Court of King's Bench of Alberta

Citation: Syncrude v Alberta (Minister of Energy), 2023 ABKB 317

Date: 20230526
Docket: 2001 08134
Registry: Calgary

Between:

Syncrude Canada Ltd

Applicant

- and -

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

Respondent

Reasons for Decision of the Honourable Justice M.H. Hollins

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[1] Syncrude Canada Ltd, the Applicant, operates a joint venture bitumen extraction project in northern Alberta. The royalties it pays to the Province of Alberta in respect of that production depend directly on the costs it is allowed to deduct from its revenues.

[2] For the years 2002-2012, Syncrude took issue with the audit assessments conducted by the Respondent, the Department of Energy. Specifically, Syncrude objected to the auditors' rejection of approximately $246.6M in claimed costs over those years, which it says has resulted in the overpayment of royalties by approximately $52M. That dispute wound its way through the internal dispute resolution process, which ended with the Minister of Energy disallowing most of the costs in dispute. Her decision is now before me for judicial review.

[3] For the reasons that follow, I find that the Minister has not provided reasons sufficient to allow for a proper review of her decision. Her decision is quashed and the matter remitted back to the office of the Minister of Energy for reconsideration.

[4] It should be noted that the Minister has been different people throughout this litigation. References herein to the "Minister" refer to whomever held or holds that office at a particular time, including reference to the decision of the Minister under review. I will refer to the Respondent throughout as the Crown and to the Department of Energy as the Department, the latter generally meaning the people working in that ministry who are not the Minister.

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1. The Dispute Resolution Process

[5] Syncrude extracts bitumen from land on Crown leases north of Fort McMurray. It also upgrades bitumen into synthetic crude oil. As the owner of the leases on which minerals are extracted, produced and sold, the Crown receives royalties from the revenues generated by those activities.

[6] From 2002-2008, Syncrude paid royalties on the revenues from its mining and extraction operations and its synthetic crude oil upgrading. From 2009-2012, royalties were paid only on its revenues from bitumen mining. Whichever operation was generating royalties at a particular time is referred to herein as the Syncrude Project.

[7] Operators like Syncrude can claim a portion of their costs to offset revenue in the calculation of the royalties payable to the Crown – the higher the allowable costs, the lower the royalty payable. The *Oil Sands Royalty Regulation, 1997* (*OSRR 1997*) governs the calculation of those royalties, including what costs can be deducted. Paraphrased, allowable costs: (1) must have been incurred to recover the oil sands products, (2) must be directly attributable to the project and (3) must be reasonable.

[8] Any objections to the auditors' assessments are made to the Department's Director of Dispute Resolution, as provided for in the *Mines and Minerals Dispute Resolution Regulation*, Alta Reg 170/2015 (*MMDRR*) [this reference will also include, unless otherwise specified, its predecessor, the *Oil Sands Dispute Resolution Regulation*, Alta Reg 247/2007 (*OSDRR*)].

[9] Once in receipt of a written objection, the Director can accept or reject the objection and has wide berth to investigate, including requesting additional information. The Director also has a statutory mandate to attempt to mediate the dispute. If the matter is not thereby resolved, the Director may issue a Statement of No Resolution which then permits the unsatisfied party to request that the Minister constitute a Dispute Resolution Committee (DRC) to review the matter and make recommendations to the Minister. The Minister can then accept, reject or vary those recommendations coming from the DRC.

[10] Syncrude followed this process, beginning with its objections to the auditors' initial treatment of certain costs. The Director denied Syncrude's objections and, for each year in question, issued a Statement of No Resolution. This process took a long time. Even though these costs had been disputed going back to 2002, the Minister did not establish the Syncrude DRC until April of 2016.

[11] The Syncrude DRC, like all DRCs, was established by Ministerial Order (17/2016). It was comprised of three panel members, two chosen by the Minister and a third approved by the Minister. Its mandate included a direction that it was bound by the results of previous DRCs involving cost disputes between the Department of Energy and Imperial and Suncor, respectively.

[12] The Syncrude DRC issued its report to the Minister on December 10, 2018 and recommended allowing almost all the disputed costs, albeit not entirely and not always unanimously. By Ministerial Order 1/2020 dated February 4, 2020, the Minister rejected virtually all of the recommendations of the Syncrude DRC and disallowed the bulk of Syncrude's claimed costs for 2002-2011. The 2012 year was treated similarly, as confirmed by letter from the Director dated February 21, 2020.

2. Other Background

[13] Two other background facts should be included here. One is the designation of the Syncrude Project as a Qualifying Joint Venture Project (QJVP) under *OSSR 1997*, meaning it was a stand-alone or single project. The import of this is that the Imperial and Suncor DRC recommendations on allowable costs were for projects that were not QJVP's and so subject to a

Schedule 1 to the *OSSR 1997* while Suncor's allowable costs were governed by Schedule 2 to the *OSSR 1997*. The parties disagree about the impact of this distinction.

[14] The second relevant fact is the existence of the 2009 Syncrude Royalty Amending Agreement (2009 RAA) between Syncrude and the Respondent. The 2009 RAA was negotiated and executed in conjunction with the shift in Syncrude's operations at that time. It dealt with the calculation of royalties payable by Syncrude, including how allowable costs would be determined.

[15] The 2009 RAA also assured Syncrude that there would be no unilateral changes to how its costs were calculated. Syncrude argues that the Minister's reliance on certain provisions of the Suncor and Imperial Oil DRCs violates this covenant in the 2009 RAA.

3. The Two Rules from Prior DRCs

[16] As mentioned earlier, when the Syncrude DRC was constituted, it was expressly bound by prior decisions of the Minister arising from prior DRC recommendations, specifically the Suncor DRC of March 24, 2010 (Ministerial Order 32/2010), and the Imperial DRC of November 19, 2012 (Ministerial Order 97/2012).

[17] The Minister rejected the recommendations because she felt that the Syncrude DRC had failed to follow the Imperial and Suncor DRCs, specifically two evidentiary rules that came out of the Imperial and Suncor DRCs. In the Minister's view, failing to apply these rules was inconsistent with these prior DRCs and so invalidated the conclusions of the Syncrude DRC.

[18] As a result, many of the arguments before this Court centred on those evidentiary rules; whether they were applied or could be applied in the way expected by the Minister, as well as whether the Syncrude DRC recommendations were consistent or inconsistent with the Imperial and Suncor DRCs.

[19] Because these rules applied across different categories of costs, I will outline them before addressing the disposition of particular costs claimed.

a. The Additional Evidentiary Requirement

[20] The first evidentiary rule referenced throughout this matter is called the "Additional Evidentiary Requirement" from the Suncor DRC. In that case, the Suncor DRC was reviewing disputed costs relating to stakeholder relations, one subcategory of which was Suncor's costs for hosting a community celebration at their project opening. The Suncor DRC said there was insufficient information before them to determine whether this was a necessary cost but that further consideration should be given to what the ERCB expected when it approved the project. It did not specify what form that additional information should take.

[21] The Minister purported to accept the whole of the Suncor DRC recommendations but in dealing with the one just described, imposed an additional requirement that there be "a specific reference in an ERCB approval or decision report that confirms that the commitments for which the costs were incurred were relied upon by stakeholders in making representations to the ERCB." The Minister gave Suncor 30 days in which to provide that additional evidence.

[22] This is now referred to as the "Additional Evidentiary Requirement", which the Minister qualified in the Suncor Ministerial Order to mean that stakeholder relations costs must be included in the ERCB approvals granted to the operator in order to deduct those costs.

