to be successful or represent sound economic policy is not the issue. The issue is whether they accord with the purpose of the scheme. In my view, they clearly do.

[40] Shoppers and Katz also argued that the private label Regulations are inconsistent with the statutory purpose because they are underinclusive: they do not prevent a pharmacy from owning a manufacturer who is also the fabricator of the drug. At the moment, this is pure speculation — there are no pharmacies in Ontario which

exclusivement de la prestation de services professionnels de santé plutôt que de la part des revenus des fabricants qu'elles touchent en mettant sur pied des filiales qui offrent des médicaments sous leur propre marque. Ainsi, les règlements correspondent à l'objectif visé par la loi consistant à réduire le coût des médicaments, étant donné que le fait de dissocier le coût des services pharmaceutiques de celui des médicaments place l'Ontario en meilleure posture pour réglementer les deux.

[38] Les règlements de 2010 relatifs aux produits sous marque de distributeur s'inscrivaient donc dans la foulée des démarches réglementaires entreprises en vue de réduire les prix des médicaments génériques et ils sont par conséquent conformes à l'objectif visé par les *Lois*.

[39] Shoppers et Katz ont toutefois plaidé que les règlements relatifs aux produits sous marque de distributeur sont incompatibles avec l'objectif visé par les *Lois* parce qu'ils ne pourraient pas réduire les prix des médicaments ou ne le réduiraient pas. En toute déférence, cet argument repose sur une interprétation erronée de la nature de l'exercice d'examen en cause. La préoccupation qui a suscité l'interdiction tient à ce que l'affiliation des fabricants de produits sous marque de distributeur avec les pharmacies serait susceptible de les rendre plus résistants aux mesures prises par l'Ontario pour promouvoir des prix moins élevés. Il existe donc un lien entre les règlements et l'objectif législatif consistant à contrôler — et à réduire — les prix des médicaments. Il n'est pas question de savoir si les règlements permettront ou non en bout de ligne d'atteindre cet objectif ou s'ils constituent ou non une saine politique économique. La question est de savoir si les règlements sont conformes à l'objectif du régime législatif. À mon avis, ils le sont manifestement.

[40] Shoppers et Katz ont également plaidé que les règlements relatifs aux produits sous marque de distributeur ne sont pas conformes à l'objectif législatif parce qu'ils ont une portée trop limitative : ils n'empêchent pas une pharmacie d'être propriétaire d'un fabricant qui est également le manufacturier du médicament. Pour le moment, il

own both the manufacturer and fabricator of a generic drug. It may well be that at some point this will become a corporate structure of concern, but Ontario is not obliged in its regulations to anticipate all potentially problematic scenarios. So long as what it has actually enacted is consistent with the statutory purpose and regulatory scope, Ontario is entitled to address the problem in stages. The ban on private label products is not inconsistent with or extraneous to the statutory purpose simply because it fails to include corporate models that do not currently exist.

s'agit là de pures spéculations : en Ontario, aucune pharmacie n'est propriétaire à la fois de fabricants et de manufacturiers de médicaments génériques. Il se peut fort bien qu'une structure organisationnelle de ce genre devienne un jour une source de préoccupations, mais l'Ontario n'est pas obligé, dans sa réglementation, d'anticiper tous les scénarios problématiques éventuels. Dès lors que les mesures effectivement adoptées sont conformes à l'objet visé par la loi et à la portée de ses règlements, l'Ontario a le droit de s'attaquer au problème par étapes. L'interdiction frappant les produits sous marque de distributeur n'est pas incompatible avec l'objet de la loi ou étrangère à ce dernier simplement parce qu'elle n'englobe pas des modèles d'entreprise qui n'existent pas encore.

[41] It bears repeating that Ontario's totemic struggle to control generic drug prices has been an incremental one, due in part to an evolving awareness of the mechanisms that can lead to high drug prices, and in part to the dynamic nature of the problem: each time the government has introduced new measures, market participants have changed their business practices to obviate the restrictions and keep prices high.

[41] Il convient de répéter que la lutte totémique, en Ontario, pour contrôler les prix des médicaments génériques a été menée graduellement, en partie parce qu'on a pris conscience peu à peu des mécanismes qui peuvent faire monter les prix des médicaments et en partie en raison de la dynamique du problème : chaque fois que le gouvernement a adopté de nouvelles mesures, les acteurs du marché ont modifié leurs pratiques commerciales pour se soustraire aux restrictions et pour maintenir les prix élevés.

[42] The private label Regulations are part of this incremental regulatory process, tailored to address a proposed business model in which the private label manufacturer is a substitute for a manufacturer which already has its drugs on the market in Ontario. Sanis, for example, proposed to rely on Cobalt and Mylan, two manufacturers who already market generic drugs in Ontario, to fabricate its drugs and to provide it with the groundwork for obtaining regulatory approval. Brent Fraser, the Director of Drug Program Services at the Ministry of Health and Long-Term Care, expressed this very concern about Sanis' proposal. In his view, Sanis' intention to rely on other companies like Cobalt or Mylan to develop the products it proposed to sell meant that "the only role of Sanis appears to be to earn a profit for a pharmacy operator over and above the increased dispensing fees, the newly introduced transitional service fees, benefits associated with ordinary

[42] Les règlements relatifs aux produits sous marque de distributeur s'inscrivent dans la foulée d'un processus réglementaire graduel conçu pour réagir à un modèle d'entreprise dans lequel le fabricant de produits sous marque de distributeur se substitue au fabricant dont les médicaments se trouvent déjà sur le marché ontarien. Sanis, par exemple, comptait s'en remettre à Cobalt et à Mylan, deux fabricants qui vendent déjà des médicaments génériques en Ontario, pour fabriquer ses médicaments et pour préparer le terrain en vue d'obtenir l'approbation réglementaire. Brent Fraser, le directeur des Services liés aux programmes de médicaments du Ministère de la Santé et des Soins de longue durée, a exprimé ses craintes sur ce point précis en ce qui concerne la proposition de Sanis. À son avis, l'intention de Sanis de s'en remettre à d'autres compagnies comme Cobalt ou Mylan pour mettre au point les produits qu'elle se proposait

commercial terms, and the planned payments for the delivery of professional services".

de vendre faisait en sorte que [TRADUCTION] « le seul rôle que Sanis semble jouer se résume à engranger les profits d'un exploitant de pharmacie en plus des honoraires de préparation plus élevés, des frais de services nouvellement instaurés pendant la période de transition, des avantages associés aux conditions commerciales habituelles, sans oublier les paiements à venir pour la prestation des services professionnels ».

[43] Shoppers and Katz also argued that the private label Regulations are *ultra vires* because they interfere with commercial rights, prohibit an activity, and discriminate between drug manufacturers, none of which they say is authorised by the grants of regulation-making authority in the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act*. In my view, these arguments cannot succeed.

[43] Shoppers et Katz ont également plaidé que les règlements relatifs aux produits sous marque de distributeur sont *ultra vires* parce qu'ils portent atteinte à des droits commerciaux, interdisent une activité et établissent une distinction entre les fabricants de médicaments, ajoutant que rien de tout cela n'est autorisé par le pouvoir de réglementation prévu par la *Loi sur le régime de médicaments de l'Ontario* et la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*. À mon avis, ces arguments ne sauraient être retenus.

[44] It seems to me somewhat ethereal to speak of a commercial "right" to trade in a market as highly regulated as is the pharmaceutical market in Ontario. Manufacturers have no right to sell drugs in the public market in Ontario unless they are listed in the Formulary, and no right to sell generic drugs at all unless they are designated as interchangeable. Since the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act* give the Lieutenant Governor in Council the authority to set the conditions that a drug must meet in order to be listed in the Formulary and designated as interchangeable, they expressly authorise interference with a manufacturer's ability to enter and remain in the market.

[44] Il me semble quelque peu immatériel de parler d'un « droit » commercial de faire des échanges dans un marché aussi réglementé que le marché pharmaceutique ontarien. Les fabricants n'ont le droit de vendre des médicaments sur le marché public en Ontario que si ces médicaments sont énumérés au Formulaire des médicaments, et ils n'ont pas du tout le droit de vendre des médicaments génériques à moins que ceux-ci n'aient été désignés comme interchangeables. Comme la *Loi sur le régime de médicaments de l'Ontario* et la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* confèrent au lieutenant-gouverneur en conseil le pouvoir de fixer les conditions qu'un médicament doit respecter pour pouvoir être énuméré au Formulaire des médicaments et pour être désigné comme interchangeable, ces lois permettent expressément de restreindre la possibilité pour un fabricant d'entrer sur le marché et d'y demeurer.

[45] Nor do the private label Regulations contravene the principle that a statutory power to regulate an activity does not include the power to prohibit it. This principle had its origins in *Municipal Corporation of City of Toronto v. Virgo*, [1896] A.C. 88 (P.C.), where Lord Davey held that

[45] Les règlements relatifs aux produits sous marque de distributeur ne contreviennent pas non plus au principe suivant lequel le pouvoir législatif de réglementer une activité ne comprend pas le pouvoir de l'interdire. Ce principe tire son origine de l'arrêt *Municipal Corporation of City of Toronto c. Virgo*, [1896] A.C. 88 (C.P.), dans lequel lord Davey a affirmé ce qui suit :

there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. [p. 93]

[46] Assessing whether a regulation has crossed the line from being a permissible condition into being an impermissible prohibition requires establishing the scope of the activity to be regulated and then determining the extent to which it can continue to be carried on (Keyes, at p. 312). Here, the activity to be regulated is the sale of generic drugs in the private and public markets in Ontario. The private label Regulations do not prohibit manufacturers from selling generic drugs in Ontario's markets; they restrict market access only if a particular corporate structure is used. That cannot be characterized as a total or near-total ban on selling generic drugs in Ontario.

[47] The "discrimination" or unauthorised distinctions argument is similarly without a legal foundation. Regulatory distinctions must be authorised by statute, either expressly or by necessary implication (*Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, at pp. 106-7). The applicable legislation in this case expressly authorises the making of distinctions between different drug manufacturers. Section 14(1)(a) of the *Drug Interchangeability and Dispensing Fee Act* expressly states that the Lieutenant Governor in Council may make regulations "prescribing conditions to be met by products *or by manufacturers of products* in order to be designated as interchangeable with other products". Prescribing conditions to be met by drug manufacturers necessarily creates classes of manufacturers who do or do not meet those conditions, and, consequently, to whom the regulations apply differently.

[TRADUCTION] [I]l faut nettement distinguer l'interdiction ou la prohibition d'un commerce et sa réglementation ou son contrôle, et il est évident que le pouvoir de réglementation et de contrôle présuppose l'existence ininterrompue de ce qui doit être réglementé ou contrôlé. [p. 93]

[46] Pour déterminer si un règlement a franchi la ligne de démarcation faisant en sorte qu'une condition acceptable devient une interdiction inacceptable, il faut préciser la portée de l'activité à réglementer et déterminer alors la mesure dans laquelle cette activité peut être poursuivie (Keyes, p. 312). Dans le cas qui nous occupe, l'activité à réglementer consiste en la vente de médicaments génériques sur le marché privé et le marché public en Ontario. Les règlements relatifs aux produits sous marque de distributeur n'interdisent pas aux fabricants de vendre des médicaments génériques sur les marchés ontariens; ils leur interdisent l'accès au marché uniquement s'ils utilisent une certaine structure organisationnelle. On ne saurait qualifier cette mesure d'interdiction totale ou quasi-totale de la vente de médicaments génériques en Ontario.

