Date: 20081020

Docket: T-2013-07
T-78-08
T-1683-07

Citation: 2008 FC 1183

Vancouver, British Columbia, October 20, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

FRIENDS OF THE EARTH –
LES AMI(E)S DE LA TERRE

Applicant

and

THE GOVERNOR IN COUNCIL and
THE MINISTER OF THE ENVIRONMENT

Respondents

BETWEEN:

FRIENDS OF THE EARTH –
LES AMI(E)S DE LA TERRE

Applicant

and

THE GOVERNOR IN COUNCIL

Respondent

BETWEEN:

**FRIENDS OF THE EARTH –
LES AMI(E)S DE LA TERRE**

Applicant

and

THE MINISTER OF THE ENVIRONMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Friends of the Earth – Les Ami(e)s de la Terre (FOTE), is a Canadian not-for-profit organization with a mission to protect the national and global environment. It has 3,500 Canadian members and is part of an international federation representing 70 countries.

[2] FOTE brings three applications for judicial review before the Court each seeking declaratory and mandatory relief in connection with a succession of alleged breaches of duties said to arise under the *Kyoto Protocol Implementation Act*, 2007, c. 30 (KPIA). All three of the applications are closely related and they were ordered to be heard consecutively by an Order of Justice Anne Mactavish dated April 17, 2008. Because these applications are all based on common material facts and involve interrelated issues of statutory interpretation, it is appropriate to issue a single set of reasons.

[3] In its first application for judicial review (T-1683-07) FOTE alleges that the Minister of the Environment (Minister) failed to comply with the duty imposed upon him under s. 5 of the KPIA to

prepare an initial Climate Change Plan that fulfilled Canada's obligations under Article 3.1 of the Kyoto Protocol.[1]

[4] In its second application for judicial review (T-2013-07) FOTE alleges that the Governor In Council (GIC) failed to comply with s. 8 and 9 of the KPIA by failing to publish proposed regulations in the Canada Gazette with accompanying statements and by failing to prepare a statement within 120 days setting out the greenhouse gas emission reductions reasonably expected to result from each proposed regulatory change and from other proposed mitigation measures.

[5] FOTE's third application (T-78-08) concerns s. 7 of the KPIA. It alleges that the GIC failed in its duty within 180 days to make, amend or repeal regulations necessary to ensure that Canada meets its obligations under Article 3.1 of the Kyoto Protocol.

[6] FOTE argues that the language of s. 5, 7, 8 and 9 of the KPIA is unambiguous and mandatory. It says that the Respondents have refused to carry out the legal duties imposed upon them by Parliament and they have each thereby acted outside of the rule of law.

[7] The Respondents assert that the statutory duties that are the subject of these applications are not justiciable because they are not properly suited or amenable to judicial review. In particular, the Respondents say that the KPIA creates a system of Parliamentary accountability involving

---

[1] The *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (1998), 37 I.L.M. 22 (Kyoto Protocol). The Kyoto Protocol came into force in 2005. It commits developed countries to individual targets to limit or reduce their greenhouse gas emissions. Under the terms of the Kyoto Protocol, 37 developed countries (including

scientific, public policy and legislative choices that the Court cannot and should not assess. In short, they assert that their accountability for their failure to fulfill Canada's Kyoto obligations will be at the ballot box and cannot be in the courtroom.

a. Legislative History and Background

[8] Following its introduction to Parliament as a private member's bill (Bill C-288), the KPIA became law on June 22, 2007. The KPIA was not supported by the government which had earlier stated that Canada would not comply with the Kyoto Protocol targets. The KPIA thus embodies a legislative policy which is inconsistent with stated government policy. This also explains why the KPIA does not authorize the expenditure of public funds to achieve its objectives. A money bill cannot be introduced to Parliament unless it is presented by the government.

[9] The KPIA imposes a number of responsibilities upon the Minister and upon the GIC. A central element of the legislation requires the Minister to prepare an annual Climate Change Plan which describes "the measures to be taken [by the federal government] to ensure that Canada meets its [Kyoto] obligations". Each Plan must be tabled in Parliament and referred to an appropriate standing Committee. The KPIA also directs the GIC to make, amend or repeal environmental regulations to ensure, as well, that Canada complies with its Kyoto obligations; this provision is tied to others which create additional reporting functions all tied to various timelines for action.

Canada) and the European Economic Community (EEC) have ratified commitments that would cut their total emissions of greenhouse gases on average between 2008 and 2012 to levels 5% below 1990 levels.

[10] The Minister's initial Climate Change Plan was released on August 21, 2007. The Plan, on its face, acknowledges the responsibilities imposed by the KPIA upon the Minister and the GIC although, at least implicitly, it characterizes some of those responsibilities as discretionary. For instance, in describing the provisions of the KPIA dealing with regulatory change, the Plan states:

> With regard to Sections 6 through 8 of the Act, these call for the Government to regulate compliance with the Kyoto Protocol, but are silent on what types of regulation are expected and which sectors of society should shoulder the burden. The Governor-in-Council has discretion on whether and how best to regulate to meet legislative objectives, in order that the Government may pursue a balanced approach that protects both the environment and the economy. The Government is taking aggressive action to reduce greenhouse gases and will therefore continue to fulfil its proper role in Canada's parliamentary system by regulating where appropriate and in a balanced and responsible manner. In that context, this document elaborates on the Government's existing plan to regulate greenhouse gas emissions and air pollution, *Turning the Corner*.

[11] The Climate Change Plan also makes it very clear that the Government of Canada has no present intention to meet its Kyoto Protocol commitments. The Climate Change Plan does confirm Canada's ratification of the Kyoto Protocol, which requires a reduction of greenhouse gas emissions between 2008 and 2012 to levels below 1990 (base year) levels. The Climate Change Plan indicates that Canada's Kyoto target for emission reduction is 6% below 1990 levels. In March 2007 Canada declared its base year emissions to be 599 Mt CO_2 equivalent. For Canada to meet its Kyoto reduction targets its average annual greenhouse gas emissions between 2008 and 2012 are thus limited to 563 Mt CO_2 equivalent.

