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KYOTO PROTOCOL IMPLEMENTATION ACT: IMPLEMENTATION AND CONSEQUENCES

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EVENTS LEADING UP TO THE ENACTMENT OF THE *KYOTO PROTOCOL IMPLEMENTATION ACT*[1]

A. The Kyoto Protocol

The Kyoto Protocol is an instrument developed through an international negotiation process that lasted more than 10 years.

The first significant step in that process was the drafting of the United Nations Framework Convention on Climate Change (UNFCCC), in preparation for the Rio Summit of 1992. The UNFCCC is a non-binding agreement, ratified by 189 states, to combat climate change. The parties to the UNFCCC later agreed that a binding framework with specific objectives was necessary, and negotiations to establish such a framework began.

In 1997, the parties agreed on the framework that became the Kyoto Protocol, an instrument setting specific targets for states and making reduction of greenhouse gas emissions a legal obligation. The binding targets cover the period from 2008 to 2012. The Kyoto Protocol came into force on 16 February 2005. Since then, other agreements pertaining to climate change have been concluded in the wake of the Kyoto Protocol, and negotiations on further agreements are continuing.[2]

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(1) This section is largely based on another Library of Parliament publication: Tim Williams, *The Kyoto Protocol: The Basics of Climate Change*, PRB 02-20E, Parliamentary Research and Information Service, Library of Parliament, Ottawa, revised 27 January 2004 (http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/bp1000/prb0220-e.asp).

(2) We are referring here to the Marrakesh Accords, which were signed in July 2001 and that set out the rules as to how the Kyoto Protocol targets will be pursued and achieved. Similarly, a commitment was made at the Montreal Conference in 2005 to initiate formal talks for reducing greenhouse gases in the post-Kyoto period, that is, after 2012. As well, an agreement regarding negotiations for the post-Kyoto period was signed in Bali in December 2007.

On 10 December 2002, the House of Commons voted 196 to 77 in favour of ratifying the Kyoto Protocol. Canada ratified the agreement seven days later. In ratifying the Kyoto Protocol, Canada undertook to reduce its emissions of greenhouse gases (GHG) by an average of 94% from 1990 levels, from 2008 to 2012. Canada's emissions in 1990 were 599 megatonnes (Mt) of CO_2 equivalent. The maximum emissions allowed are in the order of 2,815 Mt from 2008 to 2012, or 563 Mt a year, on average.

In 2005, Canada's total greenhouse emissions were approximately 747 Mt of CO_2 equivalent.(3)

B. Government Action Plans

Five steps can be identified in the development of a nationwide greenhouse gas reduction strategy for meeting Canada's obligations under the Kyoto Protocol. While the provinces have adopted measures and even endorsed the Kyoto Protocol objectives, the following chronology relates only to the actions of the federal government.

First, in October 2000, the federal and provincial (except Ontario) ministers of energy and the environment indicated their support for the National Implementation Strategy on Climate Change.(4) For the Government of Canada, the Strategy includes a national action plan on climate change and Action Plan 2000 on Climate Change, the goal of which is to achieve one third of the reductions needed to meet the national objective.(5) These documents set out a series of phases involving measures to be taken for this purpose, including some that depended on action by Canada's trading partners and on the clarification of Canadian policy.

Second, the Climate Change Implementation Plan [Plan 2002](6) was unveiled on 21 November 2002, a few days before Canada ratified the Kyoto Protocol. It provided a clear breakdown of the expected greenhouse gas emission reductions. Under this plan, large corporations were to reduce their emissions by 91 Mt, of wich 36 Mt was attributed to Plan 2000 and future innovations, and 55 Mt to agreements signed with "large final emitters". Plan 2002 included a 25% voluntary reduction in vehicle emissions by the automotive industry and an

(3) Environment Canada, Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution, 2007, p. 6.

(4) Natural Resources Canada, National Implementation Strategy on Climate Change, 2000.

(5) Government of Canada, Action Plan 2000 on Climate Change, 2000, ISBN 0-662-85118-8.

(6) Government of Canada, Climate Change Implementation Plan, 2002.

additional reduction of close to 40 Mt from forestry and agricultural sinks. Under Plan 2002, the remaining reductions would come from individuals (the domestic consumption of energy and transportation). In total, the reductions under Plan 2002 were 60 Mt short of the Kyoto Protocol objectives.