[47] L'argument des « distinctions non autorisées » est également dénué de fondement juridique. Les distinctions établies par règlement doivent être autorisées par la loi, explicitement ou par voie d'inférence nécessaire (*Forget c. Québec (Procureur général)*, [1988] 2 R.C.S. 90, p. 106-107). Les dispositions législatives applicables en l'espèce permettent expressément d'établir des distinctions entre les divers fabricants de médicaments. L'alinéa 14(1)a) de la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* prévoit explicitement que le lieutenant-gouverneur en conseil peut, par règlement, « prescrire les conditions auxquelles doivent répondre les produits *ou les fabricants de produits* pour que ces produits puissent être désignés comme étant interchangeables avec d'autres produits ». Le fait de prescrire les conditions auxquelles doivent satisfaire les fabricants de médicaments crée nécessairement des catégories de fabricants qui respectent ou non ces conditions et, par conséquent, à qui le règlement s'applique de façon différente.

[48] Both *Acts* also state that any regulations made under them "may be general or particular in [their] application" (*Ontario Drug Benefit Act*, s. 18(6), *Drug Interchangeability and Dispensing Fee Act*, s. 14(8)). Moreover, both statutes are subject to s. 82 of the *Legislation Act, 2006*, which expressly provides that the power to make regulations includes the power to have them apply differently to different classes:

82. (1) A regulation may be general or particular in its application.

(2) The power to make a regulation includes the power to prescribe a class.

(3) For the purposes of subsection (2), a class may be defined,

(a) in terms of any attribute or combination of attributes; or

(b) as consisting of, including or excluding a specified member.

[49] The Regulations focus on the sale of drugs by private label manufacturers because those manufacturers and their affiliated pharmacies are the ones considered to be particularly poised to circumvent the statutory ban on rebates that applies to *all* manufacturers and pharmacies in Ontario. Far from being "discriminatory", the distinctions they draw flow directly from the statutory purpose and the scope of the mandate.

[50] Shoppers and Katz have therefore not, with respect, demonstrated that the Regulations are *ultra vires*.

[51] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. and Pharmx

[48] Les deux *Lois* précisent également que leurs règlements d'application peuvent être « d'application générale ou particulière » (*Loi sur le régime de médicaments de l'Ontario*, par. 18(6)), ou qu'ils « peuvent avoir une portée générale ou particulière » (*Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*, par. 14(8)). Qui plus est, les deux lois sont assujetties à l'art. 82 de la *Loi de 2006 sur la législation*, qui prévoit expressément que le pouvoir de prendre des règlements comprend le pouvoir de les appliquer à différentes catégories :

82. (1) Les règlements peuvent avoir une portée générale ou particulière.

(2) Le pouvoir de prendre des règlements comprend le pouvoir de prescrire des catégories.

(3) Pour l'application du paragraphe (2), une catégorie peut être définie :

a) soit en fonction d'un attribut ou d'une combinaison d'attributs;

b) soit de façon à être constituée d'un membre donné ou à comprendre ou exclure un tel membre.

[49] Les règlements sont axés sur la vente de médicaments par des fabricants de produits sous marque de distributeur parce que ces fabricants et leurs pharmacies affiliées sont considérés comme étant particulièrement disposés à contourner l'interdiction légale des rabais, interdiction qui vaut pour *tous* les fabricants et *toutes* les pharmacies en Ontario. Loin d'établir des « distinctions non autorisées », les distinctions que les règlements établissent découlent directement de l'objet de la loi et de la portée de son mandat.

[50] En toute déférence, Shoppers et Katz n'ont, par conséquent, pas démontré que les règlements sont *ultra vires*.

[51] Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelantes Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. et Pharmx

Rexall Drug Stores Ltd.: Lax O'Sullivan Scott Lisus, Toronto.

Solicitors for the appellants Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited and Sanis Health Inc.: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the respondents: Attorney General of Ontario, Toronto.

Rexall Drug Stores Ltd. : Lax O'Sullivan Scott Lisus, Toronto.

Procureurs des appelantes Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited et Sanis Health Inc. : Osler, Hoskin & Harcourt, Toronto.

Procureur des intimés : Procureur général de l'Ontario, Toronto.

Second Session, 39th Parliament

OFFICIAL REPORT OF

DEBATES OF THE LEGISLATIVE ASSEMBLY

(HANSARD)

Wednesday, May 26, 2010
Afternoon Sitting
Volume 18, Number 8

THE HONOURABLE BILL BARISOFF, SPEAKER

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is that the 5 percent goods and services tax, of course, still exists, and it is on top of the 21 percent TransLink tax. As of July 1 the adoption of the harmonized sales tax will mean that there will be 12 percent tax applied on top of the 21 percent TransLink tax.

Sections 69 to 83 inclusive approved.

Title approved.

Hon. C. Hansen: I move that the committee rise and report the bill complete without amendment.

Motion approved.

The committee rose at 4:13 p.m.

The House resumed; Mr. Speaker in the chair.

Report and Third Reading of Bills

BILL 19 — FINANCE STATUTES AMENDMENT ACT (No. 2), 2010

Bill 19, Finance Statutes Amendment Act (No. 2), 2010, reported complete without amendment, read a third time and passed.

Hon. I. Chong: I call second reading of Bill 17, the Clean Energy Act.

Second Reading of Bills

BILL 17 — CLEAN ENERGY ACT

Hon. B. Lekstrom: Hon. Speaker, it is my pleasure to move second reading of Bill 17, the Clean Energy Act.

This government has set out a new vision to be a leading North American supplier of low-carbon energy and technologies and clean, reliable and competitively priced power. The Clean Energy Act is a key step in achieving this vision.

British Columbia has a proud history of producing clean, reliable electricity at rates that are among the lowest in North America. This legacy is the result of a vision of British Columbia's leaders 50 years ago and a vision that helped build and shape our province.

[1615]

The vision of W.A.C. Bennett 50 years ago led to the development of hydroelectric projects on the Peace and Columbia, the two-river system.

When it was completed in 1968, the W.A.C. Bennett dam was the largest earth-fill structure ever built. It was followed by the Mica dam, one of the Columbia River projects. Then in 1980 a second dam on the Peace system, the Peace Canyon, opened, followed by the Revelstoke dam in 1984.

More than a series of electricity projects, the two-river system was the backbone of B.C.'s industrial strategy and made possible a whole series of economic activities. Energy from the Peace and Columbia has made possible our forest industry and our mining industry, industries that have opened up our province and sustained a high quality of life for families and communities across B.C.

Over the long term, the single most important market advantage for our industries has been our incredibly competitively-priced electricity rates. Competitive power rates have allowed entrepreneurs to innovate, to grow new businesses and to thrive in domestic and export markets. That's helped our province and helped B.C. families.

B.C. is blessed with enormous untapped clean energy potential that allows us to build on the two-rivers legacy, to create new wealth and jobs in communities across British Columbia while lowering greenhouse gas emissions at home and beyond B.C. borders.

The Clean Energy Act builds on the 2007 energy plan, the 2008 climate action plan and the recommendations of the Green Energy Advisory Task Force. In November 2009 government appointed the Green Energy Advisory Task Force to recommend strategic action for turning British Columbia's clean power potential into real economic, environmental and social benefits for British Columbians.

When the task force reported to us in January, one of its main messages was: "Clean energy will be one of this century's driving economic and environmental forces. British Columbia has tremendous opportunities to leverage its clean energy resources and clean technology sector and stimulate economic development and environmental improvements throughout the province."

The Clean Energy Act responds to these opportunities and establishes a long-term vision for British Columbia to become a clean energy powerhouse. It sets out 16 specific energy objectives that will guide and align government, B.C. Hydro and the British Columbia Utilities Commission in advancing British Columbia's energy vision.

[C. Trevena in the chair]

Through this act these energy objectives are legally tied to B.C. Hydro's planning requirements, decision-making by the BCUC and regulatory authorities in the act. B.C. Hydro will be required to have regard to these objectives in developing its plans. These objectives must be used by the B.C. Utilities Commission in performing its role, and in particular, the Utilities Commission will be required to consider and be guided by these principles and these objectives.

There are various regulation-making authorities set out in the act that either must be or can be tied specifically

to these objectives. Key among the objectives are ensuring that B.C. is self-sufficient in electricity once again, achieving higher levels of conservation and a greater share of energy from clean and renewable resources, ensuring B.C.'s ratepayers continue to benefit from heritage assets, meeting B.C.'s greenhouse gas–reduction targets, encouraging First Nations and rural communities to use and develop clean and renewable resources, economic development and job creation, becoming a net exporter and a leading supplier of clean and renewable energy to western North America.

B.C.'s actions to implement the clean energy powerhouse strategy will focus on three areas: meeting the long-term electricity needs of British Columbians at low rates, harnessing British Columbia's clean power potential to create jobs in every region, and strengthening environmental stewardship and reducing greenhouse gas emissions.

The Clean Energy Act strengthens self-sufficiency by placing the commitment into legislation and by requiring B.C. Hydro to acquire an additional 3,000 gigawatt hours of electricity by no later than 2020, referred to as insurance. Over the next 20 years, we expect our electricity demand to grow between 20 and 40 percent.

[1620]

Achieving self-sufficiency and meeting growing demand will require a renewed emphasis on energy efficiency and conservation and major new investments by the public sector and private sector in B.C.'s electricity system.

Conservation and minimizing electricity waste will continue to be the cornerstones of achieving long-term electricity self-sufficiency and low rates now and into the future. The 2007 energy plan set an aggressive conservation target for B.C. Hydro that required the utility to meet 50 percent of its load growth through conservation.

B.C. Hydro's Power Smart program, one of the most successful energy conservation programs in North America, has been delivering energy conservation programs at homes, businesses and industry since its launch back in 1989.

Since the 2007 energy plan, Power Smart has been kicked into overdrive and has helped consumers achieve over $150 million in bill savings, and annual energy savings have grown to approximately 1,800 gigawatt hours per year. That is the equivalent to powering almost 168,000 homes. Conservation also supports local jobs and economic growth, with Power Smart initiatives creating 6,400 jobs each year.

But we will need to be even more aggressive with energy efficiency and conservation. The Clean Energy Act includes a new commitment to meet 66 percent of B.C. Hydro's future incremental power demand from conservation and efficiency improvements by 2020, an increase from the current target of 50 percent.

The Clean Energy Act also gives consumers and utilities new tools to better manage electricity use and save on power bills. The act includes a renewed commitment to smart meters and smart grids. B.C. Hydro is automating, modernizing and upgrading its electricity grid and metering system and is required by the Clean Energy Act to replace all of its 1.8 million customer meters with solid state smart electricity meters by the end of 2012.

