

FEDERAL COURT

BETWEEN:

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

Applicant

- and -

THE MINISTER OF THE ENVIRONMENT

Respondent

APPLICATION PURSUANT TO sections 18 and 18.1 of the *Federal Court Act*.

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The Applicant requests that this application be heard at Toronto, Ontario.


IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

September 19, 2007

Issued by:


DENISE HEENEY
REGISTRY OFFICER
AGENT DU GREFFE

Address of
local office:

Registry Officer
Federal Court of Canada
Registry Office
180 Queen Street West
Suite 200
Toronto, ON M5V 3L6

ph.: (416) 973-3356
fax: (416) 954-5068

TO: THE MINISTER OF THE ENVIRONMENT

c/o THE ATTORNEY GENERAL OF CANADA
East Memorial Building
284 Wellington Street
Ottawa, ON K1A 0H8

APPLICATION

This is an application for judicial review of the failure of the Minister of Environment (“Minister”) to prepare a climate change plan (“Climate Change Plan”) in compliance with the mandatory requirements set out in the *Kyoto Protocol Implementation Act* (“KPIA”).

The Applicant makes application for:

1. 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;
2. A declaration that the Minister's plan entitled *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act 2007* (the “Plan”) does not meet the legal obligations under s. 5 of the KPIA and that his actions are therefore unlawful;
3. 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
4. such further and other relief as this Honourable Court deems just.

The grounds for the application are:

1. 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'.
2. On August 21, 2007, the Minister released his plan entitled *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act 2007* ("Plan"). The Plan explicitly does not aim at complying with the Kyoto Protocol, and therefore does not conform to the requirements of the Act.
3. The Minister has omitted and refused to comply with a mandatory duty and to exercise its jurisdiction; erred in law; and acted contrary to law within the meaning of sections 18 and 18.1 of the *Federal Courts Act*.

Kyoto Protocol Implementation Act, Section 5

4. Section 5 (1) of the KPIA states:
 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.

The Plan Does Not Comply with s. 5 of the KPIA

5. The Minister's release of his Plan does not meet the legal obligations imposed by s. 5 of the KPIA. The provision imposes a mandatory duty on the Minister to 'ensure' that Canada meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol.

6. Article 3.1 of the Kyoto Protocol states:

3.1. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012. (Note that Canada's "assigned amount" is 6% below 1990 levels.)

7. Under the Kyoto Protocol, Canada's allowable greenhouse gas emissions for the period 2008 to 2012 are 2,815 Mt. In the Plan, the Minister has set out figures that, based on the proposed measures, project Canada's emissions at 3,779 Mt for the period 2008 to 2012. The Plan does not provide for reductions below 1990 levels. On its terms, the Plan provides that emissions of greenhouse gases will far exceed the levels required by the Kyoto Protocol.
8. The Plan does not describe measures to be taken to 'ensure' that Canada meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol.

Notices Given by Applicant of Breaches of Federal and International law

9. By letter dated October 31, 2006, the Applicant gave notice to the Minister of her obligations under both federal and international law in regards to the Kyoto Protocol. There was a verbal acknowledgement of receipt of the letter but no formal response to date.
10. By letter dated May 28, 2007, the Applicant sent a second letter to the Minister, providing additional information as to the ongoing course of action and decisions of the government in regards to greenhouse gas emissions and its likely violation of international law.

11. By letter dated September 12, 2007, the Applicant sent a third letter to the Minister stating that the Plan does not conform with the requirements set out in s. 5 of the KPIA and requesting the Minister to comply with these requirements.

Nature of the Applicant

12. The Applicant is a national non-profit environmental group with a strong international umbrella organization. The Applicant has been very involved in the climate change debate. In addition, the Applicant presented its own recommended climate change action plan that would be Kyoto Protocol compliant, and was very engaged in the adoption and implementation of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, a similar process and related protocol.

Statutory Provisions, Rules and Principles

13. *Kyoto Protocol Implementation Act*, ss. 2, 3, 4, and 5;
14. *United Nations Framework Convention on Climate Change* (1992), 31 I.L.M. 848;
15. *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (1998), 37 I.L.M. 22;
16. *Vienna Convention on the Law of Treaties* (1969) 8 I.L.M. 679, Article 26;
17. the precautionary, intergenerational equity and public trust principles;
18. *Federal Court Act*, ss. 18 and 18.1;
19. *Federal Court Rules, 1998*, and in particular r. 64; and

20. Such further grounds as counsel may advise and this Court may accept.

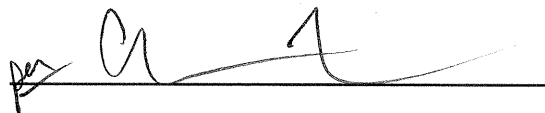
This application will be supported by the following material:

1. The affidavit of Beatrice Olivastri, Chief Executive Officer of Friends of the Earth, to be sworn;
2. The affidavit of Professor Lynda Collins, to be sworn;
3. The record of the Minister's decision to prepare and make public *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act 2007* as purported compliance with the KPIA;
4. Such further and other affidavits and material as counsel may advise and this Honourable Court permit.

The applicant requests that the Minister send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Minister to the Applicant and to the Registry:

1. The record of all documents and other materials considered by the Minister in his decision to prepare and make public *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act 2007* as purported compliance with the KPIA;

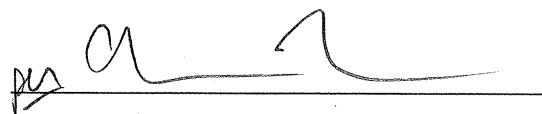
September 19, 2007



Chris G. Paliare
Andrew K. Lokan

Paliare Roland Rosenberg Rothstein LLP
Barristers & Solicitors
501 University Avenue, Suite 501
Toronto, ON M5H 3E5

ph.: (416) 646-4300
fax: (416) 646-4301



Hugh Wilkins

Ecojustice
30 St. Patrick Street, Suite 900
Toronto, ON M5T 3A3

ph.: (416) 368-7533
fax: (416) 363-2746

Solicitors for the Applicant

Court File No.

FEDERAL COURT

B E T W E E N:

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

Applicant

- and -

**HER MAJESTY THE QUEEN, as
represented by the
MINISTER OF THE ENVIRONMENT**

Respondent

NOTICE OF APPLICATION

Paliare Roland Rosenberg Rothstein LLP
Barristers & Solicitors
501 University Avenue, Suite 501
Toronto, ON M5H 3E5

Chris G. Paliare
Andrew K. Lokan
ph.: (416) 646-4300
fax: (416) 646-4301

Ecojustice
30 St. Patrick Street, Suite 900
Toronto, ON M5T 3A3

Hugh Wilkins
ph.: (416) 368-7533
fax: (416) 363-2746

Solicitors for the Applicant