Third, Project Green Moving Forward on Climate Change: A Plan for Honouring Our Kyoto Commitment was adopted in 2005, amending Plan 2002 [Plan 2005].(7) Plan 2005 includes provision for the creation of a Climate Fund to allow the government to purchase greenhouse gas emission reductions. It lowered the reductions expected from large final emitters to 45 Mt from 55 Mt. Under this plan, these emitters could purchase up to 9 Mt of credits from the Greenhouse Gas Technology Investment Fund. Plan 2005 also outlined how climate change funding would be used.

Fourth, as of 2006, the Government of Canada no longer endorses or promotes the Kyoto Protocol emission targets. In May 2006, the Minister of the Environment stated in Bonn that the Kyoto Protocol was too ambitious. In November 2006, the Minister stated that Canada did not intend to comply with Kyoto Protocol targets. The government did however continue to take steps to fight climate change. In October 2006, the government announced its clean air bill. Then, on 26 April 2007, the Minister presented a new plan entitled Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution [original Plan 2007].(8)

This distancing from the Kyoto Protocol and greenhouse gas reduction targets has had international repercussions for Canada. Canada supported the Asia-Pacific Partnership on Clean Development and Climate, which included the United States, Australia, Japan, China, India and South Korea, as an alternative to Kyoto. When Canada indicated its preference for that forum over the Kyoto Protocol, member states from APEC (Asia-Pacific Economic Cooperation) endorsed the idea of adopting binding reduction targets, but without quantifying them.

Fifth, in August 2007, the Minister presented another climate change plan, the substance of which was very similar to the previous plan [Plan 2007].(9) It is designed to address the requirements of the *Kyoto Protocol Implementation Act* (KPIA). This is the plan that is currently in effect; its terms are described below.

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(7) Government of Canada, *A Plan for Honouring our Kyoto Commitment*, 2005 ISBN 0-662-68808-2.

(8) *Turning the Corner*: *An Action Plan to Reduce Greenhouse Gases and Air Pollution*, Environment Canada, 2007.

(9) Environment Canada, A Climate Change Plan for the Purposes of the *Kyoto Protocol Implementation Act*, 2007, ISBN 978-0-662-09804-1.

CIRCUMSTANCES IN WHICH THE *KYOTO PROTOCOL IMPLEMENTATION ACT* WAS ENACTED

The KPIA was enacted into law on 22 June 2007.(10) It launched a process of measures designed to achieve GHG reduction objectives, as set out in the Kyoto Protocol (KP).(11) The circumstances and issues surrounding the enactment of the KPIA explain in part the political and legal situation since its adoption, which is examined below. A review of those circumstances and issues will be useful in order to understand the current issues.

Bill C-288 was introduced as a private member's bill and was never supported by the government. The KPIA therefore forces the government to follow a legislative policy that it did not support. Moreover, the Speaker of the House of Commons decided that it was not a money bill, which would have prevented its passing, since the introduction of money bills is a government prerogative.(12) While the bill does not include appropriations and does not strictly speaking commit spending, it forces the government to take measures that involve significant expenditures. The controversy surrounding the enactment of the KPIA can be attributed to the combination of it being a private member's bill, the government's opposition to the policies in the Act and the eventual need to commit public funds to achieving the objectives of those policies. During the process leading to passage of the bill, the consistency of this practice with parliamentary tradition in Canada was questioned.(13)

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(10) PLC-288, Royal Assent, 22 June 2007.

(11) The references to Kyoto targets in this document are of course to Canada's targets under the Kyoto Protocol.

(12) One of the issues was the government's prerogative to control the tabling of money bills. This parliamentary principle is explained as follows by Smith and Brazier, with respect to the British system: "…it is a constitutional convention, and one of fundamental importance, that every amendment or motion to authorize central government expenditure, or to increase or impose a tax, must have the Queen's recommendation – that is to say, it must be introduced by a Minister. This necessarily implies that the power of the purse belongs to the Government and not to private members. Hence, if a bill introduced by a private member requires the expenditure of public money for the fulfillment of its purpose – and it does so require more often than not – the member must be able to persuade a Minister to move a financial resolution in the House; otherwise the bill cannot be passed." See Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 6th Ed., Penguin Books, London, 1990, pp. 229 and 230.

