In the Court of Appeal of Alberta

Citation: Syncrude Canada Ltd v Alberta (Energy), 2024 ABCA 366

Date: 20241113
Docket: 2301-0149AC
Registry: Calgary

Between:

Syncrude Canada Ltd

Appellant

- and -

His Majesty the King in right of the Province of Alberta as represented by the Minister of Energy and Alberta Energy

Respondent

The Court:

The Honourable Justice Jolaine Antonio
The Honourable Justice Alice Woolley
The Honourable Justice Karan Shaner

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order of
The Honourable Justice M.H. Hollins
Dated the 26th day of May, 2024
Filed on the 24th day of June, 2024
(2024 ABKB 317, Docket: 2001-08134)

Memorandum of Judgment
Delivered from the Bench

Woolley, JA (for the Court):

[1] The appellant Syncrude Canada Ltd (Syncrude) and the respondent Alberta have a long-standing dispute over the royalties payable by Syncrude for the period from 2002-2011 in respect of its oil sands joint venture north of Fort McMurray (Syncrude Project). Specifically, the parties disagree with respect to whether approximately $246.6M in costs incurred by Syncrude during that period should be considered allowable costs under the *Oil Sands Royalty Regulation, 1997*, Alta Reg 185/1997 [*OSRR97*], which applies during this period as a result of a royalty agreement between the parties dated effective January 1, 2009. Allowing the costs would decrease the royalties owed by Syncrude for this period by approximately $52M.

[2] The dispute has been ongoing for many years. Alberta Energy audited the Syncrude Project for each year between 2002 and 2011, and disallowed costs across those years. The costs fell into seven categories: costs incurred pursuant to a management services agreement, costs associated with construction of an upgrader (Plant 29), and costs arising with respect to stakeholder relations, research, a higher education program for employees' dependents, membership fees in various industry organizations, and Alberta Energy and Utilities Board administration fees.

[3] Syncrude objected to the audit assessments but its objections were denied. As a consequence, for each year Alberta Energy's Director of Dispute Resolution issued a "statement of no resolution" pursuant to s. 5(5) of the *Oil Sands Dispute Resolution Regulation*, Alta Reg 247/2007 [*OSDRR07*], and later s. 6(6) of the *Mines and Minerals Dispute Resolution Regulation*, Alta Reg 170/2015 [*MMDRR15*]. After each denial, Syncrude requested that a dispute review committee be formed, as contemplated s. 6 of *OSDRR07* and s. 7 of by *MMDRR15*. On April 25, 2016, approximately eight years after Syncrude's first request, the Minister ordered the formation of a dispute review committee for the 2002-2010 audit years (Dispute Review Committee). The Minister added the 2011 audit year to the Committee's mandate on December 19, 2017.

[4] In a report dated December 10, 2018, the Dispute Review Committee recommended that the Minister approve almost all the disputed costs incurred by Syncrude as allowed costs. With respect to the two largest categories of costs, the costs incurred pursuant to the management services agreement and when constructing Plant 29, one member of the Committee dissented.

[5] As required by s. 9(1) of the *MMDRR15*, the recommendations and reasons of the Dispute Review Committee were provided to the Minister. Pursuant to s. 9(2) of the *MMDRR15*, the Minister "after having reviewed the recommendations and reasons, must make a decision to accept,

reject or vary the recommendations of the committee". Section 9(3) of the *MMDRR15* imposes a 45-day deadline on that decision "unless the Minister extends that period".

[6] The Minister did not comply with the 45-day deadline, extending that deadline to June 30, 2020 instead. On February 4, 2020, the Minister rejected the recommendations of the Dispute Review Committee thereby upholding the audit assessment that the costs incurred by Syncrude were not allowable costs under the *OSRR97*.

[7] Syncrude applied for judicial review of that decision. The chambers judge agreed with Syncrude that the Minister's decision was unreasonable: *Syncrude v Alberta (Minister of Energy)*, 2023 ABKB 317 [*Chambers Decision*]. She emphasized the deficiency of the reasons provided by the Minister:

> As I explain in more detail at the conclusion of these Reasons, the decision of the Minister does little more than conclude that the Syncrude DRC generally failed to apply the evidentiary rules from prior DRCs. The Syncrude DRC did in fact apply those rules in some instances and in others, explained why the rules did not or should not apply and yet the Minister's decision includes no references to the approach or the conclusions of the Syncrude DRC in doing so.
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> *Chambers Decision* at para 45.