Smart meters include two-way communication, enable in-home displays and provide customers with much more detailed information about their electricity use, and when customers get better data about how their electricity use affects their bills, they get interested. You can see it with other purchases. People will drive past three service stations to buy gas from one that charges two cents a litre less because they can see the price.

The smart grid will also be critical to manage the charging requirements of electric vehicles as more and more of these penetrate the market. A single vehicle charging at 220 volts can double a household's peak-power usage, so it will be critical to make sure that they don't plug into the grid at 6 p.m. Smart meters make it possible for pricing that varies by time of use so that homeowners can be encouraged to charge their vehicles in off-peak hours.

Government is also playing a key role in supporting conservation and efficiency through energy codes and standards for homes, buildings, appliances and equipment and by renewing the LiveSmart energy retrofit with an additional $35 million.

But even with aggressive new conservation targets, meeting future energy needs will require new investments in the electricity system. British Columbia has benefited for decades from the investments in hydro infrastructure made in the 1950s, '60s and '70s. It's time now for new investments and an expansion of B.C.'s heritage assets to ensure that future generations of British Columbians benefit as we did.

British Columbia is planning to build major generation and transmission infrastructure on a scale not seen since the Revelstoke dam was completed in 1984. Site C and new turbines at Mica and Revelstoke will ensure a source of clean, reliable, competitively priced power for decades to come. They will also continue to provide B.C. with the long-term economic advantage of affordable electricity prices.

A major expansion of the transmission system, the northwest transmission line, will electrify the Highway 37 corridor.

On April 19 Premier Campbell and I announced that the Site C project will move forward into detailed environmental assessments and reviews. By building Site C, we will be building the next generation of power on the Peace River, taking advantage of the W.A.C. Bennett dam and the Williston reservoir behind it.

Subject to approvals, Site C will be a source of clean, renewable electricity for more than 100 years. It will

produce 30 percent of the power of the Bennett dam with only 5 percent of the reservoir area. As a source of firm energy, Site C will facilitate the development of clean energy projects by providing additional capacity to back up intermittent resources such as wind and run-of-the-river hydro.

[1625]

Site C will provide lasting economic and social benefits for northern communities, aboriginal groups and the province. It will create an estimated 7,650 construction jobs — those are direct construction jobs — and up to 35,000 direct and indirect jobs through all stages of the project. Construction of Site C will be subject to regulatory approvals and to ensuring that the Crown's constitutional duties to First Nations are met.

The Revelstoke and Mica dams are key heritage assets located on B.C. Hydro's Columbia River system, and both can be expanded with no impact on the reservoirs. The Mica generating station began operating in 1977 with four of the planned six turbines. B.C. Hydro is planning to add two 500-megawatt turbines to complete the station.

The Revelstoke generating station began operating in 1984 — again, with four of the potential six units, like Mica. The fifth unit should be completed by the fall of this year, 2010. B.C. Hydro plans to add one 500-megawatt turbine to the sixth and last bay.

The expansions of Mica and Revelstoke are some of the lowest-cost capacity projects available to be built in North America. They will both be required, to meet domestic needs in future.

The northwest transmission line, or NTL, will electrify the Highway 37 corridor by extending B.C.'s high-voltage transmission grid to the region. Northwestern British Columbia has 2,000 megawatts of green energy potential, and the NTL will create new opportunities for renewable power producers to connect their clean energy to the grid.

The project will provide clean electricity to support industrial developments in the area and will reduce greenhouse gas emissions by connecting communities now relying on diesel generation. They will be connected to the grid.

These new heritage assets — Site C, the Mica and Revelstoke expansions and the northwest transmission line — are critical to self-sufficiency, economic development and our government's clean energy vision.

To ensure that these critical projects proceed and are not subject to unnecessary, lengthy and costly processes before the B.C. Utilities Commission, the Clean Energy Act exempts these projects from the B.C. Utilities Commission review.

All will still be subject to environmental assessments and to ensuring that the Crown's obligations to First Nations are met. Let me read that again. All will still be subject to environmental assessments and to ensuring that the Crown's obligations to First Nations are met.

The Clean Energy Act also protects the benefits of both new and existing heritage assets by reinforcing the existing prohibition against selling or disposing of heritage assets and strengthening it by adding new heritage assets to the list: Site C, Mica and Revelstoke dam expansions, and B.C. Hydro's purchase of one-third of the Waneta dam and generating facility.

By law, the low-rate benefits that come from B.C.'s existing and future heritage assets will flow exclusively to British Columbians and will not be used to subsidize foreign power sales.

In addition to Crown investments, new independent power projects will also be needed to achieve the self-sufficiency requirements. The clean and renewable electricity and technology sector has contributed significantly to the development of British Columbia's electricity system, and the Clean Energy Act creates new opportunities for investments, jobs and economic growth in every region of our province.

Since the late 1980s the private sector has developed 63 independent power projects in B.C. that account for approximately 14 percent of British Columbia's domestic electricity requirements. These projects have contributed more than $1 billion to the provincial gross domestic product and created more than 11,000 person-years of employment.

The Clean Energy Act will expedite B.C. Hydro's electricity purchase agreements with clean and renewable electricity producers to secure sufficient supplies of additional clean, renewable electricity that will ensure electricity self-sufficiency by 2016 and beyond.

B.C. Hydro will be required to advance its acquisition of an additional 3,000 gigawatt hours of electricity by 2020 instead of by 2026 — beyond the amount specified in its base electricity supply obligations for self-sufficiency by 2016.

[1630]

New energy projects approved under the 2008 Clean Power Call to acquire up to 5,000 gigawatt hours of electricity will move forward, along with the phase 2 bioenergy call for up to 1,000 gigawatt hours of electricity from wood waste and projects to increase power generation and efficiency at B.C. pulp mills.

These specific clean power procurement processes that provide the power to achieve self-sufficiency will not be put at risk or delayed. They will be exempt from costly and time-consuming reviews under the Utilities Commission Act, yet they will still be subject to the B.C. Utilities Commission oversight with respect to rate-setting requirements and to all existing environmental requirements and standards, as well as to the Crown's constitutional obligations to First Nations.

Following the 2007 energy plan, B.C. Hydro introduced the standing offer program to take supplies of private power as and when ready and has so far signed six electricity purchase agreements. The Clean Energy

Act enables repricing to reflect the results of recent calls, includes the option to increase the maximum project size above ten megawatts and allows for technologies to be specified.

The Clean Energy Act will result in major new private and public sector investments in energy infrastructure and strengthened conservation efforts to ensure that we meet the long-term electricity needs of British Columbians at low rates.

A key purpose of the Clean Energy Act is to ensure that government, B.C. Hydro and the Utilities Commission are all aligned with the same objective: to make British Columbia a leading North American supplier of low-carbon energy and technologies and reliable, competitively priced power.

To ensure that alignment, the Clean Energy Act introduces a new regulatory framework for long-term electricity planning. The current multitude of planning processes will be replaced with a long-term integrated resource plan that allows for public input and long-term stability for the industry. B.C. Hydro will be required to submit to government a long-term integrated resource plan that considers B.C.'s electricity needs over the next 30 years.

The integrated resource plan will set out B.C. Hydro's demand forecast and supply plans to achieve self-sufficiency, B.C. Hydro's plans to implement government's energy objectives, and results of the public and First Nations consultations. The integrated resource plan must be submitted within 18 months of the Clean Energy Act coming into force and must include a description of clean and renewable electricity potential in the province and the infrastructure needs for the transmission system over the next 30 years.

This incorporates and replaces the B.C. Utilities Commission's long-term transmission inquiry that commenced in 2009. Subsequent plans must be submitted every five years, and plans may be amended to adapt to changing conditions.

The act introduces a major change in the review and approval process for B.C. Hydro plans. Cabinet will approve or reject the integrated resource plan, rather than the Utilities Commission. If it chooses, cabinet may use its power to exempt specific projects, programs, contracts or expenditures in an integrated resource plan from further Utilities Commission review.

Otherwise, the projects, programs, contracts or expenditures will be subject to the Utilities Commission review, although the Clean Energy Act will require the Utilities Commission to consider and be guided by British Columbia's energy objectives and the IRP approved by government. This process will ensure that B.C. Hydro and the Utilities Commission are aligned with government's energy policy objectives.

The Utilities Commission will continue to regulate domestic supply and rates, and I want to reiterate that point, a very important point. The Utilities Commission will continue to regulate domestic supply and rates. It will continue to approve or reject projects or programs that are not otherwise addressed by this act, and when it's carrying out those functions, it will be required to consider and be guided by the energy objectives in section 2 and any approved integrated resource plans.

The government will also strengthen B.C. Hydro to help deliver the province's clean energy objectives. The Clean Energy Act will consolidate B.C. Hydro and B.C. Transmission Corporation to strengthen public ownership and allow the combined entity to fully capitalize on its unique ability to manage generation and transmission facilities.

The act will integrate the two companies into a single organization with one board of directors and executive and will transfer all B.C. Transmission Corporation assets, liabilities and employees to B.C. Hydro. B.C. Hydro will become a single point of planning — an authority to deliver the government's clean energy vision.

[1635]

The British Columbia Transmission Corporation was originally created in 2003 in response to emerging regulatory requirements in the U.S. calling for increased independence of transmission and the development of regional transmission organizations. Regional transmission organizations did not develop in the Pacific Northwest, and the movement towards greater independence for transmission was halted.

B.C. Hydro will continue to be owned by the province, and public ownership of B.C. Hydro's assets will remain protected by legislation. British Columbians will benefit from a unified publicly owned entity that will capitalize on the proven strength and trusted service of both organizations to lead the development of clean, reliable and affordable electricity for generations to come.

The Clean Energy Act will ensure self-sufficiency at low rates, but it will also position British Columbia to become a major exporter and harness British Columbia's clean power potential to create jobs in every region of our great province.

For decades, B.C. Hydro has traded energy with Alberta and the United States. Trading clean, renewable electricity is no different than other products the province develops and sells, like our natural gas or our lumber.

British Columbia and jurisdictions such as California have different seasonal peaks that allow their systems to complement one another. British Columbia's energy use peaks in the winter, when temperatures are coldest. California's energy use peaks in the summer, when temperatures are the highest.

Madam Speaker, I note I have a member that would like to make an introduction. I will take a moment's break and allow that member to make the introduction.

J. Brar: I seek leave to make an introduction.

Deputy Speaker: Proceed.

Introductions by Members

J. Brar: I know the students are just leaving. I just wanted to make sure I introduce them before they leave.

Just a few minutes ago I introduced a group of students from Frost Road Elementary School in Surrey-Fleetwood. This is the second group of students from the same school. Altogether, there are 75 students from the grade 5 class, and they are led by their teacher Ms. Kerry Schwab. There are 40 other volunteers, including parents. I would like to ask the members from both sides to please make them feel welcome.

