

**FEDERAL COURT — TRIAL DIVISION**

B E T W E E N:

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

Applicant

- and -

**THE MINISTER OF THE ENVIRONMENT**

Respondent

**APPLICANT’S MEMORANDUM OF FACT AND LAW**

**PART I – FACTS**

**(a) Overview**

1. This case raises the fundamental question of whether a Minister of the Crown is accountable for ignoring the will of Parliament. The Applicant submits that the Respondent Minister of Environment (“Minister”) has defied the will of Parliament and dispensed with the rule of law, by refusing to comply with the mandatory requirements of s. 5 of the *Kyoto Protocol Implementation Act* (“KPIA”). This provision requires the Minister to prepare and publicly release a climate change plan (“Climate Change Plan”) setting out specific measures to be taken to ensure that Canada meets its obligations under the *Kyoto Protocol*.

2. The present government takes the position that compliance with the *Kyoto Protocol* is impractical or inadvisable. However, it has not amended or repealed the *KPIA*. Instead, it has chosen to ignore its clear terms. Rather than release a Climate Change Plan that sets out measures to be taken to ensure that Canada meets its obligations under the *Kyoto Protocol*, the Minister has done the opposite. He prepared and released a document entitled *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act 2007* (“Minister’s Plan”), which, on its terms, sets out measures that fall well short of Canada’s *Kyoto Protocol* obligations.

3. Accordingly, the Applicant seeks a declaration that the Minister has not complied with s. 5 of the *KPIA* and that the Minister's Plan does not meet the requirements of s. 5. The Applicant also respectfully requests that an order in the nature of *mandamus* be issued requiring the Minister to comply with s. 5 of the *KPIA* and to prepare a revised plan that meets the requirements of the Act.

**(b) Facts**

4. The *KPIA* was introduced to the House of Commons as a Private Member's Bill on May 17, 2006, by the Honourable Pablo Rodriguez, a Liberal Member of Parliament. The Government did not support the bill, but it passed third reading in February 2007 and was given Royal Assent on June 22, 2007 with the combined votes of the opposition parties in both the House and Senate.

Affidavit of Lynda M. Collins, dated October 12, 2007 ("Collins Affidavit"), *Applicant's Record*, Vol. 1, p. 12-13, paras 5 and 7.

5. The purpose of the *KPIA*, as set out in its 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." Section 5 of the *KPIA* requires that within 60 days of the Act coming into force, the Minister must prepare a Climate Change Plan and release the Plan publicly. The Act stipulates that the Plan must include "a description of the measures to be taken to ensure that Canada meets its obligations under Article 3, paragraph 1, of the *Kyoto Protocol*".

*Kyoto Protocol Implementation Act*

6. Article 3.1 of the *Kyoto Protocol* states that specified countries, including Canada, must ensure that their aggregate greenhouse gas emissions do not exceed levels set out in Annex B to the *Protocol* over the commitment period from 2008 to 2012. Annex B to the *Protocol* states that Canada is obliged to reduce its greenhouse gas emissions by 6% below 1990 levels during that period.

*Kyoto Protocol to the United Nations Framework Convention on Climate Change* (1998), 37 I.L.M. 22, Article 3.1, Exhibit C to the Collins Affidavit, *Application Record*, Vol. 1, p. 32-49

7. On August 21, 2007, the Minister released his Plan. The Minister's Plan consists of a compilation of previously proposed measures which were primarily set out in the Government's April 2007 Technical Paper entitled *Turning the Corner*. These measures would leave Canada well out of compliance with Article 3.1 of the *Kyoto Protocol*. In fact, the Minister's Plan states that the Government's greenhouse gas emission reduction targets for Canada will be based on a 2006 baseline (roughly 33% higher than the *Protocol's* 1990 baseline) and adds that under these targets Canada will not reach the reductions required under the *Kyoto Protocol* until after 2020. The Minister's Plan therefore on its face does not meet the mandatory legal duty of the Minister to "ensure" that Canada meets its obligations under the *Kyoto Protocol*.

Collins Affidavit, *Applicant's Record*, Vol. 1, p. 13, paras 8 and 9.

8. The Minister's Plan also fails to set out "a description of the measures to be taken to ensure that Canada meets its obligations" under Article 3.1 of the *Kyoto Protocol*. Under this provision of the *Protocol*, Canada's allowable emissions for the period 2008 to 2012 are 2,815 Mt. In the Minister's Plan, the Minister sets out figures that, based on the Government's proposed measures, project Canada's emissions at 3,779 Mt for the period 2008 to 2012.

Collins Affidavit, *Application Record*, Vol. 1, p. 13-14, para 10.

9. These findings were highlighted in an analysis of the Minister's Plan by the Government's National Round Table on the Environment and the Economy ("NRTEE") The NRTEE's *Response of the National Round Table on the Environment and the Economy to its Obligations Under the Kyoto Protocol Implementation Act* ("NRTEE Response") asserts forthrightly that statements and information in the Minister's Plan indicate that the Federal Government "is not pursuing a policy objective of meeting the Kyoto Protocol emissions reductions targets" and that the

"stated emissions reductions set out in the Plan would not be sufficient for Canada to comply with the Kyoto Protocol". The NRTEE finds that based on the measures set out in the Minister's Plan, Canadian greenhouse gas emissions would "exceed their allowable units by 34%, with average excess emissions of 192.2 Mt/year."

Collins Affidavit, *Applicant's Record*, Vol. 1, p. 14, paras 11 and 12.

National Round Table on the Environment and the Economy, Response of the National Round Table on the Environment and the Economy to its Obligations Under the *Kyoto Protocol Implementation Act* -September 2007, (Ottawa: NRTEE, 2007), at 14, Exhibit G to Collins Affidavit, *Applicant's Record*, Vol. 1, p. 158.

10. The Applicant asks the Court to declare that the Minister has not complied with s. 5 of the *KPIA* because the Minister failed to prepare a proper Climate Change Plan, and to declare that the Minister's Plan does not meet the requirements of s. 5. The Applicant also requests a mandatory order requiring the Minister to comply with s. 5 and prepare a revised plan that meets the requirements of that section by setting out measures that will ensure compliance with Article 3.1 of the *Kyoto Protocol*.

