Federal Court  Cour fédérale

Date: 20120717

Docket: T-110-12

Citation: 2012 FC 893

Ottawa, Ontario, July 17, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

DANIEL TURP

Applicant

and

MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Government of Canada to withdraw from the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* [the Protocol], which was communicated to the Secretary General of the United Nations [UN] on December 15, 2011.

I. Background

[2] The *United Nations Framework Convention on Climate Change* [the Convention], adopted at the Earth Summit in Rio de Janeiro on May 9, 1992, was intended to be a first step toward an

international action plan to deal with the challenges of climate change. The Convention set as an objective “the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system […] within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner” (article 2 of the Convention). The first principle of the Convention asked that developed parties to the Convention, including Canada, “[…] take the lead in combating climate change and the adverse effects thereof” (paragraph 3(1) of the Convention).

[3] However, the Convention did not have specific targets or binding measures, hence the reason for the Protocol’s existence. Adopted on December 11, 1997 after two and a half years of negotiations, the Protocol set out the first official targets for reducing greenhouse gas emissions at an international level. During the commitment period of 2008 to 2012, industrialized countries were supposed to reduce their overall emissions of such gases by at least 5% below 1990 levels (article 3 of the Protocol).

[4] The Government of Canada signed the Protocol on April 29, 1998, with a commitment to reduce its emissions by 6% below 1990 levels (Annex B of the Protocol). Before ratifying the Protocol, the government chose to present the following non-binding motion to the House of Commons: “That this House call upon the government to ratify the Kyoto Protocol on climate change.” On December 10, 2002, by a vote of 196 in favour and 77 opposed (the Canadian Alliance and Progressive Conservative Party being the parties opposed), the House voted in favour of the motion. Backed by this political support, the Canadian Government ratified the Protocol on December 17, 2002.

[5] Nonetheless, the Protocol only came into effect on February 16, 2005, after it was ratified by the Russian Federation. In 2006, the Conservative Party took power as a minority government. Having earlier stated that Canada would not comply with the Protocol targets, the government published a plan in 2007 that established a new target to reduce greenhouse gas emissions that was 34% higher than the target established by the Protocol.

[6] In an attempt to force the government's hand, Liberal MP Pablo Rodriguez, a member of the Standing Committee on the Environment and Sustainable Development, introduced private-member's Bill C-288: "An Act to ensure Canada meets its global climate change obligations under the Kyoto Protocol." Without the support of the government, however, the Bill could not authorize the expenditure of public funds, as set out in section 54 of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 [*Constitution Act, 1867*]. Nevertheless, with the support of the opposition parties, the Bill was passed by the House of Commons on February 14, 2007 and the *Kyoto Protocol Implementation Act*, SC 2007, c 30 [KPIA] entered into force on June 22, 2007.

[7] This Court first reviewed the KPIA in 2008, in three applications for judicial review filed by the non-profit organization: Friends of the Earth—Les Ami(e)s de la Terre. The organization alleged that the Minister of the Environment and the Governor in Council failed to comply with the duties imposed upon them under sections 5, 7, 8, and 9 of the KPIA. At the time, the Court looked at whether these sections imposed justiciable duties (*Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 at paras 27, 28 and 31, [2008] FCJ 1464 [*Friends of the Earth*]):

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

> for reasons of public policy, meet or attempt to meet the emissions targets established by the Kyoto Protocol.
>
> **28** The question posed by FOTE's second and third applications concerns the right of the Court to involve itself in the regulatory business of the executive branch of government.
>
> […]
>
> **31** The justiciability of all of these issues is a matter of statutory interpretation directed at identifying Parliamentary intent: in particular, whether Parliament intended that the statutory duties imposed upon the Minister and upon the GIC by the KPIA be subjected to judicial scrutiny and remediation?
>
> [Emphasis added.]