D. Hayer: I also want to include my welcome to this school, because I know they are in the Surrey-Fleetwood riding now. Actually, some of the students from my part of the riding also attend the school. I had a chance to meet with them after the MLA for Surrey-Fleetwood met with them.

I also want to congratulate them for coming over here, thank the parents and the teachers for bringing the students here, and I also ask the House to make them very, very welcome. Some of the students are from my riding, and I met with them earlier today.

Debate Continued

Hon. B. Lekstrom: I, too, will welcome the people here into the chambers. I think it's important.

Carrying on, traditionally B.C. Hydro has engaged in short-term trade that has helped keep rates low and contributed hundreds of millions of dollars to help fund government programs such as health care and education.

Looking ahead, with many states and provinces seeking to meet renewable electricity requirements and reduce greenhouse gas emissions, British Columbia is uniquely positioned to offer clean, reliable power at competitive prices to assist those jurisdictions in meeting their targets. It is estimated that we have the potential clean energy supply in B.C. to power 11 million homes.

Accessing new markets will not be easy. We need willing buyers, access to transmission and a supply portfolio that meets customers' needs. And to deliver this, we will need a partnership between government, B.C. Hydro and B.C.'s renewable power producers.

The Clean Energy Act creates a new role for B.C. Hydro to actively market B.C.'s clean power and spearhead long-term competitively priced export contracts to neighbours in Canada and the U.S. that create new opportunities for investments and jobs across British Columbia. To secure these opportunities, B.C. Hydro will partner with renewable power producers to aggregate B.C.'s supplies, market B.C. clean energy, and leverage the hydro system's unique firming and shaping capabilities.

B.C. Hydro will minimize risk by ensuring that long-term export agreements are secured before issuing new calls for power — another quote I'm going to go back on, Madam Speaker.

[1640]

B.C. Hydro will minimize risks by ensuring that long-term export power agreements are secured before issuing new calls for power. Consistent with government's commitment to one project, one process, export contracts will be exempt from B.C. Utilities Commission review, yet will remain subject to the provincial environmental, First Nations and community consultation requirements. The benefits of electricity exports will accrue to all British Columbians, but ratepayers will not bear the cost.

The Clean Energy Act firmly establishes this principle. The act clearly separates exports and ensures that ratepayers are not subject to the risk of long-term export sales and also ensures that benefits from export revenues flow to ratepayers and taxpayers. In fact, the Utilities Commission is required to ensure that any expenditures associated with long-term exports are not included in domestic rates.

The affordable rates that are one of the benefits of B.C.'s existing and future heritage assets will by law continue to flow exclusively to British Columbians. The Clean Energy Act will create other economic opportunities as well. Resource-dependent communities will especially benefit from the pursuit of new export opportunities through new clean energy investments and job creation.

These communities hit hard by the effects of the mountain pine beetle and the economic downturn can leverage their resources to produce low-carbon electricity such as bioenergy. Other rural areas of resources such as wind, run of the river and other clean resources, which can be developed to create jobs and benefits in every region of our province....

Several First Nations have participated in B.C. Hydro's calls for clean power. The new First Nations clean energy business fund will facilitate further First Nations participation in renewable power production. The fund will initially have up to $5 million invested by the province as well as a share of incremental natural resource revenues that the province receives from new power projects.

The Clean Energy Act will attract new low-carbon investments and create jobs in B.C. by permitting B.C. Hydro to enter into long-term sales contracts for green technology investments that require stable, predictable electricity prices.

A strengthened B.C. Hydro will also open new regional economic opportunities by advancing the northwest

transmission line, continuing to plan for an extension of the clean electricity grid to northeast British Columbia, and establishing a new distribution extension policy to help connect rural and remote communities to B.C. Hydro's clean electricity grid.

The act will also support our growing clean tech sector by fostering the growth and development of innovative businesses and technologies. B.C. Hydro will update terms and conditions for the standing offer program in consultation with industry and will introduce a feed-in tariff program to promote the development of emerging technologies in renewable power production.

The feed-in tariff enabled by the Clean Energy Act will focus on supporting emerging technologies that can supply power from B.C.'s diverse renewable resources and develop expertise here in B.C.

Government and B.C. Hydro will work with industry to define the program, which will be established through regulation. The program will be targeted and focused. It will not be an Ontario-style feed-in tariff.

In addition to meeting self-sufficiency and harnessing our clean resources to create jobs, the third major focus of the Clean Energy Act is on strengthening environmental stewardship and reducing greenhouse gas emissions. The act enshrines in law measures the province will take to reduce greenhouse gas emissions, help customers save money through conservation and protect the environment.

Building on the commitment for net zero emissions from electricity generation, the act increases the legislated clean or renewable electricity generation from 90 percent to at least 93 percent of total generation, one of the highest standards in the world and something we should all be proud of.

The environmental assessment process will now be strengthened to specifically provide for assessments of potential cumulative environmental effects. The Clean Energy Act will prohibit the development or proposal of energy projects in parks, protected areas and conservancies. The act rejects consideration of nuclear power in implementing B.C.'s clean energy strategy. B.C. Hydro's operation of Burrard Thermal is restricted only to emergency situations and supporting transmission reliability.

[1645]

The act enshrines B.C.'s historic two-river policy by prohibiting, with the exception of Site C, future development of large-scale hydroelectric storage projects on all river systems in British Columbia, including nine sites previously considered by B.C. Hydro.

The act enables public utilities to establish programs to encourage the use of electricity or energy directly from a clean or renewable resource and to accelerate the deployment of natural gas and electric vehicles and fuelling infrastructure.

New opportunities will be provided for rural and remote residents who are now dependent on diesel power to connect to the transmission system to access clean and renewable electricity from B.C.'s heritage assets.

In closing, this government has set out a new vision to be a leading North American supplier of low-carbon energy and technologies and clean, reliable and competitively priced power. The Clean Energy Act puts in place the framework to meet the long-term electricity needs of British Columbians at low rates and harness British Columbia's clean power potential to create jobs in every region, strengthen environmental stewardship and reduce greenhouse gases.

The Clean Energy Act builds on the 2007 energy plan, the 2008 climate action plan and the recommendations of the Green Energy Advisory Task Force that was appointed in November of 2009. This bill puts British Columbia at the forefront of clean energy development in North America.

In closing, I want to say I'm extremely proud of the work that has gone into this bill, of the men and women in the ministry, the men and women of British Columbia who contributed to the input or gave their input.

We have a significant potential before us here in British Columbia. Our ability to develop clean, renewable electricity is probably unlike any other jurisdiction in the world. We have potential not only to help ourselves but to help others.

Greenhouse gas emissions don't recognize boundaries. They don't recognize the B.C.-Alberta boundary. They don't recognize the Canada-U.S. boundary. If we have the ability to develop our resources in a sound, environmentally sustainable manner, I think we have an obligation to do that.

It will help us meet British Columbia's domestic needs when it comes to electricity, but it will also help us generate jobs across this province. It will help us benefit through the money that is returned to British Columbians, to continue to invest in infrastructure and continue to invest in health care, in transportation, in education, in our social programs. I'm proud to deliver second reading of the clean energy bill here this afternoon.

J. Horgan: For the Clerk's information, I'll be the designated speaker on Bill 17 this afternoon. I want to thank the minister for his presentation this afternoon. It's always a pleasure to hear a crafted speech that was put together by those who want to put forward the illusion of progress, and the words from the minister today certainly achieved that.

There are significant challenges that we have with this bill, significant issues that I will be raising over the next hour or so as we discuss the Clean Energy Act. I want to start with the end of the minister's speech and then go back to the beginning.

The minister spoke passionately about his desire to reduce greenhouse gas emissions, yet this very minister

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.

(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.

(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.

(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.

...

332. (1) The Minister shall

personne concernée par la qualité de l'environnement.

(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) 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) 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) 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.

(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.

(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.

(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.

(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

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

(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) 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) 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) 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

APPEARANCES:

Bernard J. Roth and Joshua A. Jantzi	FOR THE APPLICANT
Kerry E.S. Boyd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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WILLIAM F. PENTNEY Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160530

Docket: A-383-14

Citation: 2016 FCA 160

CORAM: **RYER J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

SYNCRUDE CANADA LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

RENNIE J.A.

I. Introduction

[1] Federal regulations require that all diesel fuel produced, imported or sold in Canada contain at least 2% renewable fuel. Syncrude Canada Ltd. produces diesel fuel at its oil sands operations in Alberta, which it uses in its vehicles and equipment.

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BETWEEN:

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Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Calgary, Alberta, on November 3, 2015.

Judgment delivered at Ottawa, Ontario, on May 30, 2016.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: RYER J.A.
BOIVIN J.A.

[2] Syncrude commenced an application in the Federal Court seeking declarations of invalidity of the regulations on constitutional and administrative law grounds. The Federal Court dismissed the application (2014 FC 776) and Syncrude appeals to this Court. For the reasons that follow, I would dismiss the appeal.

II. Legislative and regulatory scheme

[3] Section 139 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (CEPA) prohibits the production, importation and sale in Canada of fuel that does not meet prescribed requirements.

[4] Subsection 140(1) of the CEPA provides that the Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes of section 139. Regulations may be made prescribing the concentrations or quantities of an element, component or additive in a fuel, the physical and chemical properties of fuel, the characteristics of fuel related to conditions of use and the blending of fuels. Subsection 140(2) requires that the Governor in Council be 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. It was under this provision that the *Renewable Fuels Regulations*, SOR/2010-189 (RFRs) were promulgated.

[5] Subsection 5(2) of the RFRs requires 2% of diesel fuel to be renewable fuel. Every litre of renewable fuel mixed into other fuel creates one compliance unit (subsection 13(2) of the

RFRs), including if it is mixed outside of Canada and then imported (subsection 14(2)). A compliance unit represents one litre of renewable fuel in the total Canadian fuel supply. Pursuant to subsections 5(2) and 7(1) of the RFRs, a person must expend 2 compliance units for every 100 litres of fuel they produce, import, or sell. Compliance units can be acquired via the above procedure or by purchase in trade (subsection 20(1)).

[6] Subsection 272(1) of CEPA makes it an offence to breach section 139. If prosecuted by indictment, an offender is liable for a fine of between $500,000 and $6,000,000. On conviction for a second offence these penalties double.

[7] These legislative provisions are set forth in Annexes A and B to these reasons.

III. The development of the *Renewable Fuels Regulations*

[8] Toxic substances are defined in section 64 of CEPA as those which "...may have an immediate or long-term harmful effect on the environment or its biological diversity; constitutes or may constitute a danger to the environment on which life depends; or constitutes or may constitute a danger in Canada to human life or health." Greenhouse gases (GHGs) are gases which, when released, lead to the retention of heat in the atmosphere. Since 2005, six of the most significant GHGs have been listed as toxic substances in Schedule 1 of the CEPA. These include carbon dioxide, methane, and nitrous oxide.