[23] The application of the Additional Evidentiary Requirement to the Syncrude dispute was hotly contested before the Syncrude DRC. The Crown argued before the Syncrude DRC, and argues here, that the Suncor DRC is clear and means that any stakeholder relations costs allowed must be referenced in the project's ERCB approvals. The Crown also argued that the Syncrude DRC had no jurisdiction to adjudicate matters under the 2009 RAA, which has its own governing law clause.

[24] The Syncrude DRC rejected the application of the Additional Evidentiary Requirement to the Syncrude disputed costs. It did so for three reasons:

(a) The retroactive application of the Additional Evidentiary Rule would be unfair. This "Rule" was first reflected in the Suncor Ministerial Order from 2010 but the ERCB approvals obtained by Syncrude were issued by the ERCB between 1998 and 2007. This worked two inequities on Syncrude; an inability to go back in time and present material to the auditors which might have satisfied the intent of the Rule and an inability to go back in time and seek express inclusion of these commitments in the ERCB approvals when granted.

(b) The Additional Evidentiary Requirement was or might have been "incompatible" with the Royalty Amending Agreement signed in 2009 between the Crown and Syncrude in respect of the Project. Clause 8(a) of the 2009 RAA, called the "Lock-In Provision", essentially assured Syncrude that there would be no subsequent changes to the "Allowed Cost Rules" as applied to Syncrude after the signing of the Agreement. "Allowed Cost Rules" was defined in the 2009 RAA as the provisions of the *OSRR 1997*, including what was an "allowed cost" under Schedule 2 and elsewhere in the *Regulation.*

The Lock-In Provision of the 2009 RAA said:

> ...no changes made after January 1, 2008 to the Allowed Cost Rules [as set out and defined in the *OSRR 1997*...shall apply to [Syncrude] in respect of the [Project] for any period prior to January 1, 2016 and the Crown agrees to apply the Allowed Cost Rules to the [project]...prior to January 1, 2016 in a manner generally consistent with their application to the [Project] as at January 1, 2005

The Crown argued before the Syncrude DRC that the Additional Evidentiary Requirement only changed the *means* by which an allowable cost was proven, not what was or was not an allowable cost under the Regulation. The Syncrude DRC disagreed and said its imposition was tantamount to a change in the Regulation and thus a contravention of the 2009 RAA.

(c) The Additional Evidentiary Rule applied specifically and uniquely to Suncor, as evidenced by the time granted to Suncor to address the particular deficiency in its evidence.

[25] I am mindful of the fact that, as I am remitting this back to the Minister for reconsideration, it is not permissible nor advisable to make findings, although I am permitted, if not expected, to give some direction.

[26] With that in mind, I observe that the objective of this Rule was to require an operator to show the necessary link between the expenditure and the project approval, which seems reasonable. The idea that this requirement would apply to other parties and not just Suncor is also, *prima facie*, reasonable. However, a requirement for written confirmation of a causal link between the expenditure and the project approval, when applied retroactively to third-party processes concluded many years before the cost was assessed, does not strike me as fair or reasonable.

[27] Further, without making any findings on jurisdiction around the 2009 RAA, it does seem somewhat artificial and inefficient to take the position that its provisions could not be considered by the DRC but could be adjudicated separately by this court.

[28] None of this means that any particular cost associated with stakeholder or community relations must be allowed but rather that the Minister's blanket application of the Additional Evidentiary Requirement – or more precisely, her blanket rejection of the DRC's analysis with no relevant comment of her own and no analysis of whether and how the Additional Evidentiary Requirement applies to specific costs claims – does not meet the threshold of reasonableness.

b. The No New Information Rule

[29] The second evidentiary rule considered by the DRC in its recommendations and argued before this Court was the "No New Information Rule".

[30] This rule excludes from the Director's consideration any information that had not been before the Department's auditors; s.4(2) of the *OSDRR*, now the *MMDRR* (Alta Reg 170/2015). It also excludes from the DRC any information that had not been before the Director on the same terms; s.9(6) of the *OSDRR*, now 8(4) of the *MMDRR*. Disputes for which the Notice of No Resolution was filed before particular years were exempted from this rule.

[31] The result is that the years 2002-2005 are not subject to the No New Information Rule because their Statements of No Resolution were issued before the *OSDRR* was proclaimed (Alta Reg 247/2007) while the disputes for years 2006-2011 are subject to the No New Information Rule.

[32] Syncrude says this is absurd and unfair. It results in the Director and the DRC being forced to look at different evidence for these time periods, even though the types of costs in dispute and the arguments made in respect of each are the same. They say this flies in the face of the DRC's obligation to hold a "fair" hearing (s.8(1) *MMDRR*) and contradicts the DRC's ability to determine admissibility of evidence for itself; s.8(3) *MMDRR*.

[33] The Crown argues that such a result is precisely correct, that the DRC can consider new information provided by Syncrude for the 2002-2005 years but not to the years thereafter (Crown Brief, para.124), even if this means different allowances for the same costs in different years.

[34] The Syncrude DRC addressed the issues around the No New Information Rule in paragraphs 35-50 of its report. While it did not purport to reject the Rule, it found that the No New Information Rule did not make all evidence relating to the 2006-2011 years automatically inadmissible. Its reasons were as follows:

(a) The Rule prohibits information that was not "considered" by the Department's auditors from being put before the DRC. The Syncrude DRC found that the word "considered" was ambiguous and that the only fair and workable approach would be to deal with information that was or was not provided to the auditors, as opposed to what was considered by them.

(b) Following on that point, the Syncrude DRC noted the testimony of Department employees who acknowledged that the Department has institutional knowledge and having operators provide duplicative information to them year after year was not actually necessary or desirable.

(c) It was also important to identify exactly what matters were in dispute within each category before determining what information might get caught by the No New Information Rule.

(d) There is a distinction between "information" as used in s.8(4) *MMDRR* and "evidence". Even though Syncrude put the information in support of its arguments in Affidavit form for the DRC and those Affidavits had not existed before, most of the information contained therein had been provided to or in the knowledge of the auditors at the time of the audit. In other words, this might have been new "evidence" but it was not new "information".

The Crown's argument – that "evidence" is a subset of "information" – may be true, but does not address this point.

[35] Syncrude argued that the Crown had agreed at some point that any Syncrude DRC recommendations for the earlier years where the No New Information Rule did not apply, namely 2002-2005, would be applied to the subsequent years. This Agreement was denied by the Crown. The DRC did not find that this agreement had been proven but nevertheless suggested that that approach be followed, which suggestion the Minister rejected.

4. Grounds for Review

[36] The Minister rejected the recommendations of the Syncrude DRC largely on the grounds that it had failed to abide by the findings of the Imperial Oil and Suncor DRCs. Syncrude has applied for judicial review of the Minister's decisions, on the grounds described below.

[37] Syncrude argues that the Minister erred in [paraphrased to avoid repetition]:

(a) Rejecting the Syncrude DRC recommendations without reasonable justification;

(b) Finding that the Syncrude DRC was bound by the Additional Evidentiary Requirement;

(c) Finding that the No New Evidence Rule precluded the Syncrude DRC from considering Syncrude's evidence; and

(d) Failing to provide reasons for her decision.

[38] Syncrude asks this Court to set aside the Ministerial Order 1/2020 and direct the Minister to accept the Syncrude DRC recommendations or alternatively, to remit them back to her for reconsideration in light of these Reasons.

[39] The Minister argues that the Syncrude DRC recommendations are not binding on her and that she has broad discretion under s.9(2) of the *MMDRR* to accept, reject or vary the recommendations of a DRC.