[12] Canada's greenhouse gas emissions have not declined. In fact, they have steadily increased since 1990 including during the period following Canada's ratification of the Kyoto Protocol. According to the Climate Change Plan that growth, if not constrained, is projected to lead to average annual emissions levels between 2008 and 2012 of 825 Mt CO_2 equivalent. Because of Canada's increasing post-Kyoto reliance on fossil fuels, the Climate Change Plan states that Canada would have to achieve an average 33% reduction in emissions each year for five years to meet the promise of 6% below base year levels. The Climate Change Plan also describes the government's position on the challenges it faces in complying with the Kyoto Protocol:

> Unfortunately, when cast against a timeframe that requires Canada to begin reducing its greenhouse gas emissions by one-third beginning in January 2008, it is evident that domestic action would have to be buttressed by some international purchase of emission credits. Even allowing for such purchases, the government would need to take further drastic action that would overwhelm the environmental and other benefits of action on climate change that Canadians are seeking. These measures would require placing the equivalent of a tax on energy, impacting both large industrial emitters of greenhouse gases and individual consumers. The Government has examined this scenario and rejected it as a viable policy option. Key conclusions under this scenario are presented below, while a more detailed account can be found in the Government's Report entitled *The Cost of Bill C-288 to Canadian Families and Business* at http://www.ec.gc.ca/doc/media/m_123/c1_eng.html.
>
> The Government's analysis, broadly endorsed by some of Canada's leading economists, indicates that Canadian Gross Domestic Product (GDP) would decline by more than 6.5% relative to current projections in 2008 as a result of strict adherence to the Kyoto Protocol's emission reduction target for Canada. This would imply a deep recession in 2008, with a one-year net loss of national economic activity in the range of $51 billion relative to 2007 levels. By way of comparison, the most severe recession in the post-World War II period for Canada, as measured by the fall in real GDP, was in 1981-1982. Real GDP fell 4.9% between the second quarter of 1981 and the fourth quarter of 1982.

> All provinces and sectors would experience significant declines in economic activity under this scenario, while employment levels would fall by about 1.7% (or 276,000 jobs) between 2007 and 2009. In addition, there would be a reduction of real per capita personal disposable income levels from forecast levels of around 2.5% in 2009 (or about $1,000 per Canadian in today's dollars).
>
> Meeting Canada's Kyoto Protocol target on the timeline proposed in the *Kyoto Protocol Implementation Act* would also have implications for energy prices faced by Canadian consumers. Natural gas prices could potentially more than double in the early years of the 2008-2012 period, while electricity prices could rise by about 50% on average after 2010. Prices for transportation fuels would also inevitably rise by a large margin – roughly 60%.
>
> These statistics demonstrate the immense challenges associated with trying to meet our Kyoto Protocol target following a decade in which our emissions have grown steadily.

[13] The Climate Change Plan sets new emission reduction targets well above Canada's Kyoto commitments based on a series of proposed regulatory changes, new conservation programs, research and development initiatives, incentives and collaborative action. All of these measures are projected to reduce Canada's average annual greenhouse gas emissions between 2008 and 2012 to 755 Mt CO_2 equivalent – a figure that is 34% higher than Canada's Kyoto target for those years.

[14] In accordance with s. 10.1 of the KPIA, the Climate Change Plan was submitted to the National Round Table on the Environment and the Economy (Round Table) for its analysis and advice. As required by that provision the Round Table undertook research and gathered information with respect to the Minister's Climate Change Plan and then it issued a report. The Round Table report examined the likelihood that the Climate Change Plan and accompanying

statement would be "reasonably expected" to achieve their stated objectives. The report describes the ongoing KPIA mandate of the Round Table as follows:

> The NRTEE further notes that since it is obligated to carry out this analytical function for 2007 through to 2012, its assessment must necessarily be considered an iterative one. It expects that further information and understanding about the actual versus expected outcomes set out in the government's Plan and Statement will emerge and evolve. As judgements about whether signatories to the Kyoto Protocol have met their obligations are withheld until the conclusion of the protocol's time period, so too must the NRTEE's final judgment and conclusion be cumulative. In short, this is the first word on the subject, not the last. Although the NRTEE believes that the analytical approach it has taken is pragmatic and appropriate, it should not therefore be seen in any way as comprehensive or definitive.

[15] What is clear from the Round Table report is that the Climate Change Plan was found, in a number of instances, to overestimate projected emissions reductions between 2008 and 2012 or to contain projections based on insufficient information. The Round Table report also noted that the mandate to establish the likelihood of emission reductions in a definitive way from the policy measures proposed and from the assumptions used in the Climate Change Plan was "extremely challenging", in part, because of the short timeframe permitted by the KPIA. The Round Table report concludes with the following observation about the emissions gap between Canada's Kyoto obligations and the projections contained within the Climate Change Plan:

> Statements and information contained in the government's Plan indicate that it is not pursuing a policy objective of meeting the Kyoto Protocol emissions reductions targets. The Plan explicitly states that the government will not participate directly in the purchase of Certified Emissions Reductions (CERs), also known as international credits. Therefore, the stated emissions reductions set out in the Plan would not be sufficient for Canada to comply with the Kyoto Protocol as domestic emissions reductions alone are

> insufficient to achieve its Kyoto obligations. While statements in the Plan are correct -- that non-compliance with the Kyoto Protocol can only be judged after the end of the commitment period in 2012 -- it is unlikely that the measures and regulations in the Plan will be sufficient to meet Canada's Kyoto obligations.
>
> As shown in Table 6, the projected emissions profile described in the Plan would leave Canada in non-compliance with the Kyoto Protocol. Canadian emissions would exceed their allowable units by 34%, with average excess emissions of 192.2 Mt/year.

[16] As can be seen the Round Table report is a fairly robust scientific critique of the Climate Change Plan at least insofar as it challenges many of the government's projected emission reduction outcomes and confirms that the Plan will not achieve Canada's initial Kyoto commitments.

[17] The evidence is uncontradicted that at the point of commencement of FOTE's second and third applications the GIC had not carried out any regulatory action as contemplated by s. 7, 8 and 9 of the KPIA.

II. Issues

[18] (a) What is the standard of review for the issues raised by these applications?

1. Does FOTE have standing to bring these applications?
2. Does s. 5 of the KPIA impose a justiciable duty upon the Minister to prepare and table a Climate Change Plan that is Kyoto compliant?
3. Do s. 7, 8 and 9 of the KPIA impose justiciable duties upon the GIC to make, amend or repeal environmental regulations within the timelines therein stated?

III. Analysis

Standard of Review

[19] I agree with counsel for the Respondents that the issue of justiciability is a threshold question of law which is not the proper subject of a standard of review analysis. The KPIA either imposes the legal duties postulated by FOTE or it does not and no question of deference arises on that issue.

Standing

[20] The Respondents have challenged the right or standing of FOTE to bring these applications but only on the basis of the justiciability of the issues FOTE raises. I am satisfied that FOTE has met the other requirements of public interest standing in that it has a genuine interest in the subject matter raised, there is a serious issue presented and there is no other reasonable and effective way to bring these matters before the Court: see *Canada Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236 at para. 37, 88 D.L.R. (4th) 193, and *Fraser v. Canada (Attorney General)* (2005), 51 Imm. L.R. (3d) 101, [2005] O.J. No. 5580 (Ont. S.C.J.) at paras. 51, 102 and 109. The issue of FOTE's standing will be resolved, therefore, solely on the basis of the justiciability of the substantive issues it raises.