[9] The Regulatory Impact Analysis Statement (RIAS) accompanying the addition of GHGs to Schedule 1 in 2005 stated that they were added as toxic substances because, as concluded in the Kyoto Protocol, they "have significant global warming potentials (GWPs), are long lived and therefore of global concern [and] have the potential to contribute significantly to climate change." The RIAS also noted that there has been a substantial rise in GHGs "as a result of human activity, predominately 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": *Canada Gazette, Part II*, Vol. 139, No. 24, (November 21, 2005), pp. 2627, 2634 [2005 RIAS]. The 2005 RIAS cited both the *Montreal Protocol on Substances that Deplete the Ozone Layer* 16 September 1987, 1522 U.N.T.S. 3 and the Intergovernmental Panel on Climate Change, *Third Assessment Report*, 2000 (Cambridge, England: Cambridge University Press, 2002) as the scientific and policy basis for the addition of the six GHGs. The Panel concluded that "there is sufficient evidence to conclude that greenhouse gases constitute or may constitute a danger to the environment on which life depends, therefore satisfying the criteria set out in section 64 of the CEPA 1999" (2005 RIAS, p. 2634).

[10] A Notice of Intent to develop the RFRs was subsequently published in the *Canada Gazette Part I*, Vol. 140, No. 52, (December 30, 2006). The Notice observed that:

> 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.

[11] The "Rationale for Action" in the Notice of Intent stated that "use of renewable fuels can significantly reduce emissions" and that the projected environmental benefit of replacing 5% of Canadian transportation fuel would represent a reduction in GHG emissions equivalent to the emissions of almost 675,000 vehicles.

[12] The RIAS accompanying the publication of the RFRs in 2010 (*Canada Gazette, Part II*, Vol. 144, No. 18, September 1, 2010) stated that GHGs are a significant air pollutant and contributor to climate change. The stated objective of the RFRs was to reduce GHGs, "thereby contributing towards the protection of Canadians and the environment from the impact of climate change and air pollution."

IV. The Federal Court decision

[13] The 2% renewable fuels requirement came into force July 1, 2011, at the same time amendments were made to the RFRs. The accompanying RIAS reiterated and expanded upon the scientific, environmental and policy justifications and consequences of the renewable fuel requirement made in the September 2010 RIAS: *Canada Gazette, Part II*, Vol. 145, No. 15 (July 20, 2011).

[14] Syncrude challenged the constitutional validity of subsection 5(2) of the RFRs. It alleged that the subsection was not a valid exercise of Parliament's criminal law power under subsection 91(27) of the *Constitution Act 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 because it lacked a criminal law purpose and intruded into provincial legislative

responsibility for non-renewable natural resources. Syncrude further alleged that the provision was *ultra vires* the regulation-making power of section 140 of CEPA because the Governor in Council was required to form an opinion that the regulation would reduce air pollution, an opinion which the Governor in Council could not reasonably have held. Syncrude also raised challenges arising from the legislative procedure and process leading to the promulgation of the RFRs.

[15] Relying on *R v. Hydro-Québec,* [1997] 3 S.C.R. 213, 151 D.L.R. (4th) 32 [*Hydro-Québec*] the judge found that a valid criminal law purpose existed in the protection of the environment from pollution. He also found that the evidence adduced by Syncrude suggesting that the RFRs would not be effective in achieving their environmental goals to be irrelevant to the characterization of their dominant purpose, and that the criminal law power does not require a total or direct prohibition of the conduct in question. He rejected the argument that, in order to be a legitimate use of the criminal power, the requirement of renewable fuels had to be either an absolute requirement or, alternatively, greater than 2 %.

[16] The judge then considered Syncrude's alternative argument that the RFRs were a colourable device to establish a domestic market for renewable fuels, and hence a matter within provincial legislative competence under subsection 92(13) of the *Constitution Act, 1867*. After a review of the evidence, the judge concluded that while the RFRs had economic consequences and goals, the creation of demand for renewable fuels was a necessary and integral part of the strategy to reduce GHGs. The reason the government wanted to create a demand for renewable

fuels was to lower GHGs over the long-term. The dominant purpose of the RFRs was the protection of the environment by the reduction of air pollution.

[17] The judge then turned to the Attorney General's alternative argument that, assuming subsection 5(2) was not itself a valid exercise of the criminal law power, it would nonetheless be saved by the ancillary powers doctrine. This doctrine permits legislation to be upheld if it is connected to an otherwise valid legislative scheme and furthers its legislative purpose. Applying the criteria in *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453 and *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693 [*Quebec v. Canada*], the judge found that subsection 5(2) of the RFRs would be saved by the ancillary powers doctrine. In addressing the ancillary power question, the judge correctly observed that it was unnecessary to do so, having found as he did that subsection 5(2) was valid.

[18] With regard to the claim that the RFRs were not validly promulgated, the judge found that the Governor in Council had formed the requisite opinion under subsection 140(2) that they would reduce air pollution and that this opinion did not have to be ultimately correct as a matter of science. In the judge's view, Syncrude was asking the Court to substitute its view for that of the Governor in Council as to whether the RFRs could, in the language of subsection 140(2), "make a significant contribution to the prevention of, or reduction in, air pollution."

[19] Syncrude also advanced alternative administrative law arguments which the judge rejected. Amongst these, it contended that the Minister denied Syncrude procedural fairness by

failing to convene a board of review before promulgating the RFRs and that the failure to convene the board of review rendered the opinion of the Governor in Council unreasonable.

V. Issues on appeal

[20] It is important to define at the outset what is, and what is not, in issue in this appeal. Syncrude does not challenge the constitutionality of the enabling provisions - sections 139 and 140 of CEPA. Syncrude does not contend that the definition of "air pollution" in subsection 140(2) of CEPA is overbroad, nor does it contest that GHGs contribute to air pollution, and that their reduction is a proper objective of the criminal law power. Syncrude concedes that, if the dominant purpose of the RFRs were in fact to combat climate change, there would be no constitutional infirmity. Rather, the core of Syncrude's challenge is that subsection 5(2) is not aimed at the reduction of air pollution, but is an economic measure aimed at the creation of a local market, a matter within subsection 92(13), or is directed to non-renewable natural resources, a matter of provincial legislative competence under section 92A of the *Constitution Act, 1867*.

[21] Syncrude advances two main errors in the decision below.

[22] First, Syncrude submits that the judge erred by considering subsection 5(2) in the context of the CEPA regime as a whole before examining the subsection in isolation. It also submits that the judge failed to consider relevant evidence beyond the RIAS which, in its view, points to the true and colourable purpose of the RFRs. Before this Court, Syncrude maintains its position that,

properly characterized, the RFRs are an economic measure, and intrude on provincial responsibility for natural resources, or are colourable attempts to achieve those purposes. It further argues that the RFRs are not a valid exercise of the criminal law power because, as a requirement of 2%, and allowing certain exemptions, they do not completely prohibit or ban the use of fossil fuels.

[23] Syncrude contends that the consumption of fossil fuels is not inherently dangerous and that this undermines the notion that the RFRs have a valid criminal law purpose. Syncrude contrasts the pollutants it cites as legitimate evils, such as lead and sulphur, with GHGs. As the judge noted, "[i]n Syncrude's view, there is no evil to be suppressed": Reasons, para. 79.

[24] However, as the respondent points out, Syncrude's submission at paragraph 66 of its factum that "the production and consumption of petroleum fuels is not inherently dangerous" is inconsistent with its concession that GHG emissions contribute to the evil of climate change. Syncrude's position is problematic and at times concedes the correlation between GHGs, global warming and the consumption of fossil fuels.

[25] Syncrude's second ground of appeal is that the judge erred in failing to conclude that the Governor in Council did not, and could not, hold the requisite opinion under subsection 140(2) that the RFRs would reduce air pollution. The remainder of Syncrude's challenges to the statutory validity of the RFRs raised in the Federal Court were not pursued in this Court.

VI. Analysis

A. *Standard of review*

[26] For questions of constitutionality, the standard of review is correctness: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 58, [2008] 1 S.C.R. 190 [*Dunsmuir*]. However, to the extent that Syncrude raises a non-constitutional objection to subsection 5(2), a different standard of review is engaged.

[27] On questions of whether the RFRs were lawfully enacted (pursuant to CEPA), the Supreme Court of Canada has reaffirmed in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)* 2013 SCC 64 at para. 24, [2013] 3 S.C.R. 810 [*Katz*] that regulations can be struck down only if they are "shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate." The regulations must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose. It remains that "it would take an egregious case" to strike down regulations on the basis that they are *ultra vires* the enabling statute: *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at 111, 143 D.L.R. (3d) 577.

[28] I note that in *Katz*, the Supreme Court opted not to integrate this standard of review for the *vires* of regulations promulgated by the Governor in Council or by a Lieutenant Governor in Council into the *Dunsmuir* scheme for judicial review of administrative decision-making. Consequently, a review of federal or provincial regulations must not be confused, for example, with the standard of a review applied to a municipality's enactment of bylaws. The latter is

subject to a reasonableness review pursuant to the *Dunsmuir* framework, owing to the fact that municipalities do not have inherent legislative power under the *Constitution* and instead only "legislate" pursuant to the authority delegated to them by statute: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at paras. 14-15, 20-22, [2012] 1 S.C.R. 5. In consequence, federal regulations of the type at issue in the case at bar are subject to the *Katz* criteria.

[29] While the decision below arose from a judicial review of the Governor in Council's decision, the judge was called upon to make factual findings. When considering on appeal a decision in which the judge both reviewed an administrative decision and made separate factual findings, those factual findings attract deference on the *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 standard of palpable and overriding error: *Canada (Attorney General) v. Jodhan*, 2012 FCA 161, 350 D.L.R. (4th) 400; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 253 A.C.W.S. (3d) 677; *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209. This standard applies regardless of whether the factual findings are characterised as "adjudicative, social, or legislative": *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 48-56, [2013] 3 S.C.R. 1101.

[30] In sum, the question of whether subsection 5(2) of the RFRs is constitutional is reviewed on a standard of correctness. The question of whether the Governor in Council validly enacted subsection 5(2) pursuant to CEPA is assessed against the *Katz* standard of inconsistency with the enabling statute. Any factual findings made by the judge in the course of his analysis are reviewed on a standard of palpable and overriding error.

B. *Methodology*

[31] I will deal briefly with the contention that the judge erred in his methodology, specifically, that he did not read the legislation in the manner required for the purpose of constitutional analysis.

[32] Syncrude submits that the judge erred in his approach to the analysis of the pith and substance of the impugned provision. It suggests that the correct approach is to examine the impugned provision in isolation first, and that only if the pith and substance cannot be resolved in that manner, is it appropriate to examine the provision in the context of the entire scheme. Because the judge started with the purpose and object of CEPA, Syncrude submits, his constitutional analysis was in error.

[33] Syncrude's reliance on *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 [*AHR*] to contend that the first stage must be absolutely quarantined from consideration of the broader context is problematic as a matter of doctrine.