5. Standard of Review

[40] The Supreme Court of Canada stated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 that "…it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness."; para 25. There is nothing in the record before me to suggest that a different standard of review is appropriate here and so I find that the applicable standard of review is reasonableness. Nevertheless, the Supreme Court has made clear that this is to be a robust review: *Vavilov* at para 67.

[41] In deciding whether or not the Minister's decision is reasonable, I must begin with her reasons. The Supreme Court in *Vavilov* said this [emphasis added]:

> As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. *A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion"…*
>
> *Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker.* The reasonableness standard requires that a reviewing court defer to such a decision.
>
> …it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. …
>
> This Court's jurisprudence since Dunsmuir should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the outcome of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc v Lukács*, 2018 SCC 2 (CanLII), [2018] 1 SCR 6.
>
> *Vavilov* at paras. 84-87

[42] To the extent that a reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (above), the reasons of the decision-maker must be sufficient to allow me to assess

the coherence and rationale of the analysis and also to understand the justification for the decision. This passage is also from *Vavilov*:

> Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision… In [*Newfoundland Nurses*], the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'"…; *Vavilov* at para. 81

[43] When do reasons meet this test? The Supreme Court addressed this question at some length in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 SCR 708, in which it referred to its prior decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190:

> Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses – one for the reasons and a separate one for the result… It is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> …
>
> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion… In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. …
>
> *Newfoundland and Labrador Nurses' Union* at paras.14, 16

[44] While *Newfoundland and Labrador Nurses* made it clear that reasons do not need to be long or even comprehensive in order to be adequate, they do need to allow the reviewing court to understand how the decision-maker arrived at her decision. The Supreme Court also stated in *Vavilov* that "[r]easons that 'simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion' will rarely assist a reviewing court in understanding the rationale underlying a decision and 'are no substitute for statements of fact, analysis, inference and judgment'…"; para. 102.

[45] 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.

6. What is the "Record"?

[46] Before examining the Minister's decision on the Syncrude DRC Recommendations, I must first address a dispute between the parties as to the proper record before this Court on this judicial review.

[47] For reasons explained below, a judicial review is generally conducted based only on the filed Record of Proceedings, provided by the respondent. An applicant cannot enlarge that Record without leave of the court.

[48] Rule 3.22 of the *Alberta Rules of Court* restricts the evidence that may be considered on judicial review:

> When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
>
> > (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
> >
> > (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
> >
> > (c) anything permitted by any other rule or by an enactment;
> >
> > (d) any other evidence permitted by the Court.

[49] The threshold for granting leave to allow new or additional Affidavit evidence on a judicial review is relatively high because it is difficult to assess the reasonableness of a decision that was based on a different record.

[50] For this judicial review, Syncrude filed the Affidavit of Doug Simms, sworn on June 7, 2020. This Affidavit was not before the DRC nor before the Minister. The parties agreed that, before proceeding with the review of the Minister's decision, I needed to decide whether the Simms Affidavit forms part of this Record or not.

[51] The Simms Affidavit contains the following:

> The agreed facts found in the Certified Record, including the Syncrude DRC Report
>
> The written submissions of all parties, to the Director and to the Syncrude DRC
>
> All the Affidavits and interrogatory evidence filed for use before the Director and the Syncrude DRC
>
> The transcripts of proceedings before the DRC
>
> Correspondence with the Minister regarding the delay in her decision

[52] The Certified Record of Proceeding includes various audit notices, Ministerial Orders, correspondence and some back up documentation and spreadsheets relating to the disputed claims.

[53] The dispute regarding the record seems to be largely centred around Syncrude's inclusion of its prior Affidavits, particularly its expert evidence on specific costs. For example, at the DRC hearing, Syncrude relied on the evidence of Chris Austin and Kevin Idland on the Plant 29

construction costs and on the evidence of Kara Flynn on the regulatory approval process as it relates to the stakeholder relations costs.

[54] Those Affidavits were not before the auditors dating back to 2002 but were drafted for use in the proceedings with the Director and then before the Syncrude DRC.

[55] The Crown maintains that this is new evidence and impermissible under the Rules of Court and under common law. Syncrude says that the presentation of this material in the Simms Affidavit may be new but that the information itself is not. It says that the Simms Affidavit merely brings together information that has been known to the parties throughout, albeit in one place and admittedly with some additional explanation about that information.

[56] Syncrude also says that all the evidence and argument before the Syncrude DRC should form part of the Record of Proceedings. Otherwise, it says, this Court cannot properly evaluate whether the Minister's decision to reject the Syncrude DRC's recommendations was reasonable or not. Further, Syncrude argues that if this material was excluded from this Record of Proceedings because the Minister did not look at it, that goes to the reasonableness of her decision.

[57] There are some exceptions to the limits on new evidence on judicial review. Justice Feth provides an overview of the rationale for the rule and its exceptions in *Bergman v Innisfree Village*:

> In Alberta, judicial review is usually conducted on the record of proceedings filed by the public body. The use of affidavits is exceptional. Affidavit evidence is generally not introduced to alter or supplement the factual record used by the decision maker to decide the issue on its merits: *Alberta Liquor Store Assn. v. Alberta (Gaming & Liquor Commission)*, 2006 ABQB 904 (Alta. Q.B.) at para 40 [*Alberta Liquor*]; *University of Alberta v. Alberta (Information & Privacy Commissioner)*, 2011 ABQB 699 (Alta. Q.B.) at para 14 [*University of Alberta*].
>
> The reason for excluding evidence that was not before the decision maker is explained by S Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis Canada, 2017) at 222:
>
> > 7.91 Evidence that was not before the tribunal is not admissible without leave of the court because the role of the court is to review the tribunal decision, not to decide the matter anew. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. The tribunal's findings of fact may not be challenged with evidence that was not before the tribunal. Evidence challenging the wisdom of the decision is not admissible. Fresh evidence, discovered since the tribunal made its decision, is not admissible . . . .
>
> Attempting to introduce fresh evidence about the merits of the challenged decision "misapprehends the nature of judicial review": *Alberta Liquor* at para 42.
>
> A judicial review is not a hearing *de novo* on the merits of the issue before the original decision maker. Instead, for substantive review, the reviewing judge examines the decision maker's reasons to determine whether, based on the information before that decision maker, it reached a rational decision

(reasonableness standard) or a correct decision (correctness standard): *University of Alberta* at para 18.

Supplementary evidence is usually allowed in only limited circumstances:

> a) to address standing;
>
> b) to show bias or a reasonable apprehension of bias where the facts in support of the allegation do not appear on the record;
>
> c) to demonstrate a breach of the rules of natural justice not apparent on the record;
>
> d) to reveal the evidence actually placed before the decision maker where the decision maker provided an inadequate or no record of its proceedings.
>
> See: *University of Alberta* at para 15 and *Alberta Liquor* at para 41.

Supplementary evidence may also be permitted in other exceptional circumstances at the Court's discretion:

> a) where the evidence provides necessary background and context to the judicial review application, such as explaining the operation of a complex licensing system: *Alberta's Free Roaming Horses Society v. Alberta*, 2019 ABQB 714 (Alta. Q.B.) at paras 25-26;
>
> b) to show a complete absence of evidence before the decision maker on an essential point: *Yuill v. Alberta (Workers' Compensation Appeals Commission)*, 2016 ABQB 369 (Alta. Q.B.) at paras 60-62;
>
> c) where the evidence provides necessary background and context to a related constitutional argument under the *Charter of Rights and Freedoms*: *Schulte v. Alberta (Appeals Commission)*, 2015 ABQB 17 (Alta. Q.B.) at para 32-33;
>
> d) in Aboriginal matters, to address useful contextual information about the termination of consultation: *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation)*, 2012 ABQB 579 (Alta. Q.B.) at paras 27-29

Bergman v Innisfree (Village), 2020 ABQB 661 at paras.41-48

[58] Here, Syncrude is alleging that the Record of Proceedings is incomplete. That is an exception recognized in *Bergman* above but also in *Dodd v Alberta (Registrar of Motor Vehicle Services)*, 2010 ABQB 184 at para.17 and in other cases referenced therein.