[8] My colleague Justice Robert Barnes reviewed the relevant sections of the KPIA before making the following determination (*Friends of the Earth*, above, at paras 42, 44 and 46):

> **42** The issue of justiciability must also be assessed in the context of the other mechanisms adopted by the Act for ensuring Kyoto compliance. In this case, the Act creates rather elaborate reporting and review mechanisms within the Parliamentary sphere. On this point I agree with the counsel for the Respondents that, with respect to matters of substantive compliance with Kyoto, the Act clearly contemplates Parliamentary and public accountability. While such a scheme will not always displace an enforcement role for the Court, in the overall context of this case, I think it does. If Parliament had intended to impose a justiciable duty upon the government to comply with Canada's Kyoto commitments, it could easily have said so in clear and simple language.
>
> […]
>
> **44** Considering the scope of the review mechanisms established by the Act alongside of the statutory construction issues noted above, the statutory scheme must be interpreted as excluding judicial review over issues of substantive Kyoto compliance including the regulatory function. Parliament has, with the KPIA, created a comprehensive system of public and Parliamentary accountability as a substitute for judicial review. The practical significance of Parliamentary oversight and political accountability should not, however, be underestimated, particularly in the context of a minority government: see *Canada*

> *(Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, above, at para. 71.
>
> […]
>
> **46** I have concluded that the Court has no role to play reviewing the reasonableness of the government's response to Canada's Kyoto commitments within the four corners of the KPIA. While there may be a limited role for the Court in the enforcement of the clearly mandatory elements of the Act such as those requiring the preparation and publication of Climate Change Plans, statements and reports, those are not matters which are at issue in these applications.

[9] In a unanimous judgment delivered from the bench, the Federal Court of Appeal upheld Justice Barnes' decision (*Friends of the Earth v Canada (Governor in Council)*, 2009 FCA 297, [2009] FCJ 1307) and an application for leave to appeal to the Supreme Court was dismissed with costs (*Friends of the Earth v Canada (Minister of the Environment)*, [2009] SCCA 497).

[10] On December 6, 2011, while the United Nations Conference on climate change was being held in Durban, South Africa, pursuant to article 27 of the Protocol (see paragraph 11 below for the text of the article), the Governor in Council enacted Order In Council PC 2011-1524 (Applicant's Record at 101-102):

> His Excellency the Governor General in Council, on the recommendation of the Minister of Foreign Affairs, hereby authorizes the Minister of Foreign Affairs to take actions necessary to withdraw, on behalf of Canada, from the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.

[11] On December 15, 2011, the Minister of Foreign Affairs wrote to the UN Secretary-General, as the Depositary of the Protocol, to give notice of the decision of the Canadian government to withdraw from the Protocol (Applicant's Record at 105). In a reply dated December 16, 2011 (Applicant's Record at 108), the UN Secretary-General acknowledged receipt of the notice and

indicated that Canada's withdrawal would take effect on December 15, 2012, in accordance with article 27 of the Protocol:

> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*
>
> **Article 27**
>
> 1. At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary.
>
> 2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.
>
> 3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from this Protocol.

[12] Opposed to the Government of Canada's decision to withdraw from the Protocol, the applicant filed this application for judicial review on January 13, 2012 and a hearing was held in Montréal on June 6, 2012. The KPIA has since been repealed with Bill C-38 receiving royal assent on June 29, 2012,

II. Position of the Parties

[13] The applicant states that the withdrawal from the Protocol is illegal, null, and void as it is in violation of the KPIA, the principle of the rule of law, the principle of the separation of powers, and the democratic principle. With regard to the last two principles, the applicant is of the opinion that they obliged the government to consult the House of Commons and the provinces before withdrawing from the Protocol.

[14] In reply, the Attorney General of Canada [the Attorney General] argues that the conduct of foreign affairs, including the decision to conclude or withdraw from an international treaty, is a

matter falling within the royal prerogative and thus the executive branch of the government. The Attorney General rejects the idea that the KPIA removed the executive power to withdraw from the Protocol, a power set out in article 27 of the Protocol. The Attorney General also challenges the idea that unwritten constitutional principles could force the executive branch to consult the House of Commons and the provinces before sending the notice of withdrawal to the UN Secretary-General. The Attorney General recalls that the conduct of foreign affairs and the *Constitution Act, 1867* have coexisted for about 135 years and that there has never before been a question as to whether the exercise of the royal prerogative is subject to a duty to consult Parliament or the provinces.