[8] Syncrude asked the chambers judge to accept the Dispute Review Committee's recommendations rather than remitting the matter back to the Minister for reconsideration. She declined to do so. She set out the direction of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 140-142 [*Vavilov*] that provides that it "will most often be appropriate" to remit a matter for reconsideration by the administrative decision maker, although a court may decline to do so if "it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose".

[9] She reviewed the decision of her colleague in *Shell Canada Limited v Alberta (Energy)*, 2022 ABQB 4, affirmed in *Shell Canada Limited v Alberta (Energy)*, 2023 ABCA 230 [*Shell*], where the chambers judge did not remit a matter related to royalties back to the Minister. She said, however, that *Shell* was distinguishable, raising a procedural "yes/no" question to which industry expertise was less relevant; here the issue involved "decisions about facility construction or the regulatory approval process", and she had no relevant first-hand expert evidence to assist her: *Chambers Decision* at para 141.

[10] She also declined to rely on the recommendations and analysis of the Dispute Review Committee saying:

> Syncrude says that I need not perform that analysis myself; I can simply rely on the Syncrude DRC work and accept its recommendations. However, that is even more problematic as it effectively extinguishes an entire layer of internal, expert review. If the findings of a DRC were intended to govern without ministerial review, the *MMDRS* would have been drafted to reflect that intention.
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> *Chambers Decision* at para 142.

[11] While sharing Syncrude's concerns about the "timeline of this litigation" (*Chambers Decision* at para 143), the chambers judge emphasized the possibility for different analysis and outcomes of the issues before her:

> This is not a case where the context surrounding these multi-issue arguments allows for only one interpretation. The outcome on reconsideration is not "inevitable" to quote the *Vavilov* court (para.142). It may be that, on reflection, the Minister allows some or all of the costs that were rejected in the initial decision. Alternatively, the Minister may come to the same conclusion again but with more transparent reasoning.
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> *Chambers Decision* at para 144.

[12] Neither the appellant nor the respondent challenges the decision of the chambers judge that the Minister's decision was unreasonable. The appellant appeals only the decision of the chambers judge to remit the matter to the Minister, and what the appellant identifies as a failure of the chambers judge to provide sufficient guidance to the Minister in reconsidering the recommendations of the Dispute Review Committee.

[13] On appeal of a judicial review decision, the appellate court performs a *de novo* review of the administrative decision; the appellate court must determine whether the reviewing judge identified the correct standard of review and applied it properly: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 47; *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at paras 10, 12.

[14] Different considerations may apply, however, where the issue on review relates only to the appropriateness of the remedy chosen by the reviewing judge. In *Northern Inter-Tribal Health Authority Inc v Yang*, 2023 FCA 47 at paras 47-48, the court held, consistent with *Vavilov* at para 139, that the choice of remedy on a judicial review application is a discretionary remedy. As such, it is reviewable on appeal in the same way as other discretionary decisions:

> Discretionary decisions are reviewable under the appellate standard of review such that errors of law or in principle are reviewable for correctness, whereas errors of fact or of mixed fact and law from which a legal error cannot be extricated are reviewable for palpable and overriding error: *Canada v. Greenwood*, 2021 FCA

186, [2021] F.C.J. No. 1006 (QL) at para. 89; *Canada v. Harris*, 2020 FCA 124, 165 W.C.B. (2d) 89 (WL) at paras. 20–21.

[15] This issue came before this Court in *Shell*; however, the Court said that it did not need to decide this question in order to resolve the appeal: *Shell* at para 28.

[16] That is also the case in this appeal. The chambers judge correctly instructed herself on the legal principles applicable to the remedy. She correctly took into consideration the authority and institutional competence of the Minister to review the recommendations of the Dispute Review Committee. While she noted the issues of "facility construction" and "the regulatory approval process", we do not understand her to have exclusively categorized the costs on that basis; her point was only that the issues raised by this judicial review squarely engaged industry expertise in a way that those in *Shell* did not. In so doing, she made no error. The chambers judge also correctly assessed the lack of inevitability in the outcome following the Minister's review. In short, she analyzed the law and facts correctly and on either potential standard of review there is no basis for interfering with her decision.

[17] We also see no basis for interfering with the decision of the chambers judge on the argument that she ought to have provided further guidance or direction to the Minister. Her reasons sufficiently explained her conclusion that the Minister's decision was unreasonable, and that conclusion has not been appealed.

[18] The appeal is dismissed.

Appeal heard on November 8, 2024

Memorandum filed at Calgary, Alberta
this 13th day of November, 2024

Woolley J.A.

Appearances:

W.C. Hunter, KC
B.H. Walker
E. Colwell
for the Appellant

D.C. Mueller, KC
M.N. Burkett
for the Respondent