## **PART II - ISSUES**

11. The following are the issues that are raised by this Application:

(a) Standing of the Applicant

The Applicant anticipates that the Respondent will challenge the Applicant's standing. The Applicant's standing should be recognized as it is directly affected by the Minister's non-compliance with the requirements of the *KPIA*, and/or meets the requirements for public interest standing.

(b) Standard of Review

The standard of correctness applies. There is no written decision by the Minister addressing the compliance issue, so there is nothing for this Court to defer to. It is simply a question of whether the Minister has or has not complied with the law. This raises questions of the Minister's jurisdiction and interpretation of the law, such that correctness is the appropriate standard.

(c) The Minister's Plan Does Not Comply with the *KPIA*

The Minister's Plan does not comply with the *KPIA*. The Minister's conduct in ignoring the mandatory obligations of the *KPIA* reflect a disregard for the rule of law, requiring remedial actions by this Honourable Court.

## (d) Remedies

The Applicant states that the Minister's conduct warrants both declaratory and mandatory relief, the tests for both of which are met by the Applicant.

**PART III - SUBMISSIONS****(a) Standing of the Applicant*****Background***

12. The Applicant is a national non-profit environmental group, which has been heavily involved in addressing climate change issues over the past decade. Founded in 1978, its mission is to serve as a national voice for the environment and to work with others to renew communities and the Earth through research, education and advocacy. The Applicant provides services to promote and provide information about the protection of the environment by researching, publishing and distributing publications of various types, answering public information requests, recommending environmentally sound actions and consumer products, hosting and speaking at conferences and other public events, and demonstrating environmentally sound alternatives in the areas of personal responsibility and public policy. The Applicant has been involved in several court cases in the past representing the public interest in environmental protection.

Affidavit of Beatrice Olivastrì, dated October 10, 2007 ("Olivastrì Affidavit"), *Applicant's Record*, Vol. 1, p. 185-186, para. 2.

13. With over 3,500 Canadian members, the Applicant speaks for the environmental concerns of thousands of Canadians. It is the Canadian member of Friends of the Earth/Les Ami(e)s de la Terre International, a federation of 70 member groups and 16 affiliated groups of environmental advocates working together to help build a sustainable society for today's and tomorrow's generations by addressing

climate change and other issues. Friends of the Earth International has over 1.5 million members and has representatives based in 70 countries around the world. In Canada, the Applicant works at the international, national and provincial levels to identify issues, engage citizens and communities, advance solutions and monitor results to promote action to address climate change, environmental sustainability and justice in Canadian society.

Olivastri Affidavit, *Applicant's Record*, Vol. 1, p. 186, para 3.

### ***Test for Standing***

14. A party may seek judicial review if it is “directly affected” by a decision, or if it meets the test for public interest standing. The Applicant submits that it meets the standing test on either ground. The Applicant has been at the forefront of efforts to address climate change, and is as directly affected as any party. Alternatively, the Applicant meets the test for public interest standing.

*Sierra Club Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211, at paras. 29, 32.

15. The test for public interest standing examines three factors:

- there must be a serious issue to be tried;
- the applicant must show a "genuine interest" in the subject matter; and
- there must be no other reasonable and effective manner for the case to come before the courts.

*Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, para. 37.

16. When exercising its discretion, a court should adopt a "generous and liberal approach" in determining whether or not to grant standing and "will undoubtedly seek to ensure that its discretion is exercised so that standing is granted" in situations where it is necessary to ensure that legal requirements are met.

*Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, *supra*.

*Fraser v. Canada (A.G.)*, [2005] O.J. No. 5580, at para. 51.

### ***Serious Issue to be Tried***

17. A party arguing that there is no serious issue to be tried must meet a high threshold. It must be "plain and obvious" or "beyond reasonable doubt" that there is no reasonable cause of action. For a case to be struck out, it must be shown that the matter is "certain to fail" due to a "radical defect". If the court believes that the party requesting standing has an arguable case, then the "serious issue to be tried" test is met. In the instant case, the Applicant's allegation that the Minister has failed to comply with mandatory obligations under the *KPIA* is based on a plain reading of the Act, and on fundamental principles of law. These are clearly serious issues.

*Fraser v. Canada (Attorney General)*, *supra*.

### ***Genuine Interest in the Subject Matter***

18. The "genuine interest" branch is met if the Applicant can show that it has a "real and continuing interest" in the issue and that they are not a "mere busybody." Accumulated expertise and involvement in environmental issues, such as those of the Applicant, have been found to meet this branch of test in many cases.

*Fraser v. Canada (Attorney General)*, *supra*, para. 102

*Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, paras. 32, 34.

*Sierra Club of Canada v. Canada (Minister of Finance)*, *supra*, paras. 52, 54, 57-58, 66, 68

*Sunshine Village Corp. v. Superintendent of Banff National Park*, [1996] FCJ No. 1118 (Fed. C.A.), para. 69

### ***No Other Reasonable and Effective Way to Bring Matter to Court***

19. This branch of the test effectively limits public interest standing in situations where it can be shown that a directly affected private litigant is likely to bring forth a

challenge. To deny standing on this basis, it must be shown on the balance of probabilities that (1) there is a person who is more directly affected than the applicants and (2) that the more directly affected person can reasonably be expected to initiate litigation to challenge the legislation. The mere theoretical possibility of a challenge by a directly affected private litigant is insufficient to deny standing. In the instant case, there is no other party that is more directly affected than the Applicant. In any event, the deadline for filing an application for judicial review of the Minister's conduct has passed, and no other litigant has come forward.

*Fraser v. Canada (Attorney General)*, *supra*, at 109.

*Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, para. 35

*Harris v. R.*, [2000] 4 F.C. 37 (Fed. C.A.), para. 62

*Sunshine Village Corp. v. Superintendent of Banff National Park*, *supra*, paras. 69-70

### ***Conclusion on Standing***

20. Based on these circumstances involving the extremely important issue of the Government's adherence to the rule of law, the genuine interest and expertise of the Applicant on climate change and environmental issues and the fact no other litigant is more directly affected or has met the deadline for filing an application for judicial review of this matter within the required statutory time period, the Applicant respectfully submits that its standing ought to be recognized.