The Principles of Statutory Interpretation and Justiciability

[21] The issues raised by these applications concern the interpretation of a number of the provisions of the KPIA to determine whether the responsibilities imposed respectively upon the Minister and the GIC are justiciable. Before examining the specific language of the KPIA relied

upon by FOTE, it is helpful to recall some of the general principles of statutory interpretation and justiciability.

Statutory Interpretation

[22] One of the guiding principles of statutory interpretation is that the search for the meaning of specific words or phrases is informed by the context of the entire statutory text. Words should not be construed in isolation from other surrounding language. Wherever possible the exercise is one of looking for internal consistency and harmony of the language used with the ultimate goal of advancing the intention of Parliament. A useful general statement of these points can be found in the following passage from *Ontario (Minister of Transport) v. Ryder Truck Rental Canada Ltd.* (2000), 47 O.R. (3d) 171, [2000] O.J. No. 297 (Ont. C.A.):

> [11] The modern approach to statutory interpretation calls on the court to interpret a legislative provision in its total context. The court should consider and take into account all relevant and admissible indicators of legislative meaning. The court's interpretation should comply with the legislative text, promote the legislative purpose, reflect the legislature's intent, and produce a reasonable and just meaning. The Supreme Court has repeatedly affirmed this approach to statutory interpretation, most recently in *R. v. Gladue*, [1999] 1 S.C.R. 688 at p. 704, 171 D.L.R. (4th) 385, where Cory and Iacobucci JJ. wrote:
>
> > As this Court has frequently stated, the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament. The purpose of the statute and the intention of Parliament, in particular, are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the Act's legislative history and the context of its enactment . . .

[23] In *Greenshields v. The Queen*, [1958] S.C.R. 216, 17 D.L.R. (2d) 33, Locke, J. observed at p. 225 that "a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest". It is presumed, of course, that Parliament is careful and consistent with its use of language and that the provisions of a statute fit together to form a coherent and workable scheme: see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at p. 283. This search for statutory coherence dictates that internal inconsistencies be minimized or avoided wherever possible: see *Willick v. Willick*, [1994] 3 S.C.R. 670 at p. 689, 119 D.L.R. (4th) 405 and *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27, 154 D.L.R. (4th) 193.

Justiciability

[24] The parties do not disagree about the principles of justiciability but only in their application in these proceedings. They agree, for instance, that even a largely political question can be judicially reviewed if it "possesses a sufficient legal component to warrant a decision by a court": see *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at para. 27, 83 D.L.R. (4th) 297. The disagreement here is whether the questions raised by these applications contain a sufficient legal component to permit judicial review. The problem, of course, is that "few share any precise sense of where the boundary between political and legal questions should be drawn": see Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999) at p. 133.

[25] One of the guiding principles of justiciability is that all of the branches of government must be sensitive to the separation of function within Canada's constitutional matrix so as not to inappropriately intrude into the spheres reserved to the other branches: see *Doucett-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at paras. 33 to 36 and *C.U.P.E. v. Canada (Minister of Health)*, 2004 FC 1334 at para. 39, 244 D.L.R. (4th) 175. Generally a court will not involve itself in the review of the actions or decisions of the executive or legislative branches where the subject matter of the dispute is either inappropriate for judicial involvement or where the court lacks the capacity to properly resolved it. These concerns are well expressed in *Boundaries of Judicial Review: The Law of Justiciability in Canada*, above, at pp. 4 and 5:

> Appropriateness not only includes both normative and positive elements, but also reflects an appreciation for both the capacities and legitimacy of judicial decision-making. Tom Cromwell (now Mr. Justice Cromwell of the Nova Scotia of Appeal) summarized this approach to justiciability in the following terms:
>
> > The justiciability of a matter refers to its being suitable for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors. This appropriateness may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it.
>
> While it is helpful to develop the criteria for a determination of justiciability, including factors such as institutional capacity and institutional legitimacy, it is necessary to leave the content of justiciability open-ended. We cannot state all the reasons why a matter may be non-justiciable. While justiciability will contain a diverse and shifting set of issues, in the final analysis, all one can

> assert with confidence is that there will always be, and always should be, a boundary between what courts should and should not decide, and further, that this boundary should correspond to predictable and coherent principles. As Galligan concludes, "Non-justiciability means no more and no less than that a matter is unsuitable for adjudication."
>
> [Footnotes omitted.] [Emphasis in original.]

[26] While the courts fulfill an obvious role in the interpretation and enforcement of statutory obligations, Parliament can, within the limits of the constitution, reserve to itself the sole enforcement role: see *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, [1989] S.C.J. No. 80 at paras. 68 to 70. Such a Parliamentary intent must be derived from an interpretation of the statutory provisions in issue – a task which may be informed, in part, by considering the appropriateness of judicial decision-making in the context of policy choices or conflicting scientific predictions.

Are the Issues Raised by These Applications Justiciable?

[27] The question presented by FOTE's first application is whether, under s. 5 of the KPIA, the Minister is permitted as a matter of law to tender a Climate Change Plan that, on its face, is non-compliant with Canada's Kyoto obligations. In other words, does the KPIA contemplate judicial review in a situation like this where the government declares to Parliament and to Canadians that it will not, for reasons of public policy, meet or attempt to meet the emissions targets established by the Kyoto Protocol.

[28] The question posed by FOTE's second and third applications concerns the right of the Court to involve itself in the regulatory business of the executive branch of government.

[29] Section 5 of the KPIA deals with the Minister's duty to prepare an annual Climate Change Plan. FOTE relies heavily on the opening language of s. 5 which speaks to a Climate Change Plan that ensures that Canada meets its Kyoto obligations. FOTE says quite simply that the Minister's Climate Change Plan does not ensure Kyoto compliance because it expressly acknowledges non-compliance.

[30] FOTE advances much the same argument with respect to s. 7 and 9 of the KPIA. Those provisions similarly impose responsibilities on the GIC and on the Minister to ensure, by various means, that Canada meets its Kyoto obligations. Section 8 of the KPIA requires the GIC to pre-publish for consultation any proposed environmental regulations made pursuant to s. 7 with accompanying efficacy statements. Section 9 is also linked to s. 7 because it requires the Minister to prepare a statement concerning the emission reductions anticipated from any regulation created under s. 7. The justiciability of the s. 8 and 9 obligations is, therefore, dependant upon the authority of the Court to order the GIC to make, amend, or repeal the environmental regulations referenced in s. 7.