(13) See *Proceedings of the Standing Senate Committee on Energy, the Environment and Natural Resources*, Proceedings – No. 80 (22 March 2007); Proceedings – No. 82 (27 March 2007); Proceedings – No. 83 (28 March 2007); Proceedings – No. 84 (29 March 2007).

In any event, Bill C-288 was passed and is now law. This raises the question of the legal implications of the Act, what must be done by the government to comply with it, and the sanctions available for non-compliance. This paper discusses both the statutory framework of the KPIA and the specific measures that have been taken under the Act. The statutory framework provides an overview of the obligations created by the KPIA and the sanctions available for non-compliance. The review of the measures taken since the KPIA was enacted deals with the nature of the government actions taken to meet those obligations and the responses to those actions, including legal proceedings that have been brought against the government. This paper does not offer an opinion as to whether the government is honouring its obligations under the KPIA or about the recent legal proceedings.

GENERAL OBLIGATION FOR THE GOVERNMENT TO OBEY THE LAW

Before we examine the specific obligations imposed by the KPIA, the more general obligation that rests on the government should be noted. It is very clear that the government must obey the laws enacted by Parliament and comply with the obligations imposed on it by those laws. Three general constitutional principles apply.

First, the idea that the government must obey the law, as must any other subject of the law, is central to the principle of the rule of law.(14) The constitutional nature of that principle has been recognized repeatedly by the Supreme Court.(15)

Second is the fact that we live in a parliamentary democracy. In this regard, the Supreme Court recognizes a distinctive relationship between legislative and executive action in our system, which it describes as follows:

> One of those aspects [of parliamentary democracy] is the legal relationship between the executive and the legislature. A central principle of that relationship is that the executive must execute and implement the policies which have been enacted by the legislature in statutory form. The role of the executive, in other words, is to effectuate legislative intent. …

(14) See Peter W. Hogg and Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada," *University of Toronto Law Journal*, Vol. 55, No. 3, Summer 2005, pp. 715-32.

(15) Ibid., for a review of various decisions.

> The justification for this hierarchical relationship, in present-day Canada, is a respect for democracy, because legislatures are representative institutions accountable to the electorate.(16)

Third, the rules that govern how responsible government works have a similar effect. On this point, the Supreme Court has said:

> There is a hierarchical relationship between the executive and the legislature, whereby the executive must execute and implement the policies which have been enacted by the legislature in statutory form. In a system of responsible government, once legislatures have made political decisions and embodied those decisions in law, it is the constitutional duty of the executive to implement those choices.(17)

These principles mean that when Parliament enacted Bill C-288, the government became legally bound to comply with the obligations set out in that Act.

LEGAL FRAMEWORK OF THE KPIA

A. Obligations Created by the Act

The KPIA imposes three types of obligations on the government: to prepare a Climate Change Plan; to prepare a statement on GHG emissions; and to ensure that Canada meets its obligations under the KP.

First, section 5 of the KPIA requires that the Minister prepare a Climate Change Plan. The Plan must be produced within 60 days after the Act comes into force, and every year thereafter. The Plan must include a description of the measures to be taken to ensure that Canada meets its obligations under Article 3(1) of the KP (including the date when they take effect and the amount of GHG emission reductions that have resulted or are expected to result), the projected GHG emission levels for each year from 2008 to 2012 (and a comparison of those levels with Canada's obligations under the KP), and an "equitable distribution" of GHG reduction levels among the sectors of the economy that contribute to GHG emissions. The Climate Change Plan must also include a retrospective component, in that it must describe the implementation in the previous calendar year of the measures proposed in the Plan for that year.

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(16) *Cooper* v. *Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, paras. 24 and 25.

(17) *Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R. 3*, para. 139.

Second, the Minister has an obligation to prepare a statement setting out the GHG emission reductions that are expected up to 2012 and are associated with the GHG reduction regulations or other government measures (e.g. spending). The statement must be prepared within 120 days after the KPIA comes into force.

Third, section 6 of the KPIA also provides that the Governor in Council (i.e. the Cabinet) may make regulations for a number of purposes. The language of this provision indicates that this is a discretionary authority and not an actual obligation. However, section 7 of the KPIA imposes a specific obligation on the Cabinet, which to some extent qualifies section 6: "ensure that Canada fully meets its obligations" under Article 3(1) of the Kyoto Protocol, "by making, amending or repealing the necessary regulations under this or any other Act." That obligation is specifically stated to apply to the 180-day period after the KPIA comes into force, but it continues to apply thereafter.