[34] The Supreme Court of Canada has articulated the framework for determining the validity of a law made pursuant to the criminal law power. In *AHR*, the Chief Justice observed that where the challenge is to only one or more of the provisions of a piece of legislation, as opposed to the legislation as a whole, the inquiry *might* begin with consideration of the challenged provision or provisions alone. If the provision does not, on its face, intrude into the other jurisdiction, then there is no need to make further inquiry. The Chief Justice continued, however, and noted at

paragraph 17 that "the impugned provisions must be considered in their proper context" and it might be necessary to consider the impugned provision in light of the entire scheme in order to understand its true purpose and effect.

[35] This methodology has a long antecedence: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 68 O.R. (2d) 512 [*General Motors*]. *General Motors* affirms that the impugned provision must be examined in two stages, firstly by looking at the provision itself and secondly, as situated within the context of the broader statute. However, the first stage only stops the analysis if the provision is both independently comprehensible and demonstrably *valid*. Consequently, if analysis of the provision in isolation requires greater legislative context to be understood, or the provision is on its face of doubtful validity, then a broader analysis is inevitable.

[36] The judge did precisely what the Supreme Court of Canada mandated – he looked at subsection 5(2) and accepted that, when read alone or without reference to its enabling statute it might be considered a matter within provincial jurisdiction. The judge then considered the purpose and effect of subsection 5(2) and how it fit into the regulatory scheme. He framed his analysis in light of the Supreme Court of Canada's direction in *Ward v. Canada (Attorney General)*, 2002 SCC 17, at paragraph 19, [2002] 1 S.C.R. 569 [*Ward*], that "[t]he question is not whether the *Regulations* prohibit the sale so much as why it is prohibited" (emphasis in original). The question of whether the judge was correct in his conclusion aside, there was no error in his analytical framework.

[37] Against this legislative and jurisprudential landscape, I turn to the central question – the dominant purpose of the RFRs.

C. *Characterization of subsection 5(2) of the RFRs*

[38] There are two stages to the division of powers analysis. The first is an inquiry into the essential character of the law, or, as is often said, its pith and substance. The second is "to classify that essential character" by reference to the heads of power under the *Constitution Act, 1867*: *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para. 15, [2000] 1 S.C.R. 783 [*Firearms Reference*].

[39] The characterization exercise is informed by both the law's purpose and its effect. Purpose is gleaned first, from the law itself, as stated by Parliament, but also from extrinsic sources such as Hansard and government policy papers: see *Firearms Reference* at paragraph 17 for a discussion of the use of extrinsic evidence in the characterization exercise. The purpose can also be informed by reference to the mischief to which the law is directed.

[40] Following identification of purpose, the inquiry turns to the legal effect of the law – how does the law operate and what effect does it have? At this stage, the court may consider both the legal and practical effect of the law. Having regard to Syncrude's argument, which is predicated on the ineffectiveness of a renewable fuel requirement, the language of the Supreme Court in *Firearms Reference*, at paragraph 18, is highly instructive:

> Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it will be ineffective (e.g., criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g., burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis: *Morgentaler, supra*, at pp. 487-88, and *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373. Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its "total meaning": W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at pp. 239-40. In some cases, the effects of the law may suggest a purpose other than that which is stated in the law: see *Morgentaler, supra*, at pp. 482-83; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.) *(Alberta Bank Taxation Reference)*; and *Texada Mines Ltd. v. Attorney-General of British Columbia*, [1960] S.C.R. 713; see generally P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at pp. 15-14 to 15-16. In other words, a law may say that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be "colourable".

[41] The application of these principles to the regulation in issue leads to the conclusion that subsection 5(2) is directed to maintaining the health and safety of Canadians, as well as the natural environment upon which life depends. At the risk of repetition, the following points can be derived from the enabling statutory framework in support of this conclusion:

- The RFRs were enacted under subsection 140(2) of CEPA, which requires the Governor in Council be of the opinion that the regulation could make a significant contribution to the reduction of air pollution.

- Subsection 3(1) of CEPA defines "air pollution" as a condition of the air arising from any substance that directly or indirectly endangers health and safety.

- Six substances which comprise GHGs were added to Schedule 1 of CEPA in 2005. Section 64 of CEPA defines a toxic substance as one which may have an immediate or long-term harmful effect on the environment, or its diversity, or may constitute a danger to human life or health.

- Subsection 140(1) contemplates a wide range of regulations in respect of fuel, including "the concentrations or quantities of an element, component or additive in a fuel; the physical or chemical properties of a fuel; the characteristics of a fuel [...] related to [...] conditions of use; [and] the blending of fuels [...]."

- In imposing a 2% renewable fuel requirement subsection 5(2) is directed to the reduction of toxic substances in the atmosphere. The Order in Council promulgating subsection 5(2) stated that the regulation "would make a significant contribution to the prevention of, or reduction in, air pollution, resulting from, directly or indirectly, the presence of renewable fuel gasoline, diesel fuel or heating distillate oil."

[42] The RFRs impose requirements respecting the concentration of renewable fuels and thus limit the extent to which GHGs that would otherwise arise from the combustion of fossil fuel are emitted. GHGs are listed as toxic substances under Schedule 1 of CEPA. By displacing the combustion of fossil fuels, the renewable fuel requirement reduces the amount of "air pollution" arising from the GHGs (toxic substance) which would otherwise enter the atmosphere. In sum, the purpose and effect of subsection 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.

[43] Resort to the RIAS confirms this conclusion. The Supreme Court of Canada has endorsed reliance on the RIAS for the purpose of constitutional analysis: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 at paras. 155-157, [2005] 1 S.C.R. 533.

[44] The September 1, 2010 RIAS expressly stated that the RFRs were aimed at a reduction of GHG emissions. The RIAS highlighted the projected reduction in GHG emissions and cited the underlying data for those conclusions: see Regulatory Impact Analysis Statement 2010/9/1 - *Canada Gazette, Part II*, Vol. 144, No. 18, (September 1, 2010), pp. 1673, 1677, 1687, 1699-1700, 1705-1706.

[45] The July 20, 2011 RIAS, (*Canada Gazette, Part II*, Vol. 145, No 15) notes at page 1429 that the Governor in Council was of the opinion that the proposed regulations "could, through the presence of renewable fuel, make a significant contribution to the prevention of, or reduction in, air pollution." It observed that "[t]he most significant source of GHGs [...] is the combustion of fossil fuels" and that GHGs are "the primary contribution to climate change": pp 1435-36. The RIAS reiterates, at considerable length and in considerable detail the environmental and health benefits of a renewable fuel requirement.

[46] The purpose and effect of subsection 5(2) having been determined, the inquiry turns to the scope of the criminal law power and whether subsection 5(2) fits within its ambit.

D. ***Scope of the criminal law power***

[47] In broad terms, the jurisprudence of the Supreme Court of Canada establishes a three-part test for a valid exercise of the criminal law power. A valid exercise of the criminal law power requires a) a prohibition, b) backed by a penalty, c) for a criminal purpose: *AHR*. Only the last of these is contested in the case at bar.

[48] Supreme Court jurisprudence as far back as the *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] S.C.R. 1, [1949] 1 D.L.R. 433 [*Margarine Reference*] has described the nature of the criminal purpose requirement as a requirement that the law be aimed at suppressing or reducing an "evil." Put in more contemporary language, to have a valid criminal law purpose the law must address a public concern relating to peace, order, security, morality, health or some other purpose (*AHR* at para. 43), but it must stop short of pure economic regulation.

[49] Protection of the environment is, unequivocally, a legitimate use of the criminal law purpose. The Supreme Court of Canada has held 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": *Hydro- Québec* at para.

123. In dissent although not on this point, at paragraph 43, Chief Justice Lamer and Iaccobucci J. echoed La Forest J.'s view:

> To the extent that La Forest J. suggests that this legislation is supportable as relating to health, therefore, we must respectfully disagree. We agree with him, however, that the protection of the environment is itself a legitimate criminal public purpose, analogous to those cited in the *Margarine Reference, supra*. We would not add to his lucid reasoning on this point, save to state explicitly that this purpose does not rely on any of the other traditional purposes of criminal law (health, security, public order, etc.). 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.

[50] It is useful to recall that, in *Hydro-Québec* at paragraph 150, the disputed regulation was directed to "providing or imposing requirements respecting the quantity or concentration of a substance listed in Schedule 1 that may be released into the environment either alone or in combination with others from any source" and therefore was a valid use of the criminal law power. Subsection 5(2) of the RFRs operates in the same manner.

[51] More recently, in AHR the Supreme Court observed that pollution was one of the "new realities" facing Canada, and that Parliament needed flexibility in making decisions as to the types of conduct or activity that required the sanction of criminal law: para. 235.

E. *The ineffectiveness of the RFRs*

[52] I turn to Syncrude's principal argument – that the RFRs are ineffective in achieving their purpose. Syncrude urges that "the evidence of practical effects of the RFRs overwhelmingly contradict the suggestion that the dominant purpose of the RFRs is to reduce GHG emissions."

[53] This argument does not succeed on either an evidentiary or legal basis.

[54] Syncrude points to evidence which suggests, on certain assumptions, that the actual reduction in GHGs arising from the transition to renewable fuels is illusory, and in fact, the RFRs contribute to GHGs. Syncrude emphasised a 2008 external report commissioned for Natural Resources Canada. That report stated that the upstream GHG emissions for some renewable fuels could be as much as twice that of fossil fuels. The appellant posits that this, combined with an admission on cross-examination that there are no reductions in downstream emissions from renewable fuels, indicates that the government knew that there would be no reduction in GHG emissions over the life cycle of a renewable fuel. This evidence is based on changes in land use patterns, whereby the conversion of agricultural lands from pasture or lower value crops to the production of bio or renewable fuels generate net increases in GHGs. Syncrude also points to US studies indicating increases in death rates from respiratory issues, and to the government's own evidence that "ethanol use may result in increased emissions of volatile organic compounds": see reference to Notice of Intent, paragraph 10 above.

[55] Suffice to say, the Governor in Council considered this issue and concluded otherwise. The 2011 RIAS; *Canada Gazette, Part II*, Vol. 145, No. 15, (July 20, 2011), specifically considered the adverse effects of the renewable fuel requirement on air pollution and on human health. It observed that except for a minor increase in Nitrogen Oxide (NOx) all other toxic emissions decreased (RIAS pp. 1462-1465). The RFRs were expected to directly result in an incremental reduction of GHG emissions by 1 megaton per year: RIAS p. 1436.

[56] The 2005, 2010 and 2011 RIAS describe a considered body of scientific research in support of the relationship between the RFR requirement and the reduction of GHGs. They also indicate that the renewable fuels requirement would reduce GHGs, as well as other emissions such as acetaldehyde, volatile organic compounds and fine particle pollution, all defined pollutants. The September 1, 2010 RIAS noted that the RFRs "are not expected to result in land use changes": p. 1709. The evidence relied on by Syncrude originated in European Union countries with higher renewable fuel targets and different land use patterns. Syncrude led no evidence of its own to support its argument that the RFRs would increase GHGs when applied to its own operations or to Canada as a whole.