[31] The justiciability of all of these issues is a matter of statutory interpretation directed at identifying Parliamentary intent: in particular, whether Parliament intended that the statutory duties

imposed upon the Minister and upon the GIC by the KPIA be subjected to judicial scrutiny and remediation.

[32] All of the statutory provisions which are the subject of FOTE's applications are linked to one another and, in order to construe any one of them, it is necessary to consider all of them. I have added emphasis to the provisions that are of particular significance to these applications. Sections 5, 6, 7, 8, 9, 10 and 10.1 of the KPIA state the following:

5. (1) Within 60 days after this Act comes into force and not later than May 31 of every year thereafter until 2013, the Minister shall prepare a Climate Change Plan that includes	5. (1) Dans les soixante jours suivant l'entrée en vigueur de la présente loi et au plus tard le 31 mai de chaque année subséquente jusqu'en 2013, le ministre établit un Plan sur les changements climatiques qui contient notamment les éléments suivants :
(a) a description of the measures to be taken to ensure that Canada meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol, including measures respecting	a) une description des mesures à prendre afin d'assurer le respect des engagements du Canada aux termes de l'article 3, paragraphe 1, du Protocole de Kyoto, y compris :
(i) regulated emission limits and perform-ance standards,	(i) les réductions des émissions et les normes de rendement réglementées,
(ii) market-based mechanisms such as emissions trading or offsets,	(ii) les mécanismes axés sur les conditions du marché, tels que les échanges ou les compensations

	d’émissions,
(iii) spending or fiscal measures or incentives,	(iii) l’affectation de fonds ou les mesures ou incitatifs fiscaux,
(iii.1) a just transition for workers affected by greenhouse gas emission reductions, and	(iii.1) les mesures pour prévoir une transition équitable à l’égard des travailleurs touchés par les réductions d’émissions de gaz à effet de serre,
(iv) cooperative measures or agreements with provinces, territories or other governments;	(iv) la collaboration ou les accords avec les provinces, les territoires ou d’autres gouvernements;
(b) for each measure referred to in paragraph (a),	b) pour chaque mesure visée à l’alinéa a) :
(i) the date on which it will come into effect, and	(i) la date de sa prise d’effet,
(ii) the amount of greenhouse gas emission reductions that have resulted or are expected to result for each year up to and including 2012, compared to the levels in the most recently available emission inventory for Canada;	(ii) la quantité de réductions d’émissions de gaz à effet de serre qui ont été réalisées ou qui sont anticipées, pour chaque année jusqu’en 2012, à partir des niveaux d’émissions les plus récents établis pour le Canada;

(c) the projected greenhouse gas emission level in Canada for each year from 2008 to 2012, taking into account the measures referred to in paragraph (a), and a comparison of those levels with Canada's obligations under Article 3, paragraph 1, of the Kyoto Protocol;

c) le niveau projeté d'émissions de gaz à effet de serre au Canada pour chaque année de la période de 2008 à 2012, compte tenu des mesures visées à l'alinéa a), et une comparaison de ces niveaux avec les engagements du Canada aux termes de l'article 3, paragraphe 1, du Protocole de Kyoto;

(d) an equitable distribution of greenhouse gas emission reduction levels among the sectors of the economy that contribute to greenhouse gas emissions;

d) une répartition équitable des niveaux de réduction des émissions de gaz à effet de serre entre les secteurs de l'économie qui contribuent aux émissions de gaz à effet de serre;

(e) a report describing the implementation of the Climate Change Plan for the previous calendar year; and

e) un rapport faisant état de la mise en oeuvre du Plan sur les changements climatiques pour l'année civile précédente;

(f) a statement indicating whether each measure proposed in the Climate Change Plan for the previous calendar year has been implemented by the date projected in the Plan and, if not, an explanation of the reason why the measure was not implemented and how that failure has been or will be

f) un exposé indiquant si chaque mesure proposée dans le Plan sur les changements climatiques pour l'année civile précédente a été mise en oeuvre au plus tard à la date qui y était prévue et, sinon, une explication des raisons pour lesquelles elle n'a pas été mise en oeuvre et les mesures correctives qui ont été ou seront prises.

redressed.

Provinces

(2) A Climate Change Plan shall respect provincial jurisdiction and take into account the relative greenhouse gas emission levels of provinces.

Publication

(3) The Minister shall publish

(a) within 2 days after the expiry of each period referred to in subsection (1), a Climate Change Plan in any manner the Minister considers appropriate, with an indication that persons may submit comments about the Plan to the Minister within 30 days of the Plan's publication; and

(b) within 10 days after the expiry of each period referred to in subsection (1), a notice of the publication of the Plan in the Canada Gazette.

Tabling

(4) The Minister shall table each Climate Change Plan in each House of Parliament by the day set out in subsection (1) or on any of the first three days on which that House is sitting after that day.

Committee

Provinces

(2) Chaque Plan sur les changements climatiques doit respecter les compétences provinciales et tenir compte des niveaux respectifs des émissions de gaz à effet de serre des provinces.

Publication

(3) Le ministre publie :

a) dans les deux jours suivant l'expiration du délai prévu au paragraphe (1), un Plan sur les changements climatiques de toute façon qu'il estime indiquée, en y précisant que les intéressés peuvent présenter leurs observations sur ce plan au ministre dans les trente jours suivant la date de publication;

b) dans les dix jours suivant l'expiration de chaque délai prévu au paragraphe (1), un avis de la publication du Plan dans la Gazette du Canada.

Dépôt

(4) Le ministre dépose chaque Plan sur les changements climatiques devant chacune des deux chambres du Parlement dans le délai prévu au paragraphe (1) ou dans les trois premiers jours de séance de celle-ci suivant le délai.

Comité

(5) A Climate Change Plan that is laid before the House of Commons is deemed to be referred to the standing committee of the House that normally considers matters relating to the environment or to any other committee that that House may designate for the purposes of this section.

(5) Le Plan sur les changements climatiques qui est déposé devant la Chambre des communes est réputé renvoyé au comité permanent de la Chambre qui étudie habituellement les questions portant sur l'environnement ou à tout autre comité que la Chambre peut désigner pour l'application du présent article.