[59] I agree. To the extent that the Simms Affidavit contains material argued before the Syncrude DRC which was then expressly cited in its recommendations, it is difficult to determine whether the Minister’s rejection of the Syncrude DRCs approach to that evidence is reasonable.

[60] An incomplete record may also arise, as I think is the case here, where the decision in question is not the result of opposing parties’ submissions before the decision-maker. In other

words, we can assume the record before the Syncrude DRC is complete because both parties put forward what they thought was relevant but there is no similar proceeding before the Minister. However, the Minister did not hear further from the parties themselves and so essentially created her own Record of Proceedings.

[61] My brother Justice Dunlop faced a similar issue recently, on a challenge to the decision of Alberta's Minister of Health, in which he said:

> The Crown submits that I should not consider the information about COVID-19 in Mr. McGowan's affidavit and some of the Parents' affidavits because of the additional material attached to Dr. Hinshaw's amended records. The Crown argues that the evidence on a judicial review should be limited to the record before the decision maker, in this case Dr. Hinshaw. I disagree for four reasons.
>
> First, r 3.22(d) of the Alberta Rules of Court, (coming into effect in 2010) provides that the Court may admit additional evidence. The former *Rules of Court* (Alta Reg 390/1968) did not have a similar provision. The traditional categories of admissible additional evidence on a judicial review were based on the former rules. See Alberta Liquor Store Assn. v. Alberta (Gaming and Liquor Commission),2006 ABQB 904, per Slatter J (at para 41). These categories were later summarized in Swan River First Nation v. Alberta (Ministry of Agriculture and Forestry),2022 ABQB 194 at para 19:
>
> Traditionally, new or supplemental evidence on judicial review may be admitted to:
>
> a. address standing;
>
> b. show bias or a reasonable apprehension of bias where the facts in support of the allegation do not appear on the record;
>
> c. demonstrate a breach of the rules of natural justice not apparent on the record;
>
> d. reveal the evidence actually placed before the decision maker where the decision maker provided an inadequate or no record of its proceedings.
>
> Additional categories have been judicially recognized: *Swan River First Nation* , at para 59 ("information that was well-known to the parties 'in content and substance' and therefore should have formed part of the Record in the first instance"; Andres v University of Lethbridge, 2020 ABQB 223 at para 8 ("the content and substance of the documents was before the Committee and thus properly formed part of the Record"); Cold Lake First Nation v. Alberta (Tourism, Parks and Recreation),2012 ABQB 579 at para 27 (useful contextual information); Bergman v Innisfree (Village),2020 ABQB 661, at para 46, (to provide the necessary background and context to a judicial review application and to a related constitutional argument under the Charter).
>
> Second, Dr. Hinshaw's Order was not the product of a hearing at which evidence and argument were presented by two or more parties, as is often the case when a decision-maker makes a ruling which is then brought before the Court for review. As contemplated by the *Public Health Act*, the Order was made by Dr. Hinshaw without any formal hearing at which opposing parties could present evidence and

> argument. Consequently, there is not a discrete and well-defined body of material available to the Court to assess the reasonableness of the Order.
> See *Alberta's Free Roaming Horses Society v Alberta*, 2019 ABQB 714 at para 25
> In such circumstances, it may be necessary to reconstruct the record: Beaudoin v British Columbia, 2021 BCSC 512 at para 85.
>
> *CM v Alberta*, 2022 ABQB 716 at paras.25-28

[62] This case is very similar to the *CM* case before Dunlop, J in this regard. I find that admitting the Simms Affidavit is appropriate, notwithstanding the nature of judicial review, for the following reasons:

1) This is evidence thoroughly canvassed by both parties before the Syncrude DRC. It is not "new" information to the parties so the rationale for excluding it is either inapplicable or significantly diminished. No one is surprised at this stage or unfairly prejudiced by any of the information in the Simms Affidavit.
2) It completes the record that was before the Syncrude DRC and so is relevant to this Court's review of the reasonableness of the Minister's decision on how to treat the DRC's recommendations.
3) If the only argument for exclusion is that the Minister did not consider the evidence heard by the DRC which is found in the Simms Affidavit but excluded from the Certified Record of Proceedings, then Syncrude is entitled to argue that making her decision in the absence of relevant evidence was unreasonable.

[63] To the extent that any of the Simms Affidavit is argumentative or attempts to interpret evidence that was before the Syncrude DRC, I intend to disregard such arguments or interpretative suggestions. Indeed, the Syncrude DRC took the same approach. However, to the extent that the Simms Affidavit fills in evidentiary gaps between the evidence before the Syncrude DRC and what was ultimately included in the Certified Record of Proceedings, it ought to be admitted for the reasons above.

[64] After discussing some evidentiary rules relevant to the Syncrude DRC and the Minister's consideration, I will describe the disputed costs in a bit more detail, along with the Syncrude DRC's recommendations on each. I will then review the Minister's decision and determine whether, in all the circumstances, it was reasonable within the meaning of *Vavilov*.

7. The Disputed Costs

[65] The Syncrude DRC recommendations dealt with seven discreet categories of costs: Management Services Agreement, Stakeholder Relations, EUB Administration Fees, Membership Fees, Research, Employee Related Costs (SHEAP: Syncrude Higher Education Awards Program) and Plant 29 Construction Costs. The Minister's decision also uses this nomenclature, which is adopted here as well.

[66] As mentioned, the Minister cited the No New Information Rule as a reason for rejecting the Syncrude DRC recommendations for every single category of costs. The Additional Evidence Requirement was cited as an additional reason for rejecting the Syncrude DRC's recommendations on to stakeholder relations. Several Syncrude DRC recommendations were rejected based on inconsistencies with prior DRC reports.

[67] Unfortunately, other than citing these evidentiary rules, the Minister's decision contains virtually no application of them to the facts before her nor any comment on the reasoning of the Syncrude DRC as to when and how the evidentiary rules did and did not apply to the matter before them. Without more, it is impossible to determine whether her conclusions were reasonable.

[68] Due to the nature of her reasons and the fact that the matter is being remitted back to the Minister for reconsideration, my comments on the specific costs categories are limited.

a. Management Services Agreement (MSA) Overhead Costs

[69] Under the Amended and Restated Management, Business and Technical Services Agreement (MSA) dated May 1, 2007 between Syncrude and Imperial Oil Resources, Syncrude paid amounts to Imperial Oil for access to and use of a number of proprietary systems (listed at pages 25-27 of Syncrude's Brief). The charges have varied between approximately $25M and $47M annually.

[70] Schedule 2, Section 3(a) of the *OSRR 1997* says that management fees are not claimable if they are not paid for services or materials.

[71] The auditors said that Syncrude had not demonstrated a link between the claimed costs and any specific goods or services. They characterized it as overhead and not claimable under s.3(a) without further information tying particular expenses to particular services. The auditors and the Director also characterized Imperial as an affiliate of Syncrude.

[72] Syncrude has objected throughout that these costs could not be allocated in the way the Department wanted. It said that information showing that Syncrude's use of these systems to perform the tasks of employees, whose salaries and benefits were allowable costs, should suffice.