[57] Syncrude selectively highlights certain passages from the 2008 report commissioned by Natural Resources. A complete reading of the report makes it clear that while some renewable fuels have greater upstream emissions than fossil fuels, other renewable fuels result in significant GHG emission reductions. Moreover, the government's Strategic Environmental Assessment indicates that the government was cognizant of the fact that "next generation" renewable fuels were under development and would lead to greater long-term reduction in GHGs.

[58] The legal and practical effect of legislation is relevant for the purpose of determining the pith and substance of the law: *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 at para. 23, [2000] 1 S.C.R. 494 [*Global Securities Corp.*]. However, it is well established doctrine that "the wisdom or efficacy of the statute" is not relevant to determining its pith and substance: *R v. Morgentaler* [1993] 3 S.C.R 463 at 487-488, 107 D.L.R. (4th) 537, citing P. W. Hogg, *Constitutional Law of Canada*, vol. 1, 3d ed. (Toronto: Carswell, 1992, loose-leaf) at 15-15, and more recently, in *Ward*, at para. 18.

[59] Syncrude contends that the evidence (which, as noted, is not compelling) that the RFRs would not in fact reduce GHG emissions is relevant to the characterization of the dominant purpose because it addresses *the legal and practical* effect of the provision. It contends that the evidence that the RFRs will not be effective in reducing GHGs is not addressed to the question of whether the provision is *in fact* efficacious. It concedes, correctly, that whether the measure is worthwhile or useful is not germane to the characterization exercise.

[60] This distinction simply seeks to circumvent the proposition, consistent since *Global Securities Corp.* at paragraph 22, and more recently iterated in *Ward* at paragraph 26, that the effectiveness of the legislation is irrelevant for the purposes of characterization. There is no doubt as to what the regulations seek to achieve, how they operate, and their practical effect. The argument that there may be a better, more efficacious way to reduce GHGs does not alter the conclusion. As noted in *Ward*, at paragraph 26 "the purpose of legislation cannot be challenged by proposing an alternative, allegedly better, method for achieving that purpose." Syncrude's

argument that, because the RFRs are ineffective, an assertion which fails on the evidence, the dominant purpose must have been to establish a local market, fails.

F. ***The regulation is not an economic measure***

[61] As noted, Syncrude contends that the dominant purpose of the RFRs was to create a market in renewable fuels. The RIAS reveals careful consideration of the refining industry, transportation to the consumer, and the effect of subsection 5(2) on agriculture. There is also evidence that the creation of long-term demand for renewable fuels was an integral part of the strategy to reduce GHGs.

[62] It must be recalled that 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. Syncrude concedes that GHGs are air pollution within the definition of CEPA. Nevertheless, Syncrude urges that subsection 5(2) is *ultra vires* because the government foresaw and hoped for the development of a market whereby more renewable fuels would be available for consumption, replacing the consumption of fossil fuels which produce the GHGs. It also contends that the RFRs do not in fact, achieve the goal of reducing air pollution, indeed, it says that the renewable fuel requirement would lead to a net increase in GHGs, arising from the GHG emissions associated with the planting, harvesting, transportation and refining of bio-fuel crops.

[63] The Attorney General does not contest that Canada foresaw that the RFRs would have favourable economic consequences and that there would be market responses in agriculture to

the increased demand for renewable fuel. The impact on various sectors of agriculture was negligible: *Canada Gazette, Part II*, Vol. 144, No. 18, (September 1, 2010), pp. 1708-1710). The overall cost of the RFRs would be borne by consumers, at an estimated cost of 1¢ per litre, and would be lost in day to day fluctuation of fuel prices: pp. 1746-1717. These effects were considered to be minimal.

[64] However, these consequential effects cannot be considered in isolation. The reason the government hoped for the development of a renewable fuels market in Canada was because the availability of renewable fuels would lead to a long-term reduction of GHGs. The judge concluded that "these economic effects are part of a four-pronged Renewable Fuels Strategy" (emphasis in original).

[65] Insofar as the effect on agriculture was concerned, the Minister of the Environment noted that the reason why the government hoped for the emergence of a renewable fuels market was "to provide the maximum opportunity for emissions reductions." When asked whether the RFRs would cause a net benefit for the environment, the Minister replied: "Yes. And that is why we brought these three components together. We can't do this framework without the three components of energy, environment and agriculture."

[66] The environment and economy are intimately connected. Indeed, it is practically impossible to disassociate the two. This point was well-made in *Friends of Oldman River Society v Canada (Ministry of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1 where the Court said "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."

[67] The 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. The inquiry does not end with proof of an incentive or market subsidy. Consistent with *Ward*, one must inquire as to the purpose and effect. For example, regulations under the *Firearms Act*, S.C. 1995, c. 39 could call for new, enhanced locking mechanisms. The fact that capital investments are made to assist the lock industry to transition to the new requirements would not detract from the dominate purpose being addressed to "peace, order, security, morality, health or some other purpose" (*AHR* at para. 43). Here, the RIAS (*Canada Gazette, Part I*, Vol. 145, No. 15, (July 20, 2011), p. 699) states the purpose of collateral investments in infrastructure costs related to the production of renewable fuels was "to generate greater environmental benefits in terms of GHG emission reductions."

[68] The evidence demonstrates that part of the objective of the RFRs was to encourage next-generation renewable fuels production and to create opportunities for farmers in renewable fuels. However, the evidence also demonstrates that a market demand and a market supply for renewable fuels and advanced renewable fuels technologies had to be created to achieve the overall goal of greater GHG emissions reduction.

[69] The criminal law power is not negated simply because Parliament hoped that the underlying sanction would encourage the consumption of renewable fuel and spur a demand for

fuels that did not produce GHGs. All criminal law seeks to deter or modify behaviour, and it remains a valid use of the power if Parliament foresees behavioural responses, either in persons or in the economy.

[70] To close on this point, the consequential shifts in agriculture and the market for fuel arising from the renewable fuel requirement is not inconsistent with the dominant purpose of subsection 5(2) being the reduction of GHGs, with their uncontroverted costs to the health of the human and natural environment; rather, it reinforces the dominant purpose.

G. ***The absence of an absolute prohibition***

[71] Syncrude also argues that the RFRs cannot be a valid exercise of the criminal law power given certain exemptions in the RFR regime, and that in imposing a 2% renewable fuel requirement, they do not ban outright the presence of GHGs in fuel.

[72] I note at the outset that this appears to be, in essence, an allegation that the "prohibition" requirement for a valid exercise of the criminal law power is unmet, not the "criminal law purpose" requirement. This gives me pause because, before the Federal Court, Syncrude conceded the presence of a prohibition. This is of no consequence, however, as constitutionality, as a matter of law, cannot be conceded. In any event, the judge found that the absence of a total prohibition on the use of non-renewable fuels (and the absence of a total prohibition on a given supplier using more than 98% non-renewable fuels at a given time) did not preclude subsection 5(2) from being a valid exercise of Parliament's criminal law power.

[73] A prohibition need not be total, and it can admit exceptions: *Firearms Reference* at para. 39 and *RJR-MacDonald Inc. v. Canada (Attorney General,)* [1995] 3 S.C.R. 199 at paras. 52-57, 127 D.L.R. (4th) 1 [*RJR-MacDonald*]. Indeed, environmental regulations often set limits, or concentrations of listed substances; so too do regulations of the food industry. Recall that in *Hydro- Québec* the majority observed, at paragraph 150, that regulations imposing requirements prescribing *the manner and condition of release or the source of release* of substances listed in Schedule 1 to CEPA into the environment were a valid use of the criminal law power. Recall as well that paragraph 140(1)(a) of CEPA authorizes regulations respecting "the concentration or quantities of an element, component or additive in fuel."

[74] Syncrude points to the fact that the regulation is, in some circumstances, suspended during the winter due to technical challenges in blending traditional and renewable fuels. There are two answers to this, one legal, the other pragmatic. It may be that a criminal law requires exceptions in circumstances where a total prohibition would either be unjust or contrary to other interests which Parliament is charged with safeguarding. Many uncontroversial exercises of the criminal law establish a regime whereby, if certain measures or steps are taken otherwise-prohibited conduct becomes permissible. The *Food and Drugs Act*, R.S.C. 1985, c. F-27, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and *Firearms Act*, along with many others and their attendant regulations, require licenses in order to possess particular substances or items. Indeed, other regulations made pursuant to CEPA, such as the *Gasoline Regulations*, SOR/90-247, sections 4 and 6, prescribe a maximum amount of a harmful substance that is allowed in fuel without prohibiting that substance completely.

[75] There is no constitutional threshold of harm that must be surpassed before the criminal law power is met, provided there is a reasonable apprehension of harm. Syncrude has no answer to the question of whether the RFRs become constitutional at a 10%, 25%, 50% or 100% renewable fuel requirement. There is no magic number. As the Supreme Court observed in *AHR* at paragraphs 55 to 56, "there is no constitutional threshold of harm."

[76] Turning to the pragmatic answer; if the winter exemption is engaged, the RFRs require a greater than 2% utilization during the summer months. The regulatory obligation is met by purchasing compliance units from another user. On a national basis, the net effect is the same.

[77] To conclude, Syncrude's argument that the regulation is invalid because it is not a blanket prohibition has no doctrinal support. Further, Syncrude concedes that other regulations, such as those limiting concentration of lead and sulphur in fuel are valid: *Sulphur in Diesel Fuel Regulations*, SOR/2002-254. Nothing distinguishes the prohibition of a certain amount of sulphur or lead in fuel from a positive requirement of a certain amount of renewable fuel in fuels. Both seek to prevent the emission of toxic substances, whether sulphur dioxide or GHGs, and both are addressed to the reduction of air pollution.

H. *Intrusion into provincial jurisdiction over non-renewable natural resources*

[78] The answer to Syncrude's argument that the RFRs intrude into provincial competence over non-renewable resources lies in the structure and operation of the RFRs themselves.

[79] The regulatory obligation is met either by meeting the 2% requirement, or by purchasing compliance units from another producer or user who has exceeded their own obligation. Shortfalls arising from the difficulties of blending renewable fuels with fossil fuels in the winter months can be compensated for by excess utilization of renewable fuel in the summer. The RFRs are, in this sense, 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. The overall effect is the same on a yearly, Canada-wide, basis – 2% less fossil fuel is consumed.

[80] It must also be remembered that subsection 5(2) applies to Syncrude as a consumer of diesel fuel in its operations, not its production of synthetic crude oil. Syncrude meets the requirements of the RFRs by purchasing compliance units from another producer. The RFRs do nothing to affect the rate or timing of resource extraction, which Syncrude describes as its core business. Simply put, Syncrude stands no different than any other consumer of diesel fuel in Canada, whether a trucking company, a municipal transit authority or a contractor with a diesel fuel requirement. The RFRs are laws of general application, and not directed to the management of natural resources.

I. *The indirect means argument*

[81] Syncrude argues that the use of the RFRs to create a demand for renewable fuels which would in turn reduce GHG emissions is an indirect, and not direct, means of addressing GHGs. It says that the jurisprudence does not support the use of the criminal law power to trigger indirect economic effects to achieve the dominant purpose of protecting the environment. I have already

found above that such creation of demand for renewables was not the dominant purpose of the RFRs. This suffices to dispose of this argument.