Regulations

Règlements

6. (1) The Governor in Council may make regulations

6. (1) Le gouverneur en conseil peut, par règlement :

(a) limiting the amount of greenhouse gases that may be released into the environment;

a) limiter la quantité de gaz à effet de serre qui peut être libérée dans l'environnement;

(a.1) within the limits of federal constitutional authority, limiting the amount of greenhouse gases that may be released in each province by applying to each province Article 3, paragraphs 1, 3, 4, 7, 8, and 10 to 12, of the Kyoto Protocol, with any modifications that the circumstances require;

a.1) dans les limites des compétences constitutionnelles fédérales, de limiter la quantité de gaz à effet de serre qui peut être libérée dans chaque province en appliquant à chacune l'article 3, paragraphes 1, 3, 4, 7, 8 et 10 à 12 du Protocole de Kyoto, avec les adaptations nécessaires;

(b) establishing performance standards designed to limit greenhouse gas emissions;

b) établir des normes de performance conçues pour limiter les émissions de gaz à effet de serre;

(c) respecting the use or production of any equipment, technology, fuel, vehicle or process in order to limit greenhouse gas emissions;

c) régir l'utilisation ou la production d'équipements, de technologies, de combustibles, de véhicules ou de procédés afin de limiter les émissions de gaz à effet de serre;

(d) respecting permits or approvals for the release of any greenhouse gas;

d) régir les permis ou autorisations nécessaires à la libération de gaz à effet de serre;

(e) respecting trading in greenhouse gas emission reductions, removals, permits, credits, or other units;

e) régir les échanges en matière de réductions des émissions de gaz à effet de serre, d'absorptions, de permis, de crédits ou d'autres unités;

(f) respecting monitoring, inspections, investigations, reporting, enforcement, penalties or other matters to promote compliance with regulations made under this Act;

f) régir la surveillance, les inspections, les enquêtes, les rapports, les mesures d'application, les peines et les autres questions visant à favoriser la conformité aux règlements pris en vertu de la présente loi;

(g) designating the contravention of a provision or class of provisions of the regulations by a person or class of persons as an offence punishable by indictment or on summary conviction and prescribing, for a person or class of persons, the amount of the fine and

g) désigner la contravention à une disposition ou une catégorie de dispositions des règlements commise par une personne ou une catégorie de personnes comme une infraction punissable sur déclaration de culpabilité par acte d'accusation ou par procédure sommaire

imprisonment for the offence; and	et imposer, à l'égard de cette personne ou catégorie de personnes, le montant de l'amende et la durée de l'emprisonnement;
(h) respecting any other matter that is necessary to carry out the purposes of this Act.	h) régir toute autre question nécessaire à l'application de la présente loi.
Measures province considers appropriate	Mesures qu'une province considère appropriées
(2) Despite paragraph (1)(a.1), and for greater certainty, each province may take any measure that it considers appropriate to limit greenhouse gas emissions.	(2) Malgré l'alinéa (1)a.1), il est entendu que chaque province peut mettre en oeuvre les mesures qu'elle juge appropriées pour limiter les émissions de gaz à effet de serre.
Obligation to implement Kyoto Protocol	Obligation de mettre en oeuvre le Protocole de Kyoto
7. (1) Within 180 days after this Act comes into force, the Governor in Council shall ensure that Canada fully meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol by making, amending or repealing the necessary regulations under this or any other Act.	7. (1) Dans les cent quatre-vingts jours suivant l'entrée en vigueur de la présente loi, le gouverneur en conseil veille à ce que le Canada honore les engagements qu'il a pris en vertu de l'article 3, paragraphe 1, du Protocole de Kyoto en prenant, modifiant ou abrogeant les règlements appropriés en vertu de la présente loi ou de toute autre loi.
Obligation to maintain implementation of Kyoto Protocol	Obligation de préserver la mise en oeuvre du Protocole de Kyoto
(2) At all times after the period	(2) En tout temps après la

referred to in subsection (1), the Governor in Council shall ensure that Canada fully meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol by making, amending or repealing the necessary regulations under this or any other Act.	période prévue au paragraphe (1), le gouverneur en conseil veille à ce que le Canada honore les engagements qu'il a pris en vertu de l'article 3, paragraphe 1, du Protocole de Kyoto en prenant, modifiant ou abrogeant les règlements appropriés en vertu de la présente loi ou de toute autre loi.
Other governmental measures	Autres mesures gouvernementales
(3) In ensuring that Canada fully meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol, pursuant to subsections (1) and (2), the Governor in Council may take into account any reductions in greenhouse gas emissions that are reasonably expected to result from the implementation of other governmental measures, including spending and federal-provincial agreements.	(3) Pour la prise de toute mesure au titre des paragraphes (1) et (2), le gouverneur en conseil peut prendre en considération les réductions d'émissions de gaz à effet de serre auxquelles il est raisonnable de s'attendre après la mise en oeuvre d'autres mesures gouvernementales, notamment l'affectation de fonds et la conclusion d'accords fédéro-provinciaux.
Consultation for proposed regulations	Consultations sur le projet de règlement
8. At least 60 days before making a regulation under this Act or, with respect to subsections 7(1) and (2), any other Act, the Governor in Council shall publish the proposed regulation in the Canada Gazette for consultation purposes with statements:	8. Au moins soixante jours avant la prise d'un règlement sous le régime de la présente loi ou, en ce qui concerne les paragraphes 7(1) et (2), de toute autre loi, le gouverneur en conseil publie le projet de règlement dans la Gazette du Canada, pour consultation, accompagné de déclarations :

(a) setting out the greenhouse gas emission reductions that are reasonably expected to result from the regulation for every year it will be in force, up to and including 2012; and	a) énonçant les réductions d'émissions de gaz à effet de serre auxquelles il est raisonnable de s'attendre à la suite de la prise du règlement pour chaque année qu'il demeurera en vigueur au cours de la période se terminant en 2012;
(b) indicating that persons may submit comments to the Minister within 30 days after the publication of the regulation.	b) indiquant les personnes qui peuvent présenter des observations au ministre dans les trente jours suivant la publication du règlement.
9. (1) Within 120 days after this Act comes into force, the Minister shall prepare a statement setting out the greenhouse gas emission reductions that are reasonably expected to result for each year up to and including 2012 from	9. (1) Dans les cent vingt jours suivant l'entrée en vigueur de la présente loi, le ministre prépare une déclaration dans laquelle il énonce les réductions d'émissions de gaz à effet de serre auxquelles il est raisonnable de s'attendre chaque année au cours de la période se terminant en 2012 à la suite de :
(a) each regulation made or to be made to ensure that Canada fully meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol, pursuant to subsections 7(1) and (2); and	a) chaque règlement qui a été pris ou qui sera pris afin d'assurer que le Canada respecte tous les engagements qu'il a pris en vertu de l'article 3, paragraphe 1, du Protocole de Kyoto, en application des paragraphes 7(1) et (2);
(b) each measure	b) toute mesure visée au

referred to in subsection 7(3).

paragraphe 7(3).