[73] The Syncrude DRC recommended allowing these costs (Syncrude DRC report paras.119-132). One member of the DRC dissented on this point, agreeing with the Department that Syncrude needed to do more to prove that the amounts paid on a flat-fee basis, as opposed to being paid on an hourly or daily basis, were properly claimed for services.

[74] The Syncrude DRC accepted Syncrude's arguments that:

(a) Syncrude was a QJVP, unlike Suncor and Imperial, and thus this cost needed to be evaluated under s.3(a) of Schedule 2 to the *OSRR 1997*, not Schedule 1. As a QJVP, there was less concern about allocating costs to a particular participant as Syncrude was the only participant;

(b) Under the "plain and unambiguous meaning of [s.3(a) of Schedule 2]...,management fees charged by an affiliate are allowable costs if they are for services or materials", which the Syncrude DRC found these were, as opposed to the auditors' characterization of these costs as unallocated or untraceable overhead. After outlining specific provisions of the MSA, the Syncrude DRC concluded, "The items covered...all appear to be services or materials and of value" (para.126).

(c) The MSA was negotiated between arms-length parties, creating an inference this was for fair market value; and

(d) The procurement of services and systems under the MSA allowed Syncrude to save significant amounts of money, increasing net revenue and thus royalties.

[75] The Minister rejected the Syncrude DRC's recommendation on the MSA costs, primarily on the basis that the "DRC's recommendations were based on information which should not have been considered under the No New Information Rule". With respect, that could only be said if it was clear that the Syncrude DRC had considered information not available to the auditors. However, the references to this in the Syncrude DRC report suggest that the auditors did receive additional information about these costs (see paras.110-112 of the Syncrude DRC Report).

[76] The other point made by the Minister in her one-paragraph dismissal of the MSA costs was her finding that the cost-savings to Syncrude were irrelevant and ought not to have factored into the Syncrude DRC analysis. It does seem counterintuitive to the determination of what costs are reasonable to completely disregard the savings and the resulting increase in net revenue and resulting royalties, although that could be explored or explained by the Minister on reconsideration.

[77] As with other dispositions by the Minister, there is simply no genuine analysis, no path to her conclusion other than a wholesale rejection of the Syncrude DRC's conclusions on why the No New Information Rule did not apply in the way urged by the Crown.

b. Stakeholder Relations

[78] These costs are for payments made to various stakeholders in the course of Syncrude obtaining its required regulatory permits. They total approximately $15.5M for the years 2002-2010 and include Syncrude's costs to study the effects of its operations on impacted communities, as well as consulting and planning with those communities to minimize the impact. These costs also include the provision of amenities and services made available to Syncrude employees, in the name of attracting and retaining a quality workforce.

[79] The Minister rejected these costs in their entirety. For the years 2006-2011, she rejected the Syncrude DRC recommendations because the panel failed to apply the No New Information Rule and incorrectly relied on information applicable to the 2002-2005 years in order to determine allowable costs for the years thereafter.

[80] The only reasoning provided is her statement that the Syncrude DRC had no basis on which to find that the Department had knowledge of information from prior years that it could and typically did apply to ongoing costs claims. However, that evidence came from the Department's own witnesses so it cannot be correct to say there was no basis for that finding. Further, the Suncor DRC acknowledged the ERCB requirement for these kinds of expenditures.

[81] The Minister also relied on the Additional Evidentiary Rule from the 2010 Suncor DRC. That decision, or more precisely the Minister's Order coming out of that DRC, said that the regulatory approval needed to expressly reference particular stakeholder commitments in order to recover those costs. Without something more, simply citing the Order does nothing to explain the Minister's reasoning about these costs, particularly in view of the Syncrude DRC's comprehensive treatment of the arguments on this issue.

[82] Even though the stakeholder relations costs for 2002-2005 were not subject to the No New Information Rule, the Minister rejected all those costs as well saying that building the workforce was an irrelevant consideration.

[83] It appears from the Syncrude DRC report that some of the costs claimed were for community services, including health care, housing, social services and education that would benefit the Syncrude workforce as well as the geographic community around the project. The Syncrude DRC concluded (paragraph 151 of the Syncrude DRC report) that "ensuring that amenities and services available in the region...are sufficient to enable it to attract and retain staff" was a necessary and allowable cost.

[84] Notwithstanding that the Minister said this was an irrelevant consideration, she did not address the same conclusion reached by the Suncor DRC which said:

> "*...it is reasonably well known that obtaining and retaining employees for these Projects has over the years been a challenge for the project owner. Non-financial rewards in the form of items that express appreciation to the employees in a variety of circumstances are in the opinion of the Committee a reasonable expenditure for the purpose of fostering employee loyalty. Keeping employees is clearly necessary for the carrying out of the activities described in section 2.*"

[85] While this passage may be more directly applicable to costs herein included in the SHEAP category, discussed below, to the extent that the Minister disallowed all costs from 2002-2005 on the basis that employee retention was irrelevant, she disregards her own prior decision. She may distinguish it but it is not reasonable to simply conclude that employee retention is now irrelevant without offering some path to understanding why.

c. EUB Administrative Fees

[86] Syncrude claims approximately $13.2M in costs relating to its payment of EUB administrative fees between 2003-2010, all of which were disallowed by the Minister. She lumped these in with Membership Fees and SHEAP costs and denied them all on the basis that: (1) the Syncrude DRC considered (unidentified) information in contravention of the No New Information Rule; and (2) their conclusion was inconsistent with prior DRCs (again, there is no indication in her Decision as to which DRCs she is referring to or in what way these recommendations were inconsistent therewith).

[87] The Crown argued before the Syncrude DRC that these costs had to be disallowed in order to be consistent with their treatment by the Imperial DRC in 2012. The Imperial DRC had disallowed these administrative fees because: (1) they were not costs incurred to obtain project approval; and (2) with multiple operations at play, the costs could not be attributable to any one project.

[88] Syncrude responded that as a single-project QJVP, the costs could be attributed to one project and that such administrative fees were not expressly excluded under Schedule 2 to the *OSRR 1997* the way they were under Schedule 1 (which had applied to Imperial). Further, even though the fees may not be required to obtain initial regulatory approval, they are required to be paid to operate the Project and thus, Syncrude argued and the Syncrude DRC accepted, a necessary cost of earning revenue.

[89] The Syncrude DRC's recommendation was to allow these fees for 2003-2008 and thereafter determine them under BROAM (which agreement was effective January 1, 2009).

[90] In my opinion, it is possible that the distinction between Schedules 1 and 2 to the *OSRR1997* may not assist Syncrude in this particular argument. These fees, even if there is only one project, might still be considered the cost of doing business. However, the Minister does not

address the impact of the application of a different schedule to Syncrude. At a minimum, while not obligated to address every argument before her, where she expressly rejects an argument, she is obligated to explain why she has done so.

d. Membership Fees

[91] The costs in this category, roughly $9.8M for the years 2001-2010, refer to membership fees in various industry and community organizations which Syncrude says were necessary to further the project. These included memberships in organizations like the Regional Infrastructure Working Group, the Fort McMurray Chamber of Commerce[1], CAPP, the Mining Association of Canada, the Oil Sands Safety Association, the Industrial Gas Consumers Association of Alberta, the Canadian Standards Association, the Aboriginal Human Resource Development Council of Canada, the Canadian Council for Aboriginals and the Northeastern Aboriginal Business Association.

[92] The Crown argued that these fees could not be attributable to one project and therefore could not be claimed by Syncrude. The Syncrude DRC used a somewhat more relaxed test, saying the fees did not have to be solely incurred in relation to a specific project but needed to be connected thereto. That verbiage mirrors the language from the Suncor DRC's general principles.