### **(b) The Standard of Review**

21. Under the "pragmatic and functional approach", the court must consider four factors when determining the appropriate standard of review. These four factors (with specific reference to the instant case) are:

- whether or not there is a privative clause or statutory right of appeal in the *KPIA* that either encourages or discourages judicial review;
- the nature of the issue decided by the Minister and the expertise of the Minister to decide that issue relative to those of the Federal Court;

- the purpose of the *KPIA* as a whole and of s. 5 specifically; and
- the nature of the question (i.e. question of fact, law, or mixed fact and law).

*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,  
[1998] 1 S.C.R. 982 [*“Pushpanathan”*].

22. While each of these four factors must be considered, it is also important to note that, as stated by Iacobucci J. in *A.U.P.E. v. Lethbridge Community College*: “a highly technical or mechanistic approach is to be avoided; instead the interplay among the four factors determines the level of deference owed to the administrative decision itself.” It is also important not to lose sight of the reason for applying this test. As set out by Bastarache J. in *Pushpanathan*, at paragraph 26:

The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed.

*A.U.P.E. v. Lethbridge Community College* (2004), 238 D.L.R. (4th)  
385 at para 14.

*Pushpanathan*, *supra* at para 26.

23. Once these four factors have been considered, the Court must determine whether the standard of review is correctness (where little or no deference is appropriate); reasonableness *simpliciter*; or patent unreasonableness (where considerable deference is warranted). The overall aim of the inquiry is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

*Dr. Q v. College of Physicians and Surgeons of British Columbia*,  
[2003] 1 S.C.R. 226 at paras 26 and 35 [*“Dr.Q”*].

24. In the present case, there are no written reasons by the Minister to which the Court can defer.<sup>1</sup> It is simply a question of whether the Minister’s Plan complies with

---

<sup>1</sup> The Applicant sought production of the Tribunal Record pursuant to Rule 317. No reasons or analysis were produced in response. The Record contains only a bald statement that the plan has

s.5 of the *KPIA*. There is no privative clause, and the Minister has no greater expertise than the Court on the issues raised – they are purely questions of jurisdiction and statutory interpretation. As such, the standard of correctness applies.

***Privative Clause or Statutory Right to Appeal***

25. In the instant case, there is no privative clause in the *KPIA* that protects the Minister's decision from judicial review, and thus there is no special deference owed to the Minister.

*Dr. Q, supra* para 27.

***The Expertise of the Minister relative to that of the Reviewing Court***

26. This part of the analysis requires the Court to characterize the expertise of the Minister, examine its own expertise relative to that of the Minister, and identify the nature of the specific issue before the Minister relative to his or her expertise. In the instant case, the issue is one of jurisdiction or statutory interpretation, where deference is not appropriate. The Minister must be correct in determining the scope of his or her delegated mandate, given that it is entirely created by statute.

*Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at para. 24.

*Pushpanathan, supra*, at para. 32-33.

27. While the Minister may have expertise and discretion in determining the measures that should be included in a Climate Change Plan, the question of whether the Minister's Plan complies with the *KPIA* is purely a legal one, subject to the supervision of the courts. In other words, the Minister has discretion to choose which measures are included to ensure that Canada meets its obligations under the *Kyoto Protocol*; but the Minister is not granted the discretion to decide what he is or is not required to do under the Act. The Applicant's position is that the Minister has no

jurisdiction to publish a plan that explicitly fails to ensure that Canada's *Kyoto Protocol* obligations are met. This is a mandatory requirement set out in the *KPIA*.

28. As such, the Minister enjoys no relative expertise in the question of law that is the subject of this judicial review. To the contrary, the Minister is possessed of significantly less expertise than of the Court. In other similar cases seeking *mandamus*, the courts have given no deference to the Minister's position.

*Chieu v. Canada (Minister of Citizenship and Immigration)*, *supra*, para. 24.

*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

*Canadian Wildlife Federation Inc. v. Canada (Minister of Environment)*, [1990] 2 W.W.R. 69.

### ***The Purpose of the Act as a Whole and of s. 5 Specifically***

29. The purpose of the *KPIA* 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." Section 5 of the *KPIA* requires that within 60 days of the Act coming into force, the Minister must prepare a Climate Change Plan and release the Plan publicly. The Act sets out a specific list of measures to be described in the plan "to be taken to ensure that Canada meets its obligations under Article 3, paragraph 1, of the *Kyoto Protocol*".

*KPIA*, *supra*, s. 3.

30. Given the *KPIA*'s objectives and the integral role envisioned by Parliament for the Climate Change Plan in meeting these objectives, it is clear that the Minister was accorded no discretion by Parliament over whether to comply with s.5. The integral nature of the obligations set out in s.5 for achieving the objectives of the Act requires that the Minister's conduct regarding his obligations under s. 5 should be assessed based on the correctness standard.

### ***The Nature of the Problem***

31. This stage of the pragmatic and functional analysis examines whether the decision under review is based on an interpretation of facts, mixed fact and law, or pure law. The Courts have found that less deference is warranted on questions of law. The present case raises questions of law only. The certified record of materials before the Minister in respect of the decision under review contains no indication that the Minister considered any issues of fact. Rather, he considered only a proposed statement that “Notice is hereby given, under paragraph 5(3)(b) of the *Kyoto Protocol Implementation Act*, that a plan has been prepared by the Minister of the Environment in accordance with subsection 5(1) of the Act” – together with an email advising that “we have been able to reach agreement with the lawyers” on the wording of the statement.

Certified Tribunal Record, *Applicant’s Record*, Vol. 1, p. 227-28

*Dr. Q.*, *supra*, at para 34.

### ***Conclusion on Standard of Review***

32. Upon examining the *Pushpanathan* factors, the issues must be viewed holistically with an eye towards discerning legislative intent. Given the lack of any written reasons, the absence of a privative clause, the Minister’s limited expertise on questions of law, the objective of the legislation to ensure that Canada meets its commitments under the *Kyoto Protocol*, and the legal focus of the inquiry, this is precisely the type of decision that Parliament intended to leave to the courts to decide. Therefore, the correctness standard applies.