The next two subsections explore the possibilities, both judicial and non-judicial, for reviewing the government's exercise of the powers and obligations created by the KPIA.

B. Judicial Review Under the KPIA

The judicial remedies available originate in Canadian administrative law, and allow for a form of review of the manner in which the government acts (or does not act) and the compliance of the conduct or decision in question with the KPIA. In the passages below, we will examine how judicial review is exercised, the sanctions that it permits and the manner in which a court would deal with a case of this nature. It must be noted that there is some uncertainty and speculation involved in identifying these remedies, given that the courts have considered similar matters but rarely any that are identical to the case under consideration here.

1. Method of Seeking Judicial Review

An application for review of a violation of the KPIA is a type of review of the activities of the federal government. Under section 18(1) of the *Federal Courts Act* (FCA), the Federal Court (formerly Trial Division) has exclusive jurisdiction to hear an application for judicial review.

Under the KPIA, the procedure for challenging a decision (or the lack of one) by the Minister is an application for judicial review, which ordinarily must be made within 30 days after the time the administrative decision that a party seeks to challenge was communicated.(18)

The next question is who could bring an application for judicial review based on failure to comply with the obligations in the KPIA. In order to commence an application, the applicant ordinarily has to prove a personal interest. This means that the federal government decision that it is challenged must directly affect the rights or interests of the person or group of people taking action against the decision. Alternatively, standing may be based on the public interest.(19) Three tests must be met before such standing may be recognized: (1) there is a serious issue; (2) the plaintiff is directly affected by the legislation; (3) there is no other reasonable way to bring the issue before the courts.(20) It should be noted that the courts have discretion as to whether to grant someone standing to seek judicial review in the public interest, while a person who has a personal interest may seek such a review as of right.

In the case of the KPIA, it is difficult to imagine what personal interest could be affected. On the other hand, there is no reason why the Federal Court could not grant an applicant public interest standing, based on the three criteria identified above.

It should be noted that the question of standing is separate from the question of whether the applicant meets the tests for obtaining relief in a specific case on the merits of a particular situation.

2. Nature of Application and Relief Sought

Under the FCA, an application for judicial review can seek several forms of relief, and the the court may do as follows:(21)

- issue an injunction or writ of mandamus (order to do or perform a duty imposed by law);

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(18) Section 18(2) and (3) FCA.

(19) *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236. That decision is also based on another important decision of the Supreme Court regarding standing in administrative law: *Finlay* v. *Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. See also *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493.

(20) Ibid., p. 253. Note that in the Canadian Council of Churches case the issue was the common law power of judicial review. The power of judicial review set out in s. 18.1 of the FCA, however, seems to be subject to the same tests: see *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [1998] F.C.J. No. 1761 (T.D.); *Sunshine Village Corp.* v. *Banff National Park (Superintendent)*, [1996] 65 A.C.W.S. (3d) 437 (F.C.A.); *Friends of the Islands Inc.* v. *Canada (Minister of Public Works*), [1993] 2 F.C. 229 (T.D.).

(21) Section 18 (1) FCA.

- issue a writ of prohibition (in order not to do something);
- grant declaratory relief (declaration determining a right, power or obligation under the law, or in negative form, declaring a practice or a measure taken under a law to be unlawful);
- grant relief.

If the Federal Court is satisfied that the application has merit, it could grant relief that is tailored specifically to the application before it.(22)

3. Judicial Review by the Federal Court of Decisions Made Under the KPIA

When an application for judicial review is made to the Federal Court, the Court must examine the conduct and consider the merits, in law, of the allegations regarding that conduct. In order to determine whether the conduct constitutes an error or breach for which a sanction may be imposed, the courts may give varying degrees of deference to the authority whose conduct is under review. In legal terms, the degree of deference granted will reflect the standard of review to be applied. The standard of the review is the criterion that guides the review of decisions of the federal government and that establishes when a court may intervene to impose sanctions for a decision.

A number of complications are involved in identifying the standard of review applicable to the conduct of the government or the Minister under the KPIA. First, no precedent relates specifically to the evaluation of the exercise of the powers and obligations in the KPIA. The degree of deference to be given will therefore have to be determined in some other manner. It is also possible that the Federal Court would not apply the same standard of review in respect of the different powers and obligations created in the KPIA.(23) These two factors mean that there is some uncertainty regarding the standard or standards of review that the Federal Court might decide to apply in considering allegations of non-compliance with the KPIA.