[93] Syncrude argued that these memberships allowed it to have input into industry decisions directly affecting its project and were necessary in order to meet its commitments to stakeholders. Syncrude said, and the DRC accepted, that these memberships also allowed Syncrude to procure services from some organizations that were directly beneficial to the project.

[94] The Minister rejected the membership fees based on the No New Information Rule and inconsistency with prior DRC findings.

[95] Syncrude relied on the evidence of Kara Flynn, Michael Daley and David Turner before the Syncrude DRC. To the extent that the Syncrude DRC approached that evidence in the manner described at paragraph 63 of these Reasons, then my comments on that approach remain the same. If the Minister felt that this Affidavit evidence was "new information", not just a new format for information already possessed by the Department, then she ought to have explained her rejection of the Syncrude DRC's approach.

[96] With respect to the purported inconsistency with prior DRC findings, the Crown argues that the Imperial DRC found that membership fees should be allowed where there was proof that they were required for approval. It should be noted that this is not adherence to the Additional Evidentiary Requirement, although it sounds similar. The Imperial DRC looked at Affidavit evidence to conclude it was a requirement of obtaining regulatory permits but it did not say that that requirement needed to be included in the approval or permit itself.

[97] Similarly, the Suncor DRC rejected some membership fees because the specific evidence before it did not establish the requisite necessity of the cost.

[1] During the Syncrude DRC hearing, it became apparent that the lion's share of the Chamber of Commerce expenditures were employee gift certificates, not membership fees. The $20,000 in fees was recommended to be allowed by the DRC but the balance of almost $1M paid to the Chamber was not and Syncrude did not pursue that portion. This $20,000 was the only portion of the claimed membership fees that was accepted by the Minister.

[98] The Minister's decision does not say whether, or in what respect, she was relying on the Imperial DRC and/or the Suncor DRC in rejecting this recommendation. Previous DRC findings can only bind subsequent fact-finding processes to the extent that the facts are the same. The Syncrude DRC found that the facts before it were not the same, in some respects, as the facts before the Imperial and Suncor DRCs. It was incumbent on the Minister to address the distinctions found by the Syncrude DRC even if her conclusions were different.

e. Research

[99] The Minister varied the recommendation of the Syncrude DRC to allow the claimed research costs of approximately $2M between 2003-2008. She accepted the research costs for 2003-2005 "to the extent they are attributable to Project Operations as defined in the applicable Project Approval Order". It is not clear, at least not to me, if this refers to a process under the Additional Evidence Requirement where Syncrude would need to tie a research cost to a particular operational description in its Approval Orders. Nor is it clear whether this is something Syncrude can do retroactively. The Minister may wish to clarify that direction, should it stand upon reconsideration.

[100] The Minister rejected all other research costs, based on the No New Information Rule and because of inconsistency with the Suncor DRC.

[101] The Affidavit of Mr. Malachy Carroll describing the research in more detail, considered by the Syncrude DRC was not provided until after 2005. However, the Syncrude DRC rejected the idea that some costs would be allowable in the 2003-2005 years but not thereafter simply because the Affidavit was filed later in time. There was no indication that the auditors did not have the same information regarding the type and application of this research after 2005 as they had before 2005. The Syncrude DRC therefore treated this as institutional knowledge, not requiring separate proof each year.

[102] Syncrude concedes that the Suncor DRC established a criterion of necessity for research costs but says that the scope of that is expanded in Schedule 2 to the *OSRR 1997* (for a QJVP). In other words, even if the research is more broadly-based and/or contributed to by other producers or operators as well, for a QJVP, it is, by definition, applicable only to that specific project. The Syncrude DRC accepted that distinction, finding that basic research could fit the definition in Schedule 2 and thus the cost was allowable by Syncrude where it had been treated differently for Suncor.

[103] The Minister's failure to address the implications of the application of a different Schedule of the *OSRR 1997*, as well as her blanket application of the No New Information Rule (when the Syncrude DRC expressly found this was not new information), means I cannot know whether her rejection of these recommendations was reasonable or not.

f. Syncrude Higher Education Program (SHEAP)

[104] SHEAP refers to a program created by Syncrude to provide for post-secondary grants for Syncrude employees, again to attract and retain a quality workforce.

[105] The Crown argued that this was not a necessary expense because there was no obligation on any parents to pay for their children's post-secondary studies, therefore the benefit accrued to the family members and not the employees. The Crown also argued that the Affidavit evidence explaining the SHEAP benefits in the context of employee retention could be used to explain the costs to 2005 but not beyond, according to the No New Information Rule.

[106] The Syncrude DRC, citing the Suncor DRC recommendations, said the SHEAP benefits were attributable to the Project because they were for the employees' benefit. The Syncrude DRC noted, as had the Suncor DRC, the difficulties with hiring and retaining a quality workforce for this work. Importantly, the Syncrude DRC said that, even without the Affidavit evidence provided by Syncrude, the purpose of the SHEAP program was self-evident.

[107] The Minister dealt with the EUB Administration Fees, the Syncrude Membership Fees and the SHEAP costs together, rejecting all of them based on the No New Information Rule and "inconsistent application of previous committee findings".

[108] The Syncrude DRC made it clear that it did not need to rely on Affidavit evidence that the Crown objected to and yet the Minister rejected the recommendations based on her conclusion that the panel members did rely on impermissible evidence.

[109] Further, she does not explain, in any way, how the Syncrude DRC's recommendations were inconsistent with previous DRC recommendations. The Syncrude DRC explicitly cited the Suncor and Imperial DRCs in this section and yet the Minister does not indicate what the inconsistency is or even whether she is referring to Imperial or Suncor or both.

g. Plant 29 Construction Costs

[110] In 2011, Syncrude built Plant 29. It claimed construction costs of $107.8M, which represented 35% of the construction costs incurred. This was Syncrude's calculation of the portion of plant processes chargeable to the royalty-paying bitumen project under another agreement between it and the Crown, the Bitumen Royalty Option Agreement Methodology (BROAM).

[111] The dispute here revolves around the purpose of Plant 29. While Plant 29 is an upgrader, Syncrude argued that it was not exclusively an upgrader. In the process of removing pollutants, the boilers constructed for the plant generated large amounts of steam, which could be and was used to provide energy to Syncrude's bitumen project. Syncrude relied on the evidence of Chris Austin and Kevin Idland to explain specific modifications to the Plant for this purpose, as well as Syncrude's requirement to incur this cost. Briefly, if the Plant 29 steam was not available to Syncrude, it would have to pay to acquire steam elsewhere or reduce bitumen production.

[112] The Crown pointed to the fact that Syncrude had classified Plant 29 as unrelated to its royalty-producing bitumen project under BROAM for 2009 and 2010. Syncrude argued this was an error which could and should be corrected as it changed only the calculations under BROAM, not the methodology itself. The Syncrude DRC agreed.

[113] The majority of the Syncrude DRC also said that the non-royalty aspect of Plant 29 did not mean that the steam generation for the royalty-producing project should be ignored. The dissenting member focussed on the primary function of Plant 29 and said it fell outside Syncrude's "Integrated Operations".

[114] The Minister accepted that characterization by the dissenting member. She also cited the No New Information Rule and inconsistent application of previous DRC findings. Lastly, she said that the cost-savings occasioned by using the steam from Plant 29 was irrelevant.

[115] Syncrude says this is an example of the Minister incorrectly relying on the No New Information Rule because the information in the Idland Affidavit and the Austin testimony had

been available to the auditors, who received detailed presentations on the purpose and operation of Plant 29.