### **(c) The Minister’s Plan Does Not Comply with the *KPIA***

33. Section 5(1) of the *KPIA* provides as follows:

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

(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

- (i) regulated emission limits and performance standards,
- (ii) market-based mechanisms such as emissions trading or offsets,
- (iii) spending or fiscal measures or incentives,
- (iii.1) a just transition for workers affected by greenhouse gas emission reductions, and
- (iv) cooperative measures or agreements with provinces, territories or other governments... [emphasis added]

*Kyoto Protocol Implementation Act*, s.5(1)

34. The Minister's Plan does not include a description of measures to be taken "to ensure that Canada meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol". It describes measures that will leave Canada well short of meeting these obligations. As such, it simply ignores the requirements of the Act.

35. All government action must comply with the law. The will of Parliament is paramount and no administrative or executive authority is entitled to contravene it, whether directly or indirectly. The courts have recognized that rule of law is entrenched as "the fundamental right of the public to government in accordance with the law" it as "a corner stone of our democratic form of government", guaranteeing "the rights of citizens to protection against arbitrary and unconstitutional government action".

*Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)*, [1992] 3 F.C. 316 (C.A.), at 347.

*Re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70-72.

*Charter of Rights and Freedoms*, Preamble

*Canadian Council of Churches v. Canada*, *supra*, paras 31-32.

36. As stated by Professor Hogg:

[A] Minister of the Crown or any other representative of the government has no power to suspend the operation of a law for a time, or to

dispense with a law in favour of a particular person or group. These "suspending" and "dispensing" powers were asserted by the Stuart Kings, but were abolished by the Bill of Rights of 1688. From time to time, modern governments assert such powers, and the assertions are repudiated by the courts, who always add a stern admonition that the Crown is not above the law.

Hogg, P. *Constitutional Law in Canada* (5<sup>th</sup> ed.) Vol 2 (Thomson/Carswell, 2007), at 34.5.

37. The Supreme Court of Canada in *Re Secession of Quebec* stressed that the rule of law conveys "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" and emphasises that it "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action." A minister has no legal or quasi-legal veto power over statutes passed by Parliament. Once an act of Parliament is passed, it must be taken as law. By his conduct in the instant case, the Minister has ignored the rule of law and the will of Parliament by refusing to comply with a mandatory duty that is required by Parliament.

*Re Secession of Quebec, supra*, at paras 67 and 70.

38. This arbitrary state action of defying the will of Parliament by refusing to comply with the requirements in s. 5 of the *KPIA* constitutes an affront to executive accountability and the legitimacy of the Canadian system of government. As noted above, the purpose of the *KPIA* 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" and s. 5 provides a mandatory crucial step for achieving this objective.

*KPIA, supra*, ss. 3 and 5.

39. Clearly, the Minister's Plan does not conform to the requirements of the Act or the international law, which the *KPIA* is intended to implement. Moreover, by

exceeding the international standards set in the *Kyoto Protocol*, the Minister's Plan violates both the precautionary principle and the principle of sustainable development, which are internationally recognised concepts that have been adopted by Canada. This constitutes an abrogation of the rule of law.

*Collins Affidavit, Applicant's Record*, Vol. 1, p. 13-14, para 10.

*Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1; (1992), 31 I.L.M. 874.

#### D. Remedies

40. The Court has exclusive original jurisdiction to issue both a writ of *mandamus* and grant declaratory relief, against any federal board, commission or other tribunal, including the Minister.

*Federal Court Act*, R.S.C. 1985, c. F-7, ss. 2(1), 18(1) and 18.1(4).

*Canadian Environmental Law Assn. v. Canada (Minister of the Environment)*, [1999] 3 F.C. 564, at paras. 5-6.

41. In practice, applicants often seek both declarations and *mandamus* as part of the same proceeding. There is nothing that precludes such an application. If the requirements for both a declaration and a writ of *mandamus* are satisfied, both can be issued together.

*Alberta Wapiti Products Cooperative Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, [2007] F.C.J. No. 366, at para. 18.

### ***Declaratory Relief***

42. Declarations are generally a “normal part of every decision that grants other relief on an application for judicial review” but can also be the sole subject of a decision of the court where other remedies (e.g. *mandamus*, certiorari, injunction, etc), may not be available or appropriate.

Sara Blake, *Administrative Law in Canada*, 4<sup>th</sup> ed., (Markham, Ont. : LexisNexis Butterworths, 2006), at 228.

43. In the instant case, the Minister has failed to meet his duty to produce a Climate Change Plan addressing the requirements set out in the Act in the required time period. Based on the Minister’s refusal to address these requirements, the Applicant seeks a declaration that the Minister has not complied with s. 5 of the *KPIA*, that the Minister's Plan does not meet the legal requirements under s. 5 of the *KPIA*, and that his conduct is therefore unlawful.

### ***Relief in the Nature of Mandamus***

44. Professor Wade states that “a statutory duty must be performed without reasonable delay and this may be enforced by *mandamus*”. *Mandamus* is used to compel a public authority to perform its legal duties and can be ordered even though a statutory time limit for the performance of the statutory duty in question has expired.

Sir William Wade and Christopher Forsyth, *Administrative Law*, 9<sup>th</sup> edn (Oxford University Press, 2005), at 618-20.

David Mullan, *Administrative Law*, 3<sup>rd</sup> ed. (Carswell, 1996), at 462.

45. In *Apotex Inc. v. Canada* [1994] 1 F.C. 742, the Federal Court of Appeal set out the conditions that must be met to obtain a writ of *mandamus*:

- (a) there must be a public legal duty to act;
- (b) the duty must be owed to the applicant;
- (c) there is a clear right to performance of that duty, in particular:
  - (i) the applicant has satisfied all conditions precedent giving rise to the duty;

- (ii) there was (1) a prior demand for performance of the duty; (2) a reasonable time to comply with the demand unless refused outright; and (3) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;
- (d) where the duty sought to be enforced is discretionary, certain rules apply;
- (e) no other adequate remedy is available to the applicant;
- (f) the order sought will be of some practical value or effect;
- (g) the Court in the exercise of its discretion finds no equitable bar to the relief sought;
- (h) on a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

*Apotex Inc. v. Canada*, [1994] 1 F.C. 742, para. 45.