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(22) Section 18.1(3) FCA.

(23) For example, the preparation of a Climate Change Plan and the obligation to ensure that Canada complies with its obligations seem to me to be too different to subject to the same standard of review. Even in situations involving the same general obligation (e.g. to prepare a Plan), the standard of review could vary based on the kind of breach alleged (e.g. failure to prepare, late preparation, a Plan whose content fails to comply with the requirements of the KPIA, or a Plan that sets targets other than the Kyoto targets).

Three standards of review are stated in the case law:[24]

(1) incorrect decision: the Court will determine whether the officer made an incorrect decision, and substitute its judgment for the judgment of the officer in question to decide the matter.

(2) unreasonable decision: the Court will ask whether the decision is unreasonable, thus allowing the authority whose conduct is under review greater latitude.

(3) patently unreasonable decision: the Court allows even greater autonomy and freedom of action and intervenes only to sanction obvious excesses.[25]

Which of the three standards of review applies in particular circumstances is a complex question that requires reference to a large body of case law. There are four relevant factors to be considered in selecting the appropriate standard of review:[26]

(1) the existence of a privative clause assigning exclusive and final decision-making authority to an officer or entity;

(2) the relative expertise of the Court and the officer/entity in question in relation to the issue;

(3) the purpose of the enabling legislation and the statutory provision in issue;

(4) the nature of the problem involved (a question of law, a question of fact or a question of mixed law and fact).

In order to identify the standard of review that might be applied, we must therefore refer to the four factors set out above. In relation to the KPIA, the following points should be noted:

(1) *Privative clause*: There is no clause in the KPIA precluding judicial review, which is not surprising given that judicial review is not referred to in the KPIA. While there is no appeal, it might be noted that the obligations are subject to certain forms of non-judicial review, which will be examined in a later section.

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(24) See, *inter alia*, *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

(25) See *Dr. Q.* v. *College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226; *Ryan* v. *Law Society (New Brunswick)*, [2003] S.C.R. 247. For a more complete discussion, see David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*, 4th ed., Thomson, Scarborough, 2004, ch. 12.

(26) *Pushpanathan*. [1998] 1 S.C.R. 1222.

(2) *Relative expertise*: The Minister of the Environment has access to the expertise of his or her department on environmental issues, and this is not the case for the Federal Court. Any application in respect of the content of decisions made is therefore very likely to be treated with a high degree of deference, something that is not necessarily the case for the procedural aspects of the KPIA.

(3) *Purpose of the legislation and the powers in issue*: The purpose of the KPIA, under section 3, is "to ensure that Canada takes effective and timely action to meet its obligations under the Kyoto Protocol and help address the problem of global climate change." However, all of the powers and obligations do not necessarily call for the same degree of deference. The preparation and tabling of a Climate Change Plan and the preparation of a GHG emissions reduction statement are framed as strict obligations.(27) On the other hand, there is a significant degree of discretion as to the content of the Plan and statement, subject to the broad purposes. This suggests a much less stringent review, tending toward application of the patently unreasonable standard.(28)

(4) *Nature of the problem involved*: The nature of the problem involved could point in several directions.(29) As was noted earlier, procedural defects, or missed deadlines under the KPIA, would be readily reviewable by the Federal Court. On the other hand, determining whether certain of the regulations go far enough to combat the problem of global warming is clearly a question involving factual and scientific prediction and assessment, and this is much less amenable to judicial review.

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(27) No precedent was identified in which judicial review was sought specifically in relation to the tabling of documents stating public policy. On the other hand, where no discretion is provided in relation to the strict ministerial obligations, review will generally be available in the case of non-performance, somewhat as would be the case for a binding authority (e.g. the automatic granting of a licence if the objective requirements are met). An analogy can therefore be drawn on that basis. See the case law discussed in René Dussault and Louis Borgeat, *Traité de droit administratif*, Tome III, 2nd ed., Québec, Presses de l'université Laval, 1989, pp. 296 et seq.

(28) See *Mount Sinai Hospital Centre* v. *Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, para. 56 et seq. (Binnie J.); *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para. 53.