[116] Syncrude also complains that Minister's rejection of these construction costs was based, at least in part, on a memo dated February 7, 2019 by her internal staff at the Department, reviewing the purpose and operation of Plant 29. In her decision, she says that the "DRC appeared to have misunderstood the function of Plant 29". Although she does specifically cite this post-DRC memo, that was its subject matter.

[117] Syncrude's complaint is that they knew nothing of this memo and so were never given an opportunity to respond to it before the Minister received and allegedly relied on its conclusions, which Syncrude says are incorrect. Syncrude goes further to say that her reliance on information never disclosed to them creates procedural unfairness which renders her decision unreasonable.

[118] It is not surprising that the Minister would seek the assistance of industry professionals within the Department to assist in analyzing any DRC recommendations of this sort. However, if she is relying on that information to make her decision, she should either provide an opportunity for the claimant to respond to it or, if she chooses not to do so, address the allegation of procedural unfairness that arises from proceeding in this manner; *Taylor Processing Inc v Alberta (Minister of Energy)*, 2023 ABKB 64 at para.66.

8. The Decision of the Minister

[119] The Minister rejected 8 of 12 recommendations, varied 2 recommendations and accepted 2 recommendations. However, this presentation is a bit misleading. She rejected the DRC recommendations to allow Syncrude's costs in all the foregoing categories; MSA, Stakeholder Relations, Plant 29, EUB Administration Fees, Membership Fees and SHEAP. The Research costs were allowed in part (conditionally allowed prior to 2005 but not for 2006 or thereafter).

[120] Within the Stakeholder Relations costs, she accepted the Syncrude DRC's recommendation that certificates purchased from the Chamber of Commerce could be allowed if it could be established that the auditors had the relevant information regarding those certificates at the time of their initial assessment (para.284 of the Syncrude DRC Report).

[121] The only "recommendations" she purported to accept were not really recommendations at all but rather the Syncrude DRC's recognition that general principles of prior DRCs applied to them (para.274 of the DRC Report) and that BROAM would apply where appropriate (para.285 of the Syncrude DRC Report).

[122] This review is not an appeal from the Minister's decisions. This Court has no jurisdiction to substitute its own conclusions on whether these recommendations should be accepted or not. The Minister has broad discretion to reject DRC recommendations if she choses. She is obligated only to review the recommendations and then to "make a decision to accept, reject or vary the recommendations of the committee"; s.9(2) *MMDRR*.

[123] The Crown also argued before me that I should not conflate the Minister's review of the Syncrude DRC recommendations with the type of judicial review engaged herein. The Crown says that the DRC is not a tribunal. It does not adjudicate but rather reviews disputes and makes non-binding recommendations to the Minister. However, the *MMDRR* still uses language about the nature and admissibility of evidence and language requiring a fair and impartial review, so the DRC hearings are clearly an adversarial process. That is self-evident in the fact that the

recommendations of a DRC generally involve preferring one party's position to the other and *ergo*, the Minister is doing so as well.

[124] As broad as her statutory discretion is, there is nothing in the statute that is contrary to or exempts her from the common law obligation that her decision be reasonable, both in the path to the result and in the result; see the discussion regarding *Vavilov* and *Newfoundland and Labrador Nurses Union*, paras. 41-44, above.

[125] The Alberta Court of Appeal has quashed decisions based on insufficiency of reasons numerous times; *International Brotherhood of Boilermakers v Alberta Labour Relations Board*, 2022 ABCA 139, *Cavendish Farms Corporation v Lethbridge (City)*, 2022 ABCA 312 at para. 25 and *R v Edama*, 2022 ABCA 394 at para.18.

[126] One must be cautious in applying this jurisprudence because these all involved the review of decisions of an administrative board, not a government minister. Some involve different levels of discretion or requirements for written reasons. However, in my view, if there was no requirement that a decision-maker's reasons must at least permit meaningful review, judicial review would serve no purpose whatsoever, despite its statutory existence. The following statement from *Boilermakers* applies squarely to this case:

> In *Vavilov* and other decisions the Supreme Court has stated that reasons serve three important purposes: to inform the parties of the decision, to provide public accountability and to permit review by a court: Edmonton (City of) v Edmonton Police Association, 2020 ABCA 182 at para 27. Reasons must demonstrate "justification, transparency and intelligibility": *Vavliov* at para 81.
>
> The principles of justification and transparency require that reasons be responsive to the central issues and concerns raised by the parties. These principles are related to the duty of procedural fairness and the right to be heard. Reasons are the primary mechanism by which decision makers demonstrate that they have listened to the parties: *Vavilov* at para 127.
>
> *Boilermakers*, paras.23-24.

[127] The Minister's decision focuses primarily on the general approach of the Syncrude DRC rather than its analysis of the evidence before it. Very little of the decision focuses on the recommendations to allow or disallow particular costs but rather repeats the conclusion that the Syncrude DRC was inconsistent with its application of prior DRC findings and that it ignored the No New Information Rule.

[128] Further, while her discussion about the prior DRC principles and the No New Information Rule were somewhat more comprehensive than her treatment of the recommendations on actual costs, even those sections are somewhat confusing and perhaps incomplete.

[129] For example, in her section on "General DRC Principles" (paras. 9-15 of her Decision), she appears to be addressing a rather discreet point relating to Stakeholder Relations costs. While the Crown had argued before the Syncrude DRC that these costs were subject to the Additional Evidentiary Requirement rule, the Syncrude DRC rejected that argument. Its reasons were laid out over approximately 9 pages and were described earlier (paras.20-28 of these Reasons). The

Syncrude DRC did not reject or refuse to apply the whole of the Suncor DRC but rather found it inapplicable to particular costs claims for these reasons.

[130] The Minister addressed the 2009 RAA briefly, but only to conclude that the Additional Evidentiary Requirement did not offend the 2009 RAA because that Agreement required notice of changes to the allowed costs rules had to be given to Syncrude and no such notice was ever issued; clearly circular reasoning. Other than that, she simply restated the rather self-evident conclusion that applying the Suncor DRC in some places and not in others was inconsistent, without addressing why an inconsistent application was found to be warranted by the Syncrude DRC.

[131] Her section on the No New Information Rule (paras.22-30) accuses the Syncrude DRC of ignoring the Rule. She rejects the distinction made by the Syncrude DRC between evidence and information, saying that evidence is a type or subset of information. As mentioned earlier, that is true but does not address the actual point of the Syncrude DRC which was that information available to the auditors should not become inadmissible just because it later takes the form of evidence. The Syncrude DRC expressly found that much of the "evidence" presented to it was the same information that had been available to the auditors and thus did not offend the No New Information Rule.

[132] Further, the Minister complains that the Syncrude DRC never put its mind to whether or what specific evidence could be properly considered but this is not accurate. The Syncrude DRC Report addresses this at paragraphs 32-50 and throughout (see, for example, paragraph 112 regarding the MSA, paragraphs 143-144 regarding Stakeholder Relations and their treatment of Kara Flynn's Affidavit, paragraph 157 regarding the Plant 29 Construction Costs and the Affidavits of Messrs. Austin and Idland and paragraphs 186-187 regarding research costs and Malachy Carroll's Affidavit).

[133] If this information was properly received by the panel, then the Minister's decision has failed to consider this evidence and might be unreasonable for that omission; *Vavilov* at para.86. But if she believes this evidence could not properly be considered, then at a minimum, she needed to deal with the analysis of the Syncrude DRC on the limitations of the No New Evidence Rule on the specific evidence before them.