**a. *There must be a Public Legal Duty to Act***

46. A writ of *mandamus* cannot be issued where the Minister has "limited ad-hoc legislative power." There has to be an affirmative regulatory duty, which the Minister has failed to discharge in order for a writ to be issued to compel Ministerial cooperation. Where a Minister fails to comply with the existing regulatory regime, as in the instant case, his or her order is invalid and the court will force the Minister to make the decision using the existing structure.

*Friends of the Oldman River Society v. Canada (Minister of Transport)*, *supra*, para. 59.

*Canadian Wildlife Federation Inc. v. Canada (Minister of Environment)*, *supra*.

**b. The Duty must be Owed to the Applicant**

47. With regard to the requirement that the duty must be owed to the applicant, Desjardins J.A., in *Distribution Canada Inc. v. Minister of National Revenue*, stated:

Contrary to Rothmans, the appellant, in the case at bar, is a person aggrieved in the sense that it suffers an economic loss as a consequence of the non-enforcement of the Act. But, at the same time, the Customs Tariff is not intended for the protection of distributors such as the appellant, but for the protection of Canadian producers. The strict nature of its interest may therefore be difficult to define. **On the other hand, the matter raised by the appellant is one of strong public interest and there may be no other way such an issue could be brought to the attention of the court, were it not for the efforts of the appellant.** [emphasis added]

*Distribution Canada Inc. v. Minister of National Revenue*, [1993] 2 F.C. 26 (C.A.), at para. 24.

48. This finding has been interpreted by the Federal Court of Appeal in *Harris* to permit public interest standing where "the matter raised [...] is one of strong public interest and there may be no other way such an issue could be brought to the attention of the Court, were it not for the efforts of the [public interest litigant]." Thus, in the instant case, as in other cases of its type, this aspect of the *Apotex* test is conflated with the test for public interest standing argued above.

*Harris v. Canada*, [2000], 4 F.C. 37 (F.C.A.) at para 53.

*Apotex Inc. v. Canada*, [1994] 1 F.C. 742, para. 45.

49. In cases in which environmental protection has been at stake, environmental groups have regularly been granted standing to seek *mandamus*. The instant case is clearly one in which the Applicant seeks to require the Minister to *comply* with the law; not one in which the Court is being asked to tell the Minister *how he should enforce* the law. As noted above in the discussion on standing, the Applicant has a genuine interest in these proceedings and will directly benefit in its work if the Minister complies with the law and his duties under the Act.

*Friends of the Old Man River Society v. Minister of Transport et al., supra.*

*Sierra club of Canda v. Canada (Minister of Finance), supra, at 32.*

50. It should also be noted that the *Constitution Act, 1982* entrenches "the fundamental right of the public to government in accordance with the law". Thus is it a duty - in fact a constitutional right - that is owed to each member of the public by the Minister as a member of the Government to comply with the requirements of the law set out in s. 5 of the *KPIA*.

*Constitution Act, 1982, s. 52.*

*Charter of Rights of Freedoms, Preamble.*

### **c. There is a Clear Right to Performance of that Duty**

51. This part of the test requires that the applicant has satisfied all conditions precedent giving rise to the duty, that there was a prior demand for performance of the duty, that a reasonable time to comply with the demand has passed, and that a subsequent refusal, such as by unreasonable delay, has resulted. As noted above, s. 5 of the *KPIA* requires that within 60 days of the Act coming into force, the Minister must prepare a Climate Change Plan, which sets out a specific list of measures "to be taken to ensure that Canada meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol". This condition precedent passed without the Minister producing such a plan at which point the Minister was in violation of his duty.

*KPIA, supra s. 5.*

52. Regarding the need for a prior demand, there is a low threshold for this requirement. Any communication of the applicant's demand that the public official perform the statutory duty will suffice. In the instant case, the Applicant made several demands to the Minister calling on him to ensure that Canada comply with its obligations under the *Kyoto Protocol*, and also calling on him to comply with his obligations under the *KPIA*.

*Nguyen v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 232; at para. 37.

Applicant's letter dated October 31, 2006 to the Minister, Exhibit A to the Olivastri Affidavit, *Applicant's Record*, Vol. 1, p. 193-99.

Applicant's letter dated May 28, 2007 to the Minister, Exhibit B to the Olivastri Affidavit, *Applicant's Record*, Vol. 1, p. 201-6.

Applicant's letter dated September 12, 2007 to the Minister, Exhibit D to Olivastri Affidavit, *Applicant's Record*, Vol. 1, p. 219-22.

53. Regarding the need for actual or implicit refusal of the demand, it is clear in the circumstances of this case that the Minister has no intention of filing a new plan.

*Alberta Wapiti Products Cooperative Ltd. v. Canada (Minister of Agriculture and Agri-Foods)* (2005) 282 F.C.J. No. 1806, para. 84.

*McKay v. Minister of Municipal Affairs* (1973) 35 D.L.R. (3d) 627, p. 4.

**d. The Exercise of Discretion**

54. As noted above, s. 5 of the *KPIA* requires that within 60 days of the Act coming into force, the Minister “shall” prepare a Climate Change Plan that sets out the measures to be taken to ensure that Canada meets its obligations under the Kyoto Protocol, and release the Plan publicly. The duty that is sought to be enforced in this case, therefore, is mandatory and not discretionary.

*KPIA*, *supra* s. 5.

*Interpretation Act*, s. 11

Ruth Sullivan, Sullivan and Driedger on the *Construction of Statutes*, 4<sup>th</sup> ed., (Vancouver: Butterworths, 2002) at 60.

**e. No other Adequate Remedy is Available**

55. The mere existence of another remedy does not preclude the granting of *mandamus*. It is the adequacy of other remedies as a “better remedy” that must be assessed. It has been found by the Courts that adequacy requires “the most expeditious and secure method available”. There are no other remedies set out in the

*KPIA* nor are there any “better” remedies available elsewhere to force the Minister to comply with his statutory duty.