Minister

Ministre

(2) The Minister shall

(2) Le ministre :

(a) publish the statement in the Canada Gazette and in any other manner that the Minister considers appropriate within 10 days of the period set out in subsection (1); and

a) publie la déclaration dans la Gazette du Canada et de toute autre façon qu'il estime indiquée dans les dix jours suivant le délai prévu au paragraphe (1);

(b) table the statement in each House of Parliament by the day set out in subsection (1) or on any of the first three days on which that House is sitting after that day.

b) dépose la déclaration devant chacune des chambres du Parlement dans le délai prévu au paragraphe (1) ou dans les trois premiers jours de séance de cette chambre suivant le délai.

REPORT

RAPPORT

National Round Table on the Environment and the Economy

Table ronde nationale sur l'environnement et l'économie

10. (1) Within 60 days after the Minister publishes a Climate Change Plan under subsection 5(3), or within 30 days after the Minister publishes a statement under subsection 9(2), the National Round Table on the Environment and the Economy established by section 3 of the National Round Table on the Environment and the Economy Act shall perform the following with respect to the Plan or statement:

10. (1) Dans les soixante jours suivant la publication par le ministre du Plan sur les changements climatiques en vertu du paragraphe 5(3) ou dans les trente jours suivant la publication par le ministre d'une déclaration en vertu du paragraphe 9(2), la Table ronde nationale sur l'environnement et l'économie constituée par l'article 3 de la Loi sur la Table ronde nationale sur l'environnement et l'économie

	exécute les fonctions suivantes quant au Plan ou à la déclaration :
(a) undertake research and gather information and analyses on the Plan or statement in the context of sustainable development; and	a) effectuer des recherches et recueillir de l'information et des données provenant d'analyses sur le Plan ou la déclaration dans le contexte du développement durable;
(b) advise the Minister on issues that are within its purpose, as set out in section 4 of the National Round Table on the Environment and the Economy Act, including the following, to the extent that they are within that purpose:	b) conseille le ministre sur les questions qui relèvent de sa mission, telle qu'elle est définie à l'article 4 de la Loi sur la Table ronde nationale sur l'environnement et l'économie, notamment, dans les limites de sa mission :
(i) the likelihood that each of the proposed measures or regulations will achieve the emission reductions projected in the Plan or statement,	(i) sur la probabilité que chacun des règlements ou des mesures projetés atteignent les réductions d'émissions anticipées dans le Plan ou la déclaration,
(ii) the likelihood that the proposed measures or regulations will enable Canada to meet its obligations under Article 3, paragraph 1, of the Kyoto Protocol, and	(ii) sur la probabilité que l'ensemble des mesures ou des règlements projetés permettent au Canada de respecter ses engagements en vertu de l'article 3, paragraphe 1, du Protocole de Kyoto,

(iii) any other matters that the Round Table considers relevant.	(iii) sur toute autre question qu'elle estime pertinente.
Minister	Ministre
(2) The Minister shall (a) within three days after receiving the advice referred to in paragraph (1)(b):	(2) Le ministre : a) dans les trois jours après avoir reçu les conseils visés à l'alinéa (1)b) :
(i) publish it in any manner that the Minister considers appropriate, and	(i) les publie de la façon qu'il juge appropriée,
(ii) submit it to the Speakers of the Senate and the House of Commons and the Speakers shall table it in their respective Houses on any of the first three days on which that House is sitting after the day on which the Speaker receives the advice; and	(ii) les présente aux présidents du Sénat et de la Chambre des communes, lesquels les déposent devant leur chambre respective dans les trois premiers jours de séance de celle-ci suivant leur réception;
(b) within 10 days after receiving the advice, publish a notice in the Canada Gazette setting out how the advice was published and how a copy of the publication may be obtained.	b) dans les dix jours suivant la réception des conseils, publie dans la Gazette du Canada un avis précisant la façon dont les conseils ont été publiés et la façon d'en obtenir une copie.
Commissioner of the Environment and Sustainable	Commissaire à l'environnement et au développement durable

Development

10.1 (1) At least once every two years after this Act comes into force, up to and including 2012, the Commissioner of the Environment and Sustainable Development shall prepare a report that includes

10.1 (1) Au moins tous les deux ans suivant l'entrée en vigueur de la présente loi, et ce jusqu'en 2012, le commissaire à l'environnement et au développement durable prépare un rapport renfermant notamment :

(a) an analysis of Canada's progress in implementing the Climate Change Plans;

a) une analyse des progrès réalisés par le Canada pour mettre en oeuvre les plans sur les changements climatiques;

(b) an analysis of Canada's progress in meeting its obligations under Article 3, paragraph 1, of the Kyoto Protocol; and

b) une analyse des progrès réalisés par le Canada pour respecter ses engagements en vertu de l'article 3, paragraphe 1, du Protocole de Kyoto;

(c) any observations and recommendations on any matter that the Commissioner considers relevant.

c) toutes autres observations et recommandations sur toute question qu'il estime pertinente.

Publication of report

(2) The Commissioner shall publish the report in any manner the Commissioner considers appropriate within the period referred to in subsection (1).

Publication du rapport

(2) Le commissaire publie le rapport de la façon qu'il juge appropriée dans le délai prévu au paragraphe (1).

Report to the House of Commons

(3) The Commissioner shall

Rapport présenté à la Chambre des communes

(3) Le commissaire présente le

submit the report to the Speaker of the House of Commons on or before the day it is published, and the Speaker shall table the report in the House on any of the first three days on which that House is sitting after the Speaker receives it.	rapport au président de la Chambre des communes au plus tard le jour où il est publié et le président le dépose devant la Chambre dans les trois premiers jours de séance de celle-ci suivant sa réception.
[Emphasis added]	[Je souligne]

Section 5

[33] If the intent of s. 5 of the Act was to ensure that the Government of Canada strictly complied with Canada's Kyoto obligations, the approach taken was unduly cumbersome. Indeed, a simple and unequivocal statement of such an intent would not have been difficult to draft. Instead s. 5 couples the responsibility of ensuring Kyoto compliance with a series of stated measures some of which are well outside of the proper realm of judicial review. For instance, s. 5(1)(a)(iii.1) requires that a Climate Change Plan provide for a just transition for workers affected by greenhouse gas emission reductions and s. 5(1)(d) requires an equitable distribution of reduction levels among the sectors of the economy that contribute to greenhouse gas emissions. These are policy-laden considerations which are not the proper subject matter for judicial review. That is so because there are no objective legal criteria which can be applied and no facts to be determined which would allow a Court to decide whether compliance had been achieved: see *Chiasson v. Canada*, 2003 FCA 155, 226 D.L.R. (4th) 351 at para. 8.