[134] Without some logical explanation of why she rejects the reasoning of the Syncrude DRC, it is not possible to tell whether the disallowance of specific costs is reasonable or not. Where the Syncrude DRC gives comprehensive reasons for its treatment of certain evidence and its findings thereon and the Minister rejects that treatment and those findings, we must be able to discern why she has done so. It is reminiscent of Justice Renke's comments in *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at para 479 that "Simply repeating factors without showing how the factors were applied amounts to saying, 'I considered everything – trust me.'"

[135] As the Alberta Court of Appeal said:

> In our view, the reasons read as a repetition of relevant tests, followed by a bald conclusion they had not been met. As stated by the Supreme Court in *Vavilov* at para 102:

> Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment"
>
> A decision is unreasonable if the reasons read in conjunction with the record do not make it possible to understand the Board's reasoning on a critical point: *Vavilov* at para 103. That is the situation here. We are unable to discern the basis on which the Board's decision was made.
>
> *Boilermakers*, paras.34-35

[136] Syncrude also argues that the Minister relied on improper considerations, namely the financial repercussions of accepting or rejecting the Syncrude DRC recommendations. The Certified Record of Proceedings includes an internal memorandum dated August 3, 2019 and titled "Policy Implications of the Syncrude Dispute Committee Recommendations" that analyzed the financial ramifications of allowing the costs as recommended by the Syncrude DRC.

[137] I am aware that there is no obligation that the Minister refer to every bit of evidence in the record in her decision. But in omitting any reference to this memo, she left open to Syncrude the argument that the Minister relied on irrelevant considerations in making her decision. I was not provided with any authority as to whether financial considerations are or are not relevant in this context. This remains a possible issue as the matter returns to the Minister.

[138] In conclusion, the reasons for decision given by the Minister are not sufficient to allow me to assess whether her reasoning or her conclusions are reasonable. For that reason, her decision is quashed.

9. Remedy

[139] Syncrude urges me to direct the Minister to accept the Syncrude DRC recommendations rather than remitting the matter to the Minister for reconsideration. However, we begin with the assumption that the *de facto* remedy is to remit the matter for reconsideration to the body with the subject matter expertise. From *Vavilov*:

> Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see Delta Air Lines, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.
>
> Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In

reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines* , at paras. 30-31.

Vavilov, at paras.140-141

[140] There are cases where it is appropriate for the reviewing court to substitute its own direction. In *Shell Canada Limited v Alberta (Energy)*, 2022 ABQB 4, my brother, Justice Hall, was asked to and did quash the decision of the then-Minister, who had refused to constitute a DRC in a dispute between Shell and the Province. Rather than remit it back to the Minister for reconsideration, Justice Hall directed the constitution of a DRC.

[141] However, Justice Hall had a procedural "yes/no" question before him, which is much different than the case at bar. The decision to constitute a DRC may involve some industry knowledge but is not the kind of decision-making that a court would be less equipped to do. That is completely different than me making decisions about facility construction or the regulatory approval process, with no firsthand expert evidence to assist me. Those are the kind of things about which the Department of Energy employees and officials have industry expertise. That expertise is the reason that legislative deference to their procedures exists in the first place.

[142] 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.

[143] While I share concerns about the timeline of this litigation, in my view, it would be completely inappropriate to substitute my own views for that of the Minister.

[144] 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.

[145] In conclusion, the February 4, 2020 decision of the Minister of Energy, as referred to in Ministerial Order 1/2020 is quashed and remitted to the Minister for reconsideration.

Heard on the 11th day of March, 2022.
Dated at the City of Calgary, Alberta this 26th day of May 2023.

M.H. Hollins
J.C.K.B.A.

Appearances:

Clarke Hunter, KC
Bryan Walker
Meghan Parker
for the Applicant, Syncrude Canada Ltd.

Doreen Mueller, KC
Melissa Burkett
for the Respondents, Her Majesty the Queen
(now His Majesty the King) in Right of the Province of Alberta
as represented by the Minister of Energy and Alberta Energy

Schedule “A”

Schedule 2, Section 2 of *OSRR 1997*:

> **2** Subject to the other sections of this Schedule, a cost is an allowed cost of a Project only to the extent that
>
> (a) it is directly attributable to the Project,
>
> (b) it is reasonable in relation to the circumstances under which it is incurred,
>
> (c) it is incurred by or on behalf of the Project owners of the Project,
>
> (d) it is incurred on or after the effective date of the Project and on or before December 31, 2008, and
>
> (e) it is incurred to
>
> (i) recover oil sands from the development area of the Project,
>
> (ii) purchase oil sands products for processing or reprocessing in one or more processing plants that are part of the Project,
>
> (iii) process or reprocess oil sands or oil sands products in one or more processing plants that are part of the Project,
>
> (iv) process
>
> (A) oil sands or oil sands products recovered from the development area of the Project, or
>
> (B) oil sands products purchased and previously processed in one or more processing plants that are part of the Project, in one or more processing plants that are not part of the Project, before the oil sands products obtained as a result of such processing are delivered at a royalty calculation point,
>
> (v) transport oil sands and oil sands products from one part of the Project to another,
>
> (vi) transport oil sands and oil sands products described in subparagraph (iv)(A) or (B) from the Project to the processing plant or plants referred to in subparagraph (iv) that are not part of the Project,
>
> (vii) market an oil sands product obtained pursuant to the Project,

(viii) conduct planning, designing and engineering in relation to expansions of the Project,

(ix) conduct research that is directly attributable to the Project, or

(x) provide field, office, administrative or other services in relation to the activities described in subclauses (i) to (ix).[61]

Schedule 2, Section 3 of *OSRR97* states:

3 A cost is not an allowed cost of a Project

(a) if it is in respect of management fees that are charged by a Project owner or affiliate of a Project owner and which are not costs of services or materials,

(b) if it is on account of, in lieu of or in satisfaction of interest or any other borrowing or financing cost or any penalty or charge for late or deficient payment,

(c) if it is in respect of an overriding royalty interest, a carried interest, a net profit interest or any similar interest, other than an Overriding Royalty described in section 101(n) of Schedule 3 to the *Metis Settlements Act*,

(c.1) if it is an escalating rental paid under the *Oil Sands Tenure Regulation*,

(d) if it is incurred to acquire an interest or estate in mineral rights, except to the extent such cost is incurred to perform work on or in respect of the mineral rights included in the Project or to create wells, facilities, roads, pipelines or other assets or infrastructure that are part of the Project in order to earn the interest or estate,

(e) if it is in respect of depletion or depreciation,

(f) if it results from an act or omission that is a breach of any applicable laws, rules or regulations of a government or government agency,

(g) if it is incurred in relation to the marketing of an oil sands product by a person other than the operator of the Project,

(h) if it is a fee or expense of dispute resolution, including a referral under section 35 of this Regulation, of arbitration or of litigation, of any dispute with the Crown in connection with any matter relating to royalty, proceeds of royalty, interest or any penalty payable or paid to the Crown in relation to the Project,

(i) to the extent it would not be allowed as a deduction in computing income under the *Income Tax Act* (Canada) if it is in respect of the human consumption of food or beverages or the enjoyment of entertainment, or

(j) to the extent that

(i) any credits or discounts that are intended to reduce or offset a cost described in section 2 of this Schedule are actually received by the operator, a Project owner or an affiliate of either of them,

(ii) any economic assistance (other than economic assistance in the form of a reduction in income tax payable) that is intended to reduce or offset costs described in section 2 of this Schedule is provided by the Province of Alberta or the Government of Canada, or an agency of either, to the operator, a Project owner or an affiliate of either of them,

(iii) it is an allowed cost in respect of another Project, or

(iv) it is a cost deducted in the determination of unit price under this Regulation or in the determination of unit price under section 32 of the *Oil Sands Royalty Regulation, 2009*.