III. Issues and Standard of Review

[15] The issues raised by the applicant may be summarized as follows:

1. Does the withdrawal from the Protocol violate the KPIA and thus the rule of law?

2. Does the withdrawal from the Protocol violate the principle of separation of powers?

3. Does the withdrawal from the Protocol violate the democratic principle?

[16] When determining whether the government acted in accordance with a law, the standard of review is correctness (*Friends of the Canadian Wheat Board v Canada (Attorney General)*, 2012 FCA 183, [2012] FCJ 706) and that same standard applies to the constitutional questions raised by the applicant (*Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26, [2011] 1 SCR 160).

IV. Analysis

[17] On a preliminary point, the respondent argues that this Court does not have jurisdiction to declare the withdrawal from the Protocol to be of no force and effect. As a consequence, he says that it must refuse to rule on this case as the only order it could issue – a statement of illegality –

would not have any useful effect. This Court does not share the Attorney General's opinion and is of the view that where there is evidence the government has broken a law, a declaration of illegality is not useless, but on the contrary meets the public interest that the law be respected by all.

A. *Does the withdrawal from the Protocol violate the KPIA and thus the rule of law?*

[18] Under the royal prerogative, the conduct of foreign affairs and international relations, including the decision to conclude or withdraw from a treaty, falls exclusively under the executive branch of government (A. E. Gotlieb, *Canadian Treaty-Making*, Toronto: Butterworths, 1968 at 4 and 14; John H. Currie, Craig Forcese and Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory*, Toronto: Irwin Law, 2007 at 54 to 56 [*International Law: Doctrine, Practice, and Theory*]). In the absence of a Charter challenge, it appears that a decision made in the exercise of prerogative powers would not be justiciable (*Operation Dismantle Inc v Canada*, [1985] 1 SCR 441 [*Operation Dismantle*]; *Blanco v Canada*, 2003 FCT 263 at para 15, [2003] FCJ 355 [*Blanco*]; *Turp v Canada (Prime Minister)*, 2003 FCT 301 at paras 19-21, [2003] FCJ 423 [*Turp*]; *Turp v Chrétien*, [2003] JQ 7019 at para 11 [*Chrétien*]).

[19] That said, the applicant asserts that the passing of the KPIA had the effect of limiting the royal prerogative and preventing the government from unilaterally withdrawing from the Protocol. The applicant relies here on *Attorney General (on behalf of His Majesty) v De Keyser's Royal Hotel Ltd*, [1920] AC 580 (HL), in which the court recognized that the royal prerogative power could be abolished or limited by a legislative provision. Having considered the case law submitted by the parties, the Court acknowledges the possibility that the KPIA could abolish or limit the executive power to withdraw from the Protocol, but it remains to be determined whether this was the case.

[20] In his written submissions, the applicant suggested that the royal prerogative was limited by necessary implication (Applicant's Memorandum at para 27). At the hearing, the applicant was invited to explain in what way or under which provisions the KPIA has limited the royal prerogative. He essentially argued that the KPIA occupied the entire field of the Protocol and that, as a result, it implicitly withdrew royal prerogative. First, he raised sections 3 and 4, the first setting out the purpose of the KPIA and the other confirming that the Act is binding on the government:

Kyoto Protocol Implementation Act, SC 2007, c 30	*Loi de mise en œuvre du Protocole de Kyoto*, LC 2007, c 30
PURPOSE	OBJET
Purpose	Objet
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.	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.
HER MAJESTY	SA MAJESTÉ
Binding on Her Majesty	Obligation de Sa Majesté
4. This Act is binding on Her Majesty in Right of Canada.	4. La présente loi lie Sa Majesté du chef du Canada.