[34] It is not appropriate for the Court to parse the language of s. 5 into justiciable and non-justiciable components, at least, insofar as that language deals with the content of a Climate Change

Plan. This provision must be read as a whole and it cannot be judicially enforced on a piecemeal basis. While the failure of the Minister to prepare a Climate Change Plan may well be justiciable, an evaluation of its content is not. Indeed the various obligations under the Act for the Minister and others to prepare, publish and table the required reports, regulations and statements are all coupled with the mandatory term "shall". That word is construed as imperative in a statutory context, and when used it almost always creates a mandatory obligation: see the *Interpretation Act*, R.S.C., 1985, c. I-21, s. 11. So far as I can determine, the word "ensure" found in s. 5 and elsewhere in the KPIA is not commonly used in the context of statutory interpretation to indicate an imperative.

[35] There are other reasons for not construing the words in s. 5 "to ensure that Canada meets its [Kyoto] obligations" as creating justiciable duties. The Act contemplates an ongoing process of review and adjustment within a continuously evolving scientific and political environment. It refers to cooperative initiatives with third parties including provincial authorities and industry. These are not matters that can be completely controlled by the Government of Canada such that it could unilaterally ensure Kyoto compliance within any particular timeframe. The Act also recognizes that the implementation of any given Climate Change Plan may not be fully accomplished in any given year. This is the obvious purpose of ss. 5(1)(f), which allows for a failure to implement any of the required remedial measures for ensuring Kyoto compliance in a given year. Any such failure must be explained by the Minister in the succeeding Climate Change Plan to be tabled in Parliament, but it is implicit in this provision that strict compliance with the Kyoto emission obligations in the context of any particular Climate Change Plan is not required by s. 5.

[36] Furthermore, if the Court is not permitted by the principles of justiciability to examine the substantive merits of a Climate Change Plan that dubiously claimed Kyoto compliance, it would be incongruous for the Court to be able to order the Minister to prepare a compliant Plan where he has deliberately and transparently declined to do so for reasons of public policy.

Section 7

[37] That the words "to ensure" used in s. 5 of the Act reflect only a permissive intent is also indicated by the use of those words in s. 7 of the Act dealing with the authority of the GIC to pass, repeal or amend environmental regulations.

[38] An isolated and strictly literal interpretation of ss. 7(1) would suggest that the GIC had a duty to make all of the regulatory changes required to ensure Kyoto compliance within 180 days of the Act coming into force. Such a construction is, however, incompatible with the practical realities of making such regulatory changes, and is also inconsistent with the language of ss. 7(2) which allows the GIC at any time after the passage of the Act to make further regulatory changes to also "ensure" that Canada meets its Kyoto obligations. These two provisions are difficult to fully reconcile but the apparent intent is to allow for an ongoing process to regulate Kyoto compliance, with the initial 180-day timeframe being merely directory or suggestive. I note, as well, that s. 6 of Act says only that the GIC "may" make regulations. That language is clearly not mandatory. This, I think, was the basis for the admonition by Lord Browne-Wilkinson in *R. v. Secretary of State for the Home Department*, [1995] 2 ALL E.R. 244 (H.L.), to the effect that without clear statutory language the courts have no role to play to in requiring legislation to be implemented. This, he said,

would tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction. The language of ss. 7(1) and ss. 7(2) is sufficiently unclear that I do not think that it was intended to override the clearly permissive meaning of the words "may make regulations" in ss. 6(1) of the Act.

[39] The argument that ss. 7(1) creates a justiciable duty is further weakened by the problem facing the Court for crafting a meaningful remedy. FOTE concedes that the Court cannot dictate what it was that the GIC must have done to regulate compliance with Kyoto. Nevertheless, it argues that the GIC had a residual duty to do something of a regulatory nature within 180 days of the KPIA becoming law. It is undeniable that an attempt by the Court to dictate the content of the proposed regulatory arrangements would be an inappropriate interference with the executive role. The idea that the Court should declare that the GIC had a legal duty to make some sort of regulatory adjustment within 180 days, however insignificant that response might have been, has very little appeal and seems to me to pose an unsatisfactory role for the Court. In *R. v. Secretary of State*, above, Lord Nicholls declined to recognize as justiciable a statutory duty requiring the Secretary of State to appoint a date for the commencement of certain statutory provisions. Lord Nicholls was concerned about the judicial enforcement of a duty that was "substantially empty of content" and where the Minister's substantive decision involved consideration of a "wide range of circumstances".

[40] Given that the Court is in no position to consider or to dictate the substance of the regulatory scheme anticipated by the Act, it seems to me to be highly unlikely that Parliament intended that the 180-day timeframe be mandatory and justiciable. Indeed, I question whether, outside of the

constitutional context, the Court has any role to play in controlling or directing the other branches of government in the conduct of their legislative and regulatory functions. This was the view of Justice Barry Strayer in *Alexander Band No. 134 v. Canada (Minister of Indian Affairs and Northern Development)*, [1991] 2 F.C. 3, [1990] F.C.J. No. 1085, where he observed that the enactment of regulations must be seen as primarily the performance of a political duty which is not judicially enforceable. Support for this view can also be found in the following passage from the decision of Justice Steele in *Re Pim and Minister of the Environment*, [1978] 23 O.R. (2d) 45, 94 D.L.R. (3d) 254 (Ont. H.C. (Div. Ct.)) at p. 9:

> 21 It may not be necessary to add anything further, but if it is, it is my opinion that I would not exercise the discretion of the Court with respect to the application in the nature of mandamus. I would dismiss that application because even if there had been a mandatory date for the Lieutenant-Governor in Council to enact Regulations which I have found there was not, I believe that it would be totally improper for this Court to order the Lieutenant-Governor in Council to enact Regulations relating to a matter of which the Court has no knowledge. The Court has no concept of what should be included therein or within what time frame they should be made. This is not the type of case where a mandatory order of the Court could properly be enforced by the Court and, therefore, it should not be granted.

A very similar view was expressed by Justice Richard Mosley in *Canadian Union of Public Employees v. Canada (Minister of Health)*, 2004 FC 1334, [2004] F.C.J. No. 1582:

> 43 The applicants' argument in relation to the provinces controlling the nature and extent of the information provided to the federal Minister is predicated, in my view, on an underlying challenge to the Governor in Council's failure to make regulations to require the provinces to provide prescribed information to the federal Minister concerning their health insurance plans. This cannot sustain a justiciable issue. The lack of such regulations is not a matter for the courts, as the Act does not oblige the Minister to propose them nor the Governor in Council to make them. The enabling authority, set

> out in paragraph 22 (1)(c) of the Act, is strictly permissive and not mandatory.

Sections 8 and 9

[41] If s. 7 of the KPIA does not create a mandatory duty to regulate, it necessarily follows that all of the regulatory and related duties described in s. 8 and s. 9 of the KPIA are not justiciable if the GIC declines to act. If the government cannot be compelled to regulate, it cannot be required to carry out the ancillary duties of publishing, reporting or consulting on the efficacy of such measures – unless and until there is a proposed KPIA regulatory change.