(29) The circumstances in which judicial review is available are multiple and complex. The *Federal Courts Act* simplifies the description by listing, in s. 18.1(4), the circumstances in which judicial review may be granted. Relief may be granted where the federal board, commission or tribunal whose decision is in issue has done one of the following:

> (*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> (*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> (*e*) acted, or failed to act, by reason of fraud or perjured evidence; or
>
> (*f*) acted in any other way that was contrary to law.

In more concrete terms, the following trends can be identified. The obligations created by the KPIA include the obligation to prepare and table a Plan and statement within specific times and in accordance with the formalities prescribed, and these seem to be the most likely to be reviewed under a stricter standard of review. On the other hand, it may be that the conformity of the Plan with the content prescribed by the Act would be assessed based on the highest standard of deference, the patently unreasonable test. For example, it seems highly unlikely that the Federal Court would take it upon itself to determine, on a stricter standard, whether the measures taken and set out in the Plan can be characterized as measures to "ensure that Canada meets" the Kyoto targets, or whether the Plan contains an "equitable distribution" of GHG emission reductions.

We need not speculate as to the type of measures that would fail whatever test was adopted for judicial review.

D. Non-judicial Review Under the KPIA

Under the KPIA, there are three non-judicial ways of reviewing the activities of the Minister and the government.

(1) Parliament: Subsections 5(4) and (5) of the KPIA require that the Minister's Plan be tabled in both houses of Parliament. As well, a Plan laid before the House of Commons is deemed to be referred to the standing committee of the House that considers matters relating to the environment. It may therefore be that the conduct of the government, and any allegation of non-compliance with the KPIA, could be debated there.

(2) National Round Table on the Environment and the Economy (NRTEE): Under section 10(1) of the KPIA, the NRTEE has obligations arising from the publication of the Plan or a statement. its duties include advising the Minister on two key items that call for expertise: the likelihood that each of the proposed measures will achieve the projected GHG reductions and the likelihood that the Kyoto objectives will be met as a result of the proposed measures. The Round Table also has the power to state an opinion about "any other matters that the Round Table considers relevant." The Minister is required to publish that advice, in any manner that the Minister considers appropriate, and to submit it to both houses of Parliament.

(3) Commissioner of the Environment and Sustainable Development (CESD): The CESD must prepare reports at least every two years regarding progress in implementing the Plan and achieving the Kyoto targets. The CESD may also make observations and recommendations on any matter that he or she considers relevant. The report is also published and tabled in Parliament.

GOVERNMENT ACTION SINCE ENACTMENT OF THE KPIA

The Minister published the 2007 Plan on 21 August 2007, which was prepared within the 60 days allowed by section 5 of the KPIA. The following are the aspects of the Minister's Plan that relate to the mandatory aspects of the Act.

First, the 2007 Plan sets out the following projections.(30) With no new measures or action to reduce GHG emissions, Canada's annual GHG emissions for 2008 to 2012 are estimated at 825 Mt a year on average, taking into account economic growth. Based on those projections, achieving the KP targets would call for an average reduction of one third below business-as-usual levels. The 2007 Plan identifies two major problems in relation to achieving the Kyoto targets, given this situation: using the flexibility mechanisms created by the Kyoto Protocol would be insufficient to achieve those targets, and the economic costs associated with strict compliance with the targets would plunge Canada into a deep economic recession.(31)

Second, the 2007 Plan sets out measures for reducing GHG emissions and reports on projected levels. In terms of the objectives, it reports that the "Government is committed to reducing Canada's total emissions of greenhouse gases, relative to 2006 levels, by 20% by 2020, and by 60% to 70% by 2050."(32)

Third, the 2007 Plan discusses various sources of GHG emissions, measures to reduce emissions, projections regarding the expected reductions and the timetable for implementing those measures. Without going into detail, some of the subjects addressed in the 2007 Plan might be noted as examples: industrial air emissions, energy-efficient lighting, fuel efficiency in transportation (road, rail, air and marine), renewable fuels, various government programs (ecoACTION), and provincial and territorial cooperation and activities.

Annex 1 to the 2007 Plan contains a table entitled "Statement of Measures and Expected Emission Reductions 2008-2012." Given that the subtitle of the table refers to section 9 of the KPIA, the table may be the "statement" that the Minister of the Environment is required to make under that section.

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(30) 2007 Plan, p. 6.

(31) Ibid., pp. 7 to 9.

(32) Ibid., p. 10.