*Whitton v. Canada (A.G.)*, [2002] 4 F.C. 126 (F.C.A.), at para. 36

**f. *The Order Sought will be of some Practical Value or Effect***

56. Canada has an international obligation to act in good faith to comply with its commitments under the *Kyoto Protocol*. As noted above, the Minister’s Plan plainly shows that Canada refuses to meet its international obligations in a timely manner or to comply with the law as set out in the *KPIA*. An order of *mandamus* in this case asserting the rule of law, requiring compliance with the *KPIA*, and requiring serious efforts to address climate change, will be clearly of both practical value and effect to present as well as future generations of Canadians. Moreover, the emission reduction requirements in the *Kyoto Protocol* came into effect on January 1, 2008. The longer Canada delays in meeting these, the more difficult and costly it will be to do so. Thus there is significant public benefit in ensuring that the Minister meets his obligations in a timely manner.

*Vienna Convention on Law of Treaties* (Vienna, 23 May 1969),  
Articles 26 and 31.

*Kyoto Protocol*, Art. 3.1

57. The effect of the granting of the Order of *mandamus* will be to have the Minister re-prepare the plan so that it is consistent with the requirements of the *KPIA*. This will have practical effect not only in relation to addressing climate change, but also to Canada’s international standing and in upholding the rule of law.

*Mackin v. Strange* (1996) 134 D.L.R. (4th) 243 (N.B.C.A.) at para 17.

**g. *The Court in the Exercise of its Discretion finds no Equitable Bar to the Relief Sought***

58. An applicant for an equitable remedy must come before the Court with “clean hands” with no reasons in equity for denying the relief requested. In the instant case,

the Applicant is a public interest organization and the objective of the litigation is to assert the public interest in protecting the rule of law and the economic, social and environmental interests of present and future generations from the adverse consequences of climate change. There are no equitable bars to enforcing the will of Parliament and the rule of law. Nor is the Applicant barred in equity for any reason from bringing this application.

***h. On a "balance of convenience" an Order in the Nature of Mandamus should Issue***

59. In *Apotex*, the Federal Court of Appeal sets out three factual patterns in which the balance of convenience test has been implicitly acknowledged: those where the administrative cost or chaos that would result from granting such relief is obvious and unacceptable; instances where potential public health and safety risks are perceived to outweigh an individual's right to pursue personal or economic interests; and those where a property owner has acquired a vested right to a building permit pending approval of a by-law amendment. In the instant case, none of these scenarios are applicable either directly or by analogy.

*Apotex Inc. v. Canada, supra*, paras 107-109.

60. The Court should refrain from questioning the will of Parliament or the consequences of enforcing an Act of Parliament. Once an act of Parliament is passed, it must be taken as law. Professor de Smith states that the Court has no discretion to refuse *mandamus* when it is the only means of securing performance of a ministerial duty. Enforcing the will of Parliament and the rule of law ought to be critical priorities of the Court and should not be balanced out by other considerations. As stated by the Supreme Court of Canada in *Re Secession of Quebec*:

... democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation.

*Re Secession of Quebec, supra*, at paras 67 and 70.

S. A. de Smith, *Judicial Review of Administrative Action*, 4th edn (Stevens, 1980), at 557-59.

### **Summary**

61. The rule of law underpins the legitimacy of our democratic institutions and must be upheld. The Minister's conduct in ignoring his obligations under the *KPIA*, violates both the rule of law and the principles of international law. In the instant case, the Applicant meets the requirements for obtaining both declaratory and mandatory relief.

### **PART IV – ORDER SOUGHT**

62. The Applicant respectfully requests:

- (a) A declaration that the Minister has not complied with s. 5 of the *KPIA* because the Minister has failed to prepare a Climate Change Plan within 60 days of the *KPIA* coming into force, which provides a description of measures to be taken to ensure that Canada meets its obligations under Article 3.1 of the *Kyoto Protocol*;
- (b) A declaration that the Minister's plan entitled *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act 2007* does not meet the legal obligations under s. 5 of the *KPIA* and that his actions are therefore unlawful;
- (c) An order in the nature of mandamus requiring the Minister to comply with s. 5 of the *KPIA* and prepare a revised Plan that provides a description of measures to be taken to ensure that Canada meets its obligations under Article 3.1 of the *Kyoto Protocol*; and
- (d) The costs of this Application.

All of which is respectfully submitted this 14<sup>th</sup> day of January, 2008.

---

Chris G. Paliare and Andrew K. Lokan

Counsel for the Applicant, Friends of the  
Earth – Les Ami(e)s de la Terre

---

Hugh Wilkins

Counsel for the Applicant, Friends of the  
Earth – Les Ami(e)s de la Terre

## PART V – LIST OF AUTHORITIES

1. *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (T.D.)
2. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236
3. *Fraser v. Canada (A.G.)*, [2005] O.J. No. 5580
4. *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607
5. *Sunshine Village Corp. v. Superintendent of Banff National Park*, [1996] FCJ No. 1118 (Fed. C.A.), para. 69
6. *Harris v. R.*, [2000] 4 F.C. 37 (Fed. C.A.)
7. *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982
8. *A.U.P.E. v. Lethbridge Community College* (2004), 238 D.L.R. (4th) 385
9. *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226
10. *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84
11. *Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)*, [1992] 3 F.C. 316 (C.A.)
12. *Re Secession of Quebec*, [1998] 2 S.C.R. 217
13. Hogg, P. *Constitutional Law in Canada* (5<sup>th</sup> ed.) Vol. 2 (Thomson/Carswell, 2007)
14. *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1; (1992), 31 I.L.M. 874
15. *Canadian Environmental Law Assn. v. Canada (Minister of the Environment)*, [1999] 3 F.C. 564
16. *Alberta Wapiti Products Cooperative Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, [2007] F.C.J. No. 366
17. Sara Blake, *Administrative Law in Canada*, 4<sup>th</sup> ed., (Markham, Ont. : LexisNexis Butterworths, 2006), at 229
18. Sir William Wade and Christopher Forsyth, *Administrative Law*, 9<sup>th</sup> edn (Oxford University Press, 2005)