[21] The relevant obligations imposed on the government under the KPIA can be found in sections 5, 7, and 9. The government must prepare and publish a climate change plan (section 5 of the KPIA), make, amend or repeal the necessary regulations to ensure that Canada fully meets its obligations under Article 3, paragraph 1, of the Protocol, i.e. the 6 % reduction target (section 7 of

the KPIA), and the government shall prepare a statement setting out the greenhouse gas emission reductions that are reasonably expected to result for each year up to and including 2012 (section 9 of the KPIA).

[22] However, as we have seen, it has been determined that the KPIA must be interpreted "as excluding judicial review over issues of substantive Kyoto compliance" and that this Court "has no role to play reviewing the reasonableness of the government's response to Canada's Kyoto commitments within the four corners of the KPIA" (*Friends of the Earth*, above, at paras 44 and 46). At the most, the Court acknowledged that there may be a limited role for the Court in the enforcement of a clearly mandatory provision, but the applicant in this case did not submit that the royal prerogative was expressly limited or withdrawn and the Court cannot identify any mandatory provision that would have withdrawn or limited the royal prerogative or otherwise prevented the government from withdrawing from the Protocol.

[23] Turning back to the possibility of an implied limit on the royal prerogative, as an example of the analysis required, the Supreme Court discussed whether a legislative provision restricted the royal prerogative to set aside land for Indian reserves in *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816 [*Ross River*]. Justice LeBel stated the following regarding this possibility (*Ross River* at para 54):

> **54** [...] The extent of its authority can be abolished or limited by statute: "once a statute has occupied the ground formerly occupied by the prerogative, the Crown [has to] comply with the terms of the statute". (See P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 17; see also, Hogg, *supra*, at pp. 1:15-1:16; P. Lordon, Q.C., *Crown Law* (1991), at pp. 66-67.) In *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.), Lord Dunedin described the interplay of royal prerogative and statute, at p. 526:

> Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.
>
> Lord Parmoor added, at p. 568: "The Royal Prerogative has of necessity been gradually curtailed, as a settled rule of law has taken the place of an uncertain and arbitrary administrative discretion". In summary, then, as statute law expands and encroaches upon the purview of the royal prerogative, to that extent the royal prerogative contracts. However, this displacement occurs only to the extent that the statute does so explicitly or by necessary implication: see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 17; Hogg and Monahan, *supra*, at p. 17; Lordon, *supra*, at p. 66.
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> [Emphasis added.]

[24] However, the Supreme Court was not unanimous regarding the concept of necessary implication (*Ross River*, above, at para 4):

> **4** There is no doubt that a royal prerogative can be abolished or limited by clear and express statutory provision: see *R. v. Operation Dismantle Inc.*, [1983] 1 F.C. 745, at p. 780, aff'd [1985] 1 S.C.R. 441, at p. 464. It is less certain whether in Canada the prerogative may be abolished or limited by necessary implication. Although this doctrine seems well established in the English courts (see *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.)), this Court has questioned its application as an exception to Crown immunity (see *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, at p. 558; *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at pp. 1022-23). Assuming that prerogative powers may be removed or curtailed by necessary implication, what is meant by "necessary implication"? H. V. Evatt explains the doctrine as follows:
>
> > Where Parliament provides by statute for powers previously within the Prerogative being exercised subject to conditions and limitations contained in the statute, there is an implied intention on the part of Parliament that those powers can only be exercised in accordance with the statute. "Otherwise," says Swinfen-Eady M.R., "what use would there be in

> imposing limitations if the Crown could at its pleasure disregard them and fall back on Prerogative?"
>
> (H. V. Evatt, *The Royal Prerogative* (1987), at p. 44)

[Emphasis added.]

Using the wording of H.V. Evatt, Justices Bastarache, McLachlin, and L'Heureux-Dubé were not of the view that Parliament had specified that powers previously within the prerogative being exercised were now subject to conditions and limitations contained in the statute at issue. However, Justices Gonthier, Iacobucci, Major, Binnie, Arbour, and LeBel found otherwise, a disagreement that reflects the difficulties that can stem from this type of analysis.

[25] Nevertheless, in applying the analysis to the case at bar, this Court is of the opinion that the KPIA contains no provision, condition or restriction that would limit the royal prerogative of the government to withdraw from the Protocol. The applicant relied in particular on the title and purpose of the KPIA: "An Act to ensure Canada meets its global climate change obligations under the Kyoto Protocol [Emphasis added]" and "to ensure that Canada takes effective and timely action to meet its obligations under the Kyoto Protocol [Emphasis added]." However, the government's decision to withdraw from the Protocol is clearly provided by article 27 of that Protocol and thus the government was in compliance with it.

[26] As for determining whether this decision complies with the KPIA, to reiterate the words of Justice Barnes in *Friends of the Earth*, above, at para 42, if Parliament had intended to impose a justiciable duty upon the government to comply with Canada's Kyoto commitments, it could easily have said so in clear and simple language. It did not do so. This Court is of the opinion that the KPIA does not expressly alter the royal prerogative and that no provision or condition of the Act

does so by necessary implication. For this reason, the government's decision to withdraw from the Kyoto Protocol did not violate the KPIA nor the principle of the rule of law.

B. *Does the withdrawal from the Protocol violate the principle of separation of powers?*

[27] The applicant submits that the government violated the principle of separation of powers by withdrawing of its own initiative from the Protocol without regard for the KPIA. He accuses the executive branch of interfering in matters of Parliament's jurisdiction and unilaterally taking over the power to implicitly repeal the KPIA.

[28] Having concluded that the government's decision to withdraw from the Protocol was not limited by the KPIA, the Court must reject this argument. The executive branch maintains the prerogative to withdraw from the Protocol, this application of the prerogative is not justiciable (*Operation Dismantle*, above; *Blanco*, above, at para 15; *Turp*, above, at paras 19-21; *Chrétien*, above, at para 11) nor are issues regarding compliance with the Protocol (*Friends of the Earth*, above, at para 44). Furthermore, it should be noted that the KPIA has since been repealed by Parliament on June 29, 2012.

C. *Does the withdrawal from the Protocol violate the democratic principle?*

[29] The applicant relies on the democratic principle identified by the Supreme Court in *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paragraphs 61 to 69, [1998] SCJ 61, [1998] SCJ 61. He believes that this principle includes [TRANSLATION] "an obligation to encourage public discussion on all issues of public interest and consult the House of Commons as it is an essential element of our system of representative government" (Applicant's Memorandum at para 48) and states that the withdrawal from the Protocol is illegal because of the lack of consultation of the House of Commons and the provinces.

[30] On the issue of the need to consult the House of Commons, the applicant notes that the ratification of the Protocol led to a public discussion in the House of Commons, which ended with the passing of a motion in favour of the ratification. He argues that in such circumstances, the government had to consult the House of Commons again before doing the contrary.

[31] The motion passed by the House of Commons was not binding and acknowledged in its content that the power to conclude or withdraw from this treaty still lay with the executive branch. The motion only asked the government to ratify the Protocol and this vote could not oblige it to ratify the Protocol nor bind it in any way (see the comments regarding parliamentary resolutions by Henri Brun, Guy Tremblay, and Eugénie Brouillet, *Droit constitutionnel*, 5th ed, Cowansville: Yvon Blais, 2008 at 36). It follows that the government did not have to consult the House of Commons before withdrawing from this Protocol. As noted by Currie, Forcese, and Oosterveld, it is up to Parliament to pass a law that would force the House of Commons to be consulted before a treaty is ratified or withdrawn from, but that was never done (*International Law: Doctrine, Practice, and Theory*, above, at 55-56).

[32] Regarding the need to consult the provinces, this Court agrees with the respondent that the provinces would have been in a better position to submit this argument and that the applicant thus cannot do this for them in this public interest case.

[33] Since the issue is in the public interest, raised significant questions of law, and given the discretion conferred to the hearing judge under Rule 400 of the *Federal Courts Rules*, SOR/98-106, costs will not be awarded.

[34] Consequently, the application for judicial review is dismissed, without costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review of the government's decision to withdraw from the Kyoto Protocol is dismissed without costs.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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