It is also important to note that after the 2007 Plan was tabled, the Minister stated that the Canadian government was not going to withdraw from the Kyoto Protocol.(33)

RESPONSE TO GOVERNMENT ACTION

A. Reaction of the National Round Table on the Environment (NRTEE)

In September 2007, the NRTEE produced a document intended to meet its obligations under section 10 of the KPIA [Response].(34) The NRTEE's Response consists primarily of an examination of the likelihood that the proposed measures and regulations will achieve the reductions projected in the 2007 Plan and the likelihood that those measures will enable Canada to meet its obligations under the Kyoto Protocol.(35) The NRTEE has adopted the following classification system: (1) an overestimate of eventual emissions reductions; (2) a reliable estimate of possible emissions reductions; (3) an underestimate of eventual emissions reductions.(36) The Response examines four groups of measures that appear in the 2007 Plan.(37) The summary of conclusions indicates that the predicted reductions are probably overestimates in the case of three of the four regulatory categories:

- The regulatory framework for GHG emissions;
- The regulation of energy efficiency;
- The regulation of renewable fuels content standards.

For the fourth group, motor vehicle fuel efficiency standards, the NRTEE found that the expected reductions are reliable, but that they should not be included.

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(33) See, e.g., Murray Brewster, "Canada won't formally withdraw from Kyoto, Baird says," *The Globe and Mail*, [Toronto] 20 October 2007; "Le Canada ne se retire pas de Kyoto, dit Baird," *Le Devoir*, [Ottawa], 20, October 2007.

(34) Response of the National Round Table on the Environment and the Economy to its Obligations Under the Kyoto Protocol Implementation Act, September 2007 [Response] (http://www.nrtee-NRTEE.ca/eng/publications/c288-response-2007/NRTEE-C288-Response-2007-eng.pdf).

(35) Response, p. 3.

(36) Ibid.

(37) See Table 2, Response, p. 7.

The Response also discusses the likelihood that that the measures or regulations proposed in the Plan would enable Canada to meet its obligations under the Kyoto Protocol. On that question, the NRTEE writes:

> 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.(38)

The Response also suggests that thinking in terms of the likelihood of emissions reductions ignores certain important aspects relating to the choice of the best policies, such as the related costs.(39) As well, the Response favours a regulatory approach aimed at obtaining short-term reductions, at the expense of other market-based instruments and fiscal policy, which could have a more profound impact in the long run.(40)

B. Application for Judicial Review

An initiative was recently launched by third parties other than the political actors and institutions named in the KPIA in relation to the implementation of the Act: on 19 September 2007, the non-governmental organization Friends of the Earth (Les Ami(e)s de la Terre) filed an application for judicial review in the Federal Court.(41)

It should first be noted that this is not the first attempt to have the courts compel political institutions to act in respect of GHG reductions. On 29 May 2007, an application was filed in the Federal Court by the same group, alleging that the Government of Canada, by failing to adequately reduce GHG emissions, was engaging in conduct that would lead to a violation of its obligations under the Kyoto Protocol. The application was brought under the *Canadian Environmental Protection Act*,(42) and has since been withdrawn.

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(38) Response, p. 14.

(39) Ibid, p. 15.

(40) Ibid.

(41) *Friends of the Earth* v. *Minister of the Environment*, Application, Federal Court, 19 September 2007 [Application].

(42) *Canadian Environmental Protection Act (1999)*, S.C. 1999, c. 33, sections 166 and 167.

The most recent application relies on the KPIA and is in the form of an application for judicial review. In general terms, it alleges that the Climate Change Plan prepared by the Minister does not comply with the obligations created by the KPIA, and in particular with the emissions reduction targets under the Kyoto Protocol.(43)

Friends of the Earth is seeking three remedies. First is a declaration that the Minister has failed to comply with section 5 of the KPIA, which requires that a Plan be prepared setting out the measures to be taken to ensure that Canada meets its obligations under Article 3(1) of the Kyoto Protocol. Second, the group seeks a statement that the 2007 Plan fails to meet the requirements of section 5 of the KPIA and the Minister's actions (which are not specified, however) are unlawful. The third request is for an order of mandamus requiring the Minister to prepare a revised plan that complies with section 5 of the KPIA and ensures that Canada meets its obligations under article 3(1) of the Kyoto Protocol.

The matter is still pending.

(43) Application, p. 3.