19. David Mullan, *Administrative Law*, 3<sup>rd</sup> ed. (Carswell, 1996), at 462
20. *Apotex Inc. v. Canada*, [1994] 1 F.C. 742
21. *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3
22. *Canadian Wildlife Federation Inc. v. Canada (Minister of Environment)*, [1990] 2 W.W.R. 69
23. *Distribution Canada Inc. v. Minister of National Revenue* [1993] 2 F.C. 26 (C.A.)
24. *Nguyen v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 232; (1993), 66 F.T.R. 240.
25. *Alberta Wapiti Products Cooperative Ltd. v. Canada (Minister of Agriculture and Agri-Foods)* (2005) F.C.J. No. 1806, (FC) aff'd 2007 FCA 110.
26. *McKay v. Minister of Municipal Affairs* (1973) 35 D.L.R. (3d) 627
27. Ruth Sullivan, Sullivan and Driedger on the *Construction of Statutes*, 4<sup>th</sup> ed., (Vancouver: Butterworths, 2002) at 60
28. *Whitton v. Canada (A.G.)*, [2002] 4 F.C. 126 (F.C.A.)
29. *Vienna Convention on Law of Treaties* (Vienna, 23 May 1969), Articles 26 and 31
30. S. A. de Smith, *Judicial Review of Administrative Action*, 4th edn (Stevens, 1980)

## APPENDIX A - STATUTORY AUTHORITIES

### *Kyoto Protocol Implementation Act, s. 3, 5*

#### Purpose

**3.** The purpose of this Act 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.

#### Climate Change Plan

**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

- (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
  - (i) regulated emission limits and performance standards,
  - (ii) market-based mechanisms such as emissions trading or offsets,
  - (iii) spending or fiscal measures or incentives,
  - (iii.1) a just transition for workers affected by greenhouse gas emission reductions, and
  - (iv) cooperative measures or agreements with provinces, territories or other governments;
- (b) for each measure referred to in paragraph (a),
  - (i) the date on which it will come into effect, and
  - (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;
- (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;
- (d) an equitable distribution of greenhouse gas emission reduction levels among the sectors of the economy that contribute to greenhouse gas emissions;
- (e) a report describing the implementation of the Climate Change Plan for the previous calendar year; and

(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 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

(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.

\*\*\*\*\*

Objet

**3.** La présente loi a pour objet d'assurer la prise de mesures efficaces et rapides par le Canada afin qu'il honore ses engagements dans le cadre du Protocole de Kyoto et aide à combattre le problème des changements climatiques mondiaux.

Plan sur les changements climatiques

**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) 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) les réductions des émissions et les normes de rendement réglementées,

(ii) les mécanismes axés sur les conditions du marché, tels que les échanges ou les compensations d'émissions,

(iii) l'affectation de fonds ou les mesures ou incitatifs fiscaux,

(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) la collaboration ou les accords avec les provinces, les territoires ou d'autres gouvernements;

b) pour chaque mesure visée à l'alinéa a) :

(i) la date de sa prise d'effet,

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

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.

### 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) 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.

**Constitution Act, 1982, s. 52**

**52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

**52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

(2) La Constitution du Canada comprend :

- a) la *Loi de 1982 sur le Canada*, y compris la présente loi;
- b) les textes législatifs et les décrets figurant à l'annexe;
- c) les modifications des textes législatifs et des décrets mentionnés aux alinéas a) ou b).

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

***Charter of Rights and Freedoms, Preamble***

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

**Federal Court Act, R.S.C. 1985, c. F-7, s. 2(1)****2. (1)** In this Act,

“action for collision”  
« *action pour collision* »

“action for collision” includes an action for damage caused by one or more ships to another ship or ships or to property or persons on board another ship or ships as a result of carrying out or omitting to carry out a manoeuvre, or as a result of non-compliance with law, even though there has been no actual collision;

“Associate Chief Justice”[Repealed, 2002, c. 8, s. 15]

“Canadian maritime law”  
« *droit maritime canadien* »

“Canadian maritime law” means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament;

“Chief Justice”[Repealed, 2002, c. 8, s. 15]

“Court”[Repealed, 2002, c. 8, s. 15]

“Court of Appeal”[Repealed, 2002, c. 8, s. 15]

“Crown”  
« *Couronne* »

“Crown” means Her Majesty in right of Canada;

“federal board, commission or other tribunal”  
« *office fédéral* »

“federal board, commission or other tribunal” means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867* ;

“Federal Court of Appeal”[Repealed, 2002, c. 8, s. 15]

“final judgment”  
« *jugement définitif* »

“final judgment” means any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

“judge”[Repealed, 2002, c. 8, s. 15]

<p>"laws of Canada" « <i>droit canadien</i> »</p>	<p>"laws of Canada" has the same meaning as those words have in section 101 of the <i>Constitution Act, 1867</i>;</p>
<p>"practice and procedure" « <i>pratique et procédure</i> »</p>	<p>"practice and procedure" includes evidence relating to matters of practice and procedure;</p>
<p>"property" « <i>biens</i> »</p>	<p>"property" means property of any kind, whether real or personal or corporeal or incorporeal, and, without restricting the generality of the foregoing, includes a right of any kind, a share or a chose in action;</p>
<p>"Registry" « <i>greffe</i> »</p>	<p>"Registry" means a registry established by the Chief Administrator of the Courts Administration Service pursuant to the <i>Courts Administration Service Act</i> for the purposes of this Act;</p>
<p>"relief" « <i>réparation</i> »</p>	<p>"relief" includes every species of relief, whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise;</p>
<p>"Rules" « <i>règles</i> »</p>	<p>"Rules" means provisions of law and rules and orders made under section 46;</p>
<p>"ship" « <i>navire</i> »</p>	<p>"ship" means any vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion, and includes</p> <p style="margin-left: 40px;">( a ) a ship in the process of construction from the time that it is capable of floating, and</p> <p style="margin-left: 40px;">( b ) a ship that has been stranded, wrecked or sunk and any part of a ship that has broken up.</p>
	<p>"Supreme Court"[Repealed, 1990, c. 8, s. 1]</p>
	<p>"Trial Division"[Repealed, 2002, c. 8, s. 15]</p>
<p>Senate and House of Commons</p>	<p>(2) For greater certainty, the expression "federal board, commission or other tribunal", as defined in subsection (1), does not include the Senate, the House of Commons, any committee or member of either House, the Senate Ethics Officer or the Ethics Commissioner.</p>

## Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

« action pour collision » " <i>action for collision</i> "	« action pour collision » S'entend notamment d'une action pour dommages causés par un ou plusieurs navires à un ou plusieurs autres navires ou à des biens ou personnes à bord d'un ou plusieurs autres navires par suite de l'exécution ou de l'inexécution d'une manoeuvre, ou par suite de l'inobservation du droit, même s'il n'y a pas eu effectivement collision.
« biens » " <i>property</i> "	« biens » Biens de toute nature, meubles ou immeubles, corporels ou incorporels, notamment les droits et les parts ou actions.
	« Cour » [Abrogée, 2002, ch. 8, art. 15]
	« Cour d'appel » ou « Cour d'appel fédérale » [Abrogée, 2002, ch. 8, art. 15]
« Couronne » " <i>Crown</i> "	« Couronne » Sa Majesté du chef du Canada.
	« Cour suprême » [Abrogée, 1990, ch. 8, art. 1]
« droit canadien » " <i>laws of Canada</i> "	« droit canadien » S'entend au sens de l'expression « lois du Canada » à l'article 101 de la <i>Loi constitutionnelle de 1867</i> .
« droit maritime canadien » " <i>Canadian maritime law</i> "	« droit maritime canadien » Droit — compte tenu des modifications y apportées par la présente loi ou par toute autre loi fédérale — dont l'application relevait de la Cour de l'Échiquier du Canada, en sa qualité de juridiction de l'Amirauté, aux termes de la <i>Loi sur l'Amirauté</i> , chapitre A-1 des Statuts révisés du Canada de 1970, ou de toute autre loi, ou qui en aurait relevé si ce tribunal avait eu, en cette qualité, compétence illimitée en matière maritime et d'amirauté.
« greffe » " <i>Registry</i> "	« greffe » Greffe établi, pour l'application de la présente loi, par l'administrateur en chef du Service administratif des tribunaux judiciaires aux termes de la <i>Loi sur le Service administratif des tribunaux judiciaires</i> .
	« juge » [Abrogée, 2002, ch. 8, art. 15]
	« juge en chef » [Abrogée, 2002, ch. 8, art. 15]
	« juge en chef adjoint » [Abrogée, 2002, ch. 8, art. 15]
« jugement définitif » " <i>final judgment</i> "	« jugement définitif » Jugement ou autre décision qui statue au fond, en tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance.

« navire » " <i>ship</i> "	« navire » Bâtiment ou embarcation conçus, utilisés ou utilisables, exclusivement ou non, pour la navigation, indépendamment de leur mode de propulsion ou de l'absence de propulsion. Y sont assimilés les navires en construction à partir du moment où ils peuvent flotter, les navires échoués ou coulés ainsi que les épaves et toute partie d'un navire qui s'est brisé.
« office fédéral » " <i>federal board, commission or other tribunal</i> "	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la <i>Loi constitutionnelle de 1867</i> .
« pratique et procédure » " <i>practice and procedure</i> "	« pratique et procédure » Pratique et procédure, y compris en matière de preuve.
« règles » " <i>Rules</i> "	« règles » Dispositions de droit, règles et ordonnances établies en vertu de l'article 46.
« réparation » " <i>relief</i> "	« réparation » Toute forme de réparation en justice, notamment par voie de dommages-intérêts, de compensation pécuniaire, d'injonction, de déclaration, de restitution de droit incorporel, de bien meuble ou immeuble.
Sénat et Chambre des communes	« Section de première instance » [Abrogée, 2002, ch. 8, art. 15]  (2) Il est entendu que sont également exclus de la définition de « office fédéral » le Sénat, la Chambre des communes, tout comité ou membre de l'une ou l'autre chambre, le conseiller sénatorial en éthique ou le commissaire à l'éthique.

**Federal Court Act, R.S.C. 1985, c. F-7, s. 18(1)**

Extraordinary  
remedies,  
federal  
tribunals

**18. (1)** Subject to section 28, the Federal Court has exclusive original jurisdiction

( a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

( b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph ( a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Recours  
extraordinaires  
: offices  
fédéraux

**18. (1)** Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

**Federal Court Act, R.S.C. 1985, c. F-7, s. 18.1**

Application for judicial review	<b>18.1 (1)</b> An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.
Time limitation	(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.
Powers of Federal Court	(3) On an application for judicial review, the Federal Court may <ul style="list-style-type: none"> <li>( a ) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or</li> <li>( b ) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.</li> </ul>
Grounds of review	(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal <ul style="list-style-type: none"> <li>( a ) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;</li> <li>( b ) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;</li> <li>( c ) erred in law in making a decision or an order, whether or not the error appears on the face of the record;</li> <li>( 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;</li> <li>( e ) acted, or failed to act, by reason of fraud or perjured evidence; or</li> <li>( f ) acted in any other way that was contrary to law.</li> </ul>
Defect in form or technical irregularity	(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may <ul style="list-style-type: none"> <li>( a ) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and</li> <li>( b ) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.</li> </ul>

Demande de contrôle judiciaire	<b>18.1 (1)</b> Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
Délai de présentation	(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.
Pouvoirs de la Cour fédérale	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :  <ul style="list-style-type: none"> <li>a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;</li> <li>b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.</li> </ul>
Motifs	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :  <ul style="list-style-type: none"> <li>a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;</li> <li>b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;</li> <li>c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;</li> <li>d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;</li> <li>e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;</li> <li>f) a agi de toute autre façon contraire à la loi.</li> </ul>
Vice de forme	(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

***Interpretation Act, s. 11***Shall” and “may”

**11.** The expression “shall” is to be construed as imperative and the expression “may” as permissive.

Expression des notions

**11.** L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.