[82] In the alternative, however, I find that it would be a valid exercise of the criminal law power to use a prohibition to mandate a renewable component in fuel in order to indirectly achieve the consequential reduction of toxic GHGs in the atmosphere. This is precisely what section 139 authorizes. I stress that this point is not necessary to reach the conclusion that the RFRs are *intra vires* Parliament's authority; the reasons I have given above for this conclusion are independently sufficient.

[83] Syncrude is right to cite the *Margarine Reference*, as it does establish a relevant limit on Parliament's criminal law power. Specifically, Parliament cannot use the criminal law (in that case, prohibitions on the import, production, and sale of margarine) simply to create economic effects which it considers desirable. In that case, the economic effect – the protection of the dairy industry – was the end goal. However, Syncrude's argument that Parliament cannot use the criminal law power to indirectly reduce an evil has no support in the jurisprudence.

[84] The *Firearms Reference* establishes that a law need not have a direct prohibition of the evil in question. In the *Firearms Reference*, the Supreme Court confirmed, at paragraphs 39 and 40, that in exercising the criminal law power "Parliament may use indirect means to achieve its ends. A direct and total prohibition is not required." In *RJR-MacDonald*, the impugned provision prohibited tobacco advertising and promotion in order to reduce tobacco consumption and in turn reduce the negative health effects of tobacco consumption. The Court found that it was

permissible for Parliament to prohibit the activity that indirectly causes the evil rather than the activity that directly causes the evil.

[85] If a law provides for a prohibition backed by a penalty, with the ultimate effect that an evil is reduced, that suffices to place the law within Parliament's constitutional *vires*. The court should be neutral as to the causal mechanism by which that evil is reduced. *AHR* directs that the exercise of the criminal law power is valid if the three parts of the test are met; it does not direct the court to find an exercise of the criminal law power to be valid if the three parts of the test are met unless the way in which that evil is reduced is of a prescribed type. There is no jurisprudential basis for adjoining this additional element to that test. Indeed, *RJR-MacDonald* expressly affirms that the emphasis must not be on Parliament's method of achieving an otherwise-valid criminal law purpose, no matter how "circuitous" a path Parliament takes to reach its goal.

[86] I am reassured in this conclusion by the fact that other exercises of the criminal law power involve a prohibition that changes economic conditions so as to reduce an evil. Consider for instance, section 355.2 of the *Criminal Code*, R.S.C. 1985, c C-46, which prohibits trafficking in property that was obtained via crime. The evil at which section 355.2 is aimed is the commission of the underlying crime, and the mechanism by which it reduces that evil is economic. In prohibiting the downstream trade in property and profit obtained via crime, it creates economic conditions that are less conducive to committing the underlying criminal conduct.

J. *The colourability argument*

[87] Syncrude suggests that the RFRs are ineffective at combating climate change and must, by logical inference, be a colourable attempt to create a market for renewable fuels or to regulate provincially controlled natural resources.

[88] Colourability is not lightly inferred, nor is it a backdoor to a reconsideration of the wisdom or efficacy of the law. In *Quebec v. Canada* at paragraph 31, the Court affirmed that colourability "simply means that 'form is not controlling in the determination of essential character'."

[89] The Supreme Court of Canada in *Hydro-Québec* made it clear that colourability requires Parliament's declared valid purpose to be a mere pretence for incursion into provincial jurisdiction. This is a high standard. Again, as in the case of characterization of the dominant purpose, Syncrude points to the evidence which it submits demonstrates that the government knew that renewable fuels do not in fact have lower life cycle GHG emissions. Syncrude also submits that the government understood that the RFRs would spur the development of a domestic market for renewable fuels, create collateral economic incentives to agriculture and industry to assist in the transition to planting and refining of biofuels, and have other positive effects on some sectors of agriculture. This, Syncrude submits, establishes that the primary purpose must have been to intrude into provincial responsibilities to create a market for Canadian renewable fuels.

[90] Here, however, the evidence supports the opposite conclusion. When the references in the evidence to the creation of a domestic market for renewable fuels is considered in its context, including the evidence that the purpose of subsection 5(2) in particular, was to make a significant contribution to the prevention and reduction in air pollution through a reduction of GHGs as well as the evidence that anticipated the market related consequences and goals were part of the strategy to reduce GHG emissions of fossil fuels, the colourability argument fails.

[91] Indeed, this observation highlights the degree to which the valid use of the criminal law power to protect the environment may have consequential economic effects. It would be extremely easy for Parliament to use the criminal law to protect the environment if Parliament had no concern for the economy; it could simply ban the consumption of fossil fuels. The challenge lies in protecting the environment while avoiding or compensating for negative economic side effects. In some cases, crafting the regime so as to mitigate the economic side effects may be the majority of the work. The fact that managing economic effects plays a role, even a large role, in a given law does not mean that the law is a colourable attempt to pursue an unconstitutional objective.

[92] Syncrude points to the concomitant capital incentives and subsidies to agriculture and industry to promote the renewable fuels industry as evidence that the RFRs were a colourable attempt to intrude into areas of provincial legislative competence. However, the analysis must go further, and inquiry must be made as to the reason and purpose which underlies these measures. When this is done, it is clear that their objective was to facilitate access to renewable fuels and spur the development of new technologies which would "generate greater environmental benefits

in terms of GHG emissions reduction": *Canada Gazette*, Part I, Vol. 145, No. 15, (July 20, 2011), p. 699. As the judge observed, the creation of a demand for renewable fuels was a necessary part of the overall strategy to reduce GHG emissions, but it was not the dominant purpose.

[93] These consequential market responses do not detract from the dominant purpose. The RFRs were designed to combat the deleterious effect of GHGs on the atmosphere by mandating that a type of fuel that was foreseeably less GHG-emitting be used in at least 2% of the fuel supply. The evidence points overwhelmingly to the fact that the RFRs were in pith and substance directed to the reduction of air pollution by reducing GHG emissions from the use of fossil fuels.

K. *Ancillary powers*

[94] In light of these reasons, and the determination that subsection 5(2) of the RFRs is within federal legislative competence, it is not necessary to consider whether the ancillary powers doctrine would save the impugned provision. However, even if the law were *ultra vires*, I conclude that it would be saved by the ancillary powers doctrine, substantially for the reasons given by the judge at paragraphs 87 to 97 of the Reasons.

L. *Statutory validity*

[95] As noted, Syncrude contends that the Governor in Council failed to form the opinion in subsection 140(2) that the regulation "could make a significant contribution to the prevention of,

or reduction in, air pollution," which is a condition precedent to the promulgation of valid regulations.

[96] Substantively, the burden rests with Syncrude to show that the RFRs are inconsistent with the enabling statute. In this regard, the court does not inquire into the policy merits of the RFRs, or whether a regulation is "necessary, wise or effective in practice": *Katz* at para. 28.

[97] Syncrude's administrative law argument amounts to the following: CEPA subsection 140(2) requires the Governor in Council to be of the opinion that a regulation will reduce air pollution before making that regulation under subsection 140(1). The RFRs do not in fact reduce air pollution. Therefore, the Governor in Council could not have been of the opinion that they do, because that opinion would have been incorrect, capricious, or otherwise made for improper or extraneous objectives beyond those of the statute.

[98] The error inherent in this chain of reasoning is obvious. Subsection 140(2) does not require absolute scientific certainty, if such a state exists. What is required is an opinion, which may not be shared by all, that the regulation could reduce air pollution. There was ample evidence before the Governor in Council, set forth in the RIAS, supporting that opinion.

[99] In support of its argument, Syncrude points to evidence in the record to the effect that because of changes in land use patterns, there will be no net reduction in GHG emissions, and that there will be an increase in air pollution which will result in deleterious impacts on the

environment. However, it is clear from the evidence that the Governor in Council considered this issue, noting that in Canada there would be no change in land use patterns. The 2010 RIAS specifically addresses Syncrude's point, noting that the RFRs "are not expected to result in any changes in land use": *Canada Gazette, Part II*, Vol. 144, No. 18, (September 1, 2010), p. 1709. The evidence falls short of establishing that the biofuel requirement is irrelevant, extraneous, or completely unrelated to the statutory purpose of section 140 and the CEPA.

[100] In essence, Syncrude invites the Court to second guess the Governor in Council's opinion, an invitation that this Court should decline. Even if there was a solid evidentiary foundation establishing a different scientific opinion on the net contribution of the RFRs to the reduction of GHGs, it would not detract from the Governor in Council forming a different opinion on admittedly different evidence.

VII. Conclusion

[101] I find that subsection 5(2) of the RFRs is *intra vires* both the *Constitution Act 1867* and CEPA and I would dismiss the appeal with costs.

"Donald J. Rennie"
J.A.

"I agree
C. Michael Ryer J.A."

"I agree
Richard Boivin J.A."

ANNEX A

Canadian Environmental Protection Act, 1999, SC 1999, c33	*Loi canadienne sur la protection de l'environnement* (1999) (L.C. 1999, ch. 33)
General Requirements for Fuels	**Réglementation des combustibles**
Prohibition	**Interdiction**
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.
Regulations	**Règlements**
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;

ANNEX B

Renewable Fuels Regulations (SOR/2010-189)	*Règlement sur les carburants renouvelables* (DORS/2010-189)
Distillate pool	**Stocks de distillat**
5 (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.	5 (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.
Representing renewable fuel	**Correspondance — carburant renouvelable**
7 (1) Compliance units, which represent litres of renewable fuel, created under Part 2 are used to establish compliance with section 5.	7 (1) Les unités de conformité créées au titre de la partie 2 correspondent à des litres de carburant renouvelable et servent à établir la conformité avec l'article 5.
Blending in Canada — distillate compliance units	**Mélange au Canada — unité visant le distillat**
13 (2) Subject to subsection (3), a single distillate compliance unit is created for each litre of renewable fuel on its blending in Canada with a batch of diesel fuel or heating distillate oil.	13 (2) Sous réserve du paragraphe (3), une unité de conformité visant le distillat est créée pour chaque litre de carburant renouvelable au moment où il est mélangé, au Canada, à un lot de carburant diesel ou de mazout de chauffage.
Importation — distillate compliance units	**Importation — unité visant le distillat**
14 (2) Subject to subsection (3), a single distillate compliance unit is created for each litre of renewable fuel that is contained in a batch of diesel fuel, or heating distillate oil, on its importation into Canada.	14 (2) Sous réserve du paragraphe (3), une unité de conformité visant le distillat est créée pour chaque litre de carburant renouvelable que contient un lot de carburant diesel ou de mazout de chauffage au moment de son importation au Canada.

To primary suppliers

20 (1) A compliance unit may only be transferred in trade to a primary supplier.

À un fournisseur principal

20 (1) Un échange ne peut être conclu que si le destinataire de l'unité de conformité est un fournisseur principal.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED AUGUST 6, 2014, NO. T-1643-13 (2014 FC 776)

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CONCURRED IN BY:	RYER J.A. BOIVIN J.A.
DATED:	MAY 30, 2016

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