Parliamentary Accountability

[42] The issue of justiciability must also be assessed in the context of the other mechanisms adopted by the Act for ensuring Kyoto compliance. In this case, the Act creates rather elaborate reporting and review mechanisms within the Parliamentary sphere. On this point I agree with the counsel for the Respondents that, with respect to matters of substantive compliance with Kyoto, the Act clearly contemplates Parliamentary and public accountability. While such a scheme will not always displace an enforcement role for the Court, in the overall context of this case, I think it does. If Parliament had intended to impose a justiciable duty upon the government to comply with Canada's Kyoto commitments, it could easily have said so in clear and simple language.[2] The Act, however, uses somewhat equivocal language substituting "to ensure that" for the usual mandatory term "shall". It then goes on to create an indirect scheme for "ensuring" Kyoto compliance largely through the function of scientific review and reporting to the public and to Parliament. For instance,

---

[2] The Respondents' characterization of the language of this Act as "unusual" is certainly a fair one.

the annual Climate Change Plan required by s. 5 must be published and subjected to public comment. The Plan must also be tabled in Parliament and referred to the appropriate Parliamentary committee for consideration. Any regulations proposed to be made under the authority of the Act must first be published for public consultation purposes in the Canada Gazette. Section 9 requires that within the first 120 days of the Act becoming law, the Minister must prepare a statement setting out the gas emission reductions that are reasonably expected to result in every year until 2012. That statement must also be published and tabled in Parliament. Both the Climate Change Plan and the Minister's statements are then required to be submitted to the Round Table for external review, advice and comment. The Round Table analysis is required to include consideration of the likelihood that the proposed measures or regulations will achieve the projected emission reductions. This report must also be published by the Minister and tabled in both the House of Commons and Senate. The Commissioner of the Environment and Sustainable Development (Commissioner) is similarly obliged to prepare, publish and table a bi-annual report which analyses Canada's progress in implementing the Climate Change Plans and in meeting its Kyoto obligations.

[43] All of the above measures are directed at ensuring compliance with Canada's substantive Kyoto commitments through public, scientific and political discourse, the subject matter of which is mostly not amenable or suited to judicial scrutiny.

[44] Considering the scope of the review mechanisms established by the Act alongside of the statutory construction issues noted above, the statutory scheme must be interpreted as excluding judicial review over issues of substantive Kyoto compliance including the regulatory function.

Parliament has, with the KPIA, created a comprehensive system of public and Parliamentary accountability as a substitute for judicial review. The practical significance of Parliamentary oversight and political accountability should not, however, be underestimated, particularly in the context of a minority government: see *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, above, at para. 71.[3]

[45] I find support for this view in the comprehensive justiciability analysis carried out by Justice Richard Mosley in *Canadian Union of Public Employees*, above. That case involved allegations that the Minister of Health had failed to carry out certain statutory duties imposed by the *Canada Health Act*, R.S.C. 1985, c. C-6 related to provincial compliance with the national healthcare standards. Among other claims for relief, the applicants sought a declaration that the mandated Canada Health Act Annual Report was not sufficiently comprehensive in dealing with the issue of provincial compliance. It was also argued that the Minister had disregarded his statutory authority to compel provincial compliance and had thereby exercised his discretion in a way that frustrated the purpose of the legislation. The Minister took the position that his statutory reporting function involved a policy-laden duty owed solely to Parliament; as such it was not justiciable. The Court sided with the Minister for the following reasons:

> 39 As stated by Chief Justice Dickson in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources), supra* at pp. 90-91, a determination of whether a matter is justiciable is:
>
> > "...first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead,

[3] It is perhaps also worth noting here that the Kyoto Protocol establishes its own formal system of accountability and that Canada's refusal to meet its Kyoto obligations has attracted international criticism from other parties to the Protocol.

> deferring to other decision-making institutions of the polity...There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

40 In the view of this member of the judiciary, while this application raises important questions, they are of an inherently political nature and should be addressed in a political forum rather than in the courts.

41 The Act requires that the annual report tabled by the Minister be laid before each House of Parliament, thus indicating that Parliament's intention in creating this obligation was to provide for review and debate on the content of the reports by Parliament itself. Allegations of informational deficiencies with such reports are, therefore, to be addressed and dealt with by that branch of government, and not, in my view, by the judiciary. It is not for the courts to usurp the role of Parliament in determining the nature and quality of the information it has deemed necessary to conduct its functions. As stated by Justice McLachlin, as she then was, in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at p. 389:

> ... Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

42 The Minister's duty to report to Parliament on an annual basis as to provincial compliance with the Act's criteria and conditions is clear. The determination of what constitutes "all relevant information" for the purpose of the reporting requirement is appropriately determined by the Minister, in consultation with the provinces, and is subject to policy and political concerns, the parameters of which it is not for this Court to determine. The Minister is accountable to Parliament for the scope and accuracy of

> the information the report contains. I agree with the respondent that the section 23 obligation is one owed to Parliament and not to the applicants or the public at large although requiring production of an annual report will necessarily inform public debate on the subject. Any remedy, therefore, with regards to fulfilling the section 23 obligation lies within Parliament and not with the courts.

IV. Conclusion

[46] I have concluded that the Court has no role to play reviewing the reasonableness of the government's response to Canada's Kyoto commitments within the four corners of the KPIA. While there may be a limited role for the Court in the enforcement of the clearly mandatory elements of the Act such as those requiring the preparation and publication of Climate Change Plans, statements and reports, those are not matters which are at issue in these applications.

[47] Even if I am wrong about the issue of justiciability, I would, as a matter of discretion, still decline to make a mandatory order against the Respondents. Such an order would be so devoid of meaningful content and the nature of any response to it so legally intangible that the exercise would be meaningless in practical terms.

[48] In the result, these applications must be dismissed. I will deal with the issue of costs in writing. If the Respondents are seeking costs, they will have 10 days to make a submission to the Court. FOTE will be allowed 7 days to reply. Neither submission should exceed 5 pages in length.

JUDGMENT

THIS COURT ADJUDGES that these applications for judicial review be dismissed.

THIS COURT FURTHER ADJUDGES that the issue of costs be reserved.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2013-07
STYLE OF CAUSE:	FRIENDS OF THE EARTH… v. THE GOVERNOR IN COUNCIL ET AL.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 18, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	Mr. Justice Barnes
DATED:	October 20, 2008

APPEARANCES:

Chris G. Paliare, Andrew K. Lokan and Hugh Wilkins	FOR THE APPLICANT
Peter Southey and Andrea Bourke	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Paliare Roland Rosenberg Rothstein LLP Toronto, ON	FOR THE APPLICANT
Ecojustice Canada Toronto, ON	
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS