CANADA'S INTERNATIONAL CLIMATE OBLIGATIONS AND PROVINCIAL DIVERSITY IN GREENHOUSE GAS EMISSIONS: A FERTILE GROUND FOR MULIFACETED LITIGATION

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Canada's International Climate Obligations and Provincial Diversity in Greenhouse Gas Emissions: A Fertile Ground for Multifaceted Litigation

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Summary

There is little to be said about Canada's international climate commitments, except that, under the Paris Agreement, its nationally determined contribution (NDC), like that of each country Party to this Agreement, contains only voluntary commitments. Alongside this Canadian NDC, there is a wide provincial range in matters of energy and GHG emissions that explains the existence of climate litigation in Canada, which manifests itself in remedies that, while not presenting the same debate, for the most part raise complex constitutional law issues.

Introduction

There is little to say about Canada's international climate commitments, except that, under the Paris Agreement, each country presents its nationally determined contribution (NDC) as it sees fit, and that the Canadian NDC, like that of all Parties to this Agreement, contains only voluntary commitments. After recalling the Canadian NDC, we will review provincial diversity in energy and GHG emissions, and recall the content of the Canadian NDC and the pillars of the *Pan-Canadian Framework on Clean Growth and Climate Change* (Part 1). We will then see that this context explains the existence of climate-related legal litigation in the country, which takes several forms that, although not presenting the same debate, often raise complex constitutional law issues (Part 2).

Canadian Context

To assess Canada's contribution to the global climate effort under the Paris Agreement, it is necessary to assess Canada's share of global GHG emissions, as well as the distribution of emissions within the federation (1.1). This then provides an informed look at the Pan-Canadian Framework on Clean Growth and Climate Change, which proposes six pillars to guide Canada's climate change effort announced at COP 21 (1.2).

1.1 Canadian Emissions

Canada's total GHG emissions in 2015 amounted to 722 megatonnes of carbon (eq. CO_2), or 18% (111 megatonnes eq. CO_2) above 1990 emissions (611 Mt eq. CO_2). Canada, which accounts for 0.5% of the world's population, accounts for about 2% of global CO_2 emissions. Oil sands account for 9.3% of Canada's GHG emissions and about 0.13% of global GHG emissions.[1] At first glance, Canada appears to be a country with relatively small global emissions, but in terms of per capita emissions, it is becoming a major player.[2] Only the United States and Australia are doing worse.

When we look carefully at the emissions for each Canadian province, we realize that there is a great disparity between the emissions of the ten Canadian provinces, due to the disparate use of fossil fuels and hydroelectricity across the country. The province of Quebec, of course, has the best record, with British Columbia, given their hydroelectric resources. The provinces of Alberta and Saskatchewan, on the other hand, have the worst record, with greenhouse gas emissions much higher than the worst ranked comparator, Australia. In Canada, emissions have decreased in all Canadian provinces since 2005, with the exception of Alberta, whose emissions increased by 17% between 2005 and 2014, mainly due to increased oil and gas operations.[3] Overall, in Canada, emissions have

[1] Environment and Climate Change Canada, Greenhouse Gas Emissions per Person and per Unit of Gross Domestic Product [https://www.ec.gc.ca/indicateurs- indicators/default.asp? lang=En&n=79BA5699-1], May 29, 2017. Environment and Climate Change Canada, National Inventory Report 1990-2015: Greenhouse Gas Sources and Sinks in Canada [https://ec.gc.ca/ges-ghg/default.asp?lang=En&n=662F9C56-1].

[2] *Id.*

[3] Environment Canada, *Canada's Emissions Trends*, 2014.

increased by 20% since 1990, the base year of the Kyoto Protocol. The energy sectors (stationary combustion, transportation and fugitive sources) account for 81% of Canadian emissions,[4] with remaining emissions being attributable to agriculture (8%), industrial processes and product use (7%), and waste (4%).[5]

In this context, it is not surprising that the repudiation of the Kyoto Protocol was not supported across the country, that it was the subject of a legal challenge, and that litigation has existed for many years in Canada, concerning, on the one hand, the imposition of a carbon tax by the federal government, and on the other hand, the pipeline projects allowing increased exploitation of our non-renewable petroleum resources, including the oil sands.

1.2 The Canadian NDC in the Paris Agreement and the Pan-Canadian Framework on Clean Growth and Climate Change

Breaking with the Conservative government of Stephen Harper, Justin Trudeau's new Liberal government did well at COP 21, announcing significant support for the Paris Agreement, through expressed support for the text of the Agreement, which stresses that states should strive not to exceed, if possible, 1.5 degrees Celsius. Canadian co-operation was also demonstrated by the announcement of $2.65 billion Canadian in financial support to the Green Climate Fund for 2015-2020.[6] However, the country's NDC was the one presented by the Canadian Conservative government in Copenhagen, which was in line with that of its neighbour and trading partner, the United States.

1.2.1 The Canadian NDC in the Paris Agreement

In its nationally determined contribution (NDC), Canada (Paris Agreement) plans to reduce its GHG emissions by -30% from its 2015 emissions by 2030. From 750 megatonnes of carbon dioxide equivalent (referred to as megatonnes of CO_2) to 524 megatonnes, this will result in a reduction of 226 megatonnes. This target represents a decrease of only 14.5% from 1990, which was the base year for the Kyoto Protocol, which Canada ratified in 2005. Canada adopted 2005 as the reference year because the United States, who were not bound by the Kyoto Protocol, had adopted, at the Copenhagen Conference, this reference year under the Obama presidency.[7] Canada has an actual emission reduction target of only 15%

[4] *Id.*
[5] *Id.*
[6] **"**Le Canada consacrera 2,65 milliards pour lutter contre les changements climatiques [Canada will dedicate $2.65 billion to fight climate change]," CBC, November 27, 2015, [https://ici.radio-canada.ca/newss/environment/2015/11/27/001-changement-climatique-canada-aide-pays-ges-environment-trudeau-dion.shtml].
[7] Obama's Speech to the Copenhagen climate summit, December 18, 2009; 2009 decision to reduce GHGs by 17% from 2005 to 2020. For the Canadian government, it is always a matter of levelling the playing field with the Americans, given the integration of the two economies (Environment Canada *Emissions Trends in Canada* 2014https://www.canada.ca/en/environment-climate-change/services/climate-change/publications/emission-trends-2014.html)https://www.canada.ca/en/environment-climate-change/services/climate-change/publications/emission-trends-2014.html.

with respect to 1990; instead of applying a reduction of 30% with respect to 1990 (613 megatonnes), it established it at a much higher level (747 megatonnes).[8]

What happens if Canada does not meet its 2030 target? Although the Paris Agreement does not define its legal status, it makes "NDCs supplements to its provisions and a condition of its ratification."[9] Article 4.2 states that "[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve". It further states that "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions". However, these NDCs are not found in an annex to the Agreement, but in a separate register, depriving their contents of [translation] "an implied or explicit conventional value."[10] The NDC is therefore described by doctrine as a unilateral state act. Hugues Hellio explains the legal status as follows:

> [Translation] "Formally, a unilateral state act is a legal act attributable to a single state which, acting in the name of its sovereignty and within its capacity, ensures sufficient publicity of its state will. In doing so, "the State has discretion and is determined essentially on the basis of its own interests". This is the case with NDCs. Attributable to a single Party, the NDC is the unilateral and sovereign act of that Party, which has discreetly and in accordance with its own interests, determined its climate objectives and actions.
>
> While NDCs are unilateral acts, they are linked to the Paris Agreement. Such acts are sometimes referred to as acts conditioned by conventional norms. They are frequently used to enhance conventional engagement without enshrining in the treaty differences in treatment between its Parties as revealed by the analysis of conditioned unilateral acts. This duality between the common conventional framework and the differentiated treatment of the Parties reinforces the qualification of unilateral acts conditioned by the NDCs, both of which, specific to each Party, remain governed by the common obligations of the Paris Agreement.[11]

For example, the common NDC obligations set out in the Paris Agreement mean that a transparency framework[12] requires disclosure and that the communicated NDC must represent progress against the previously communicated NDC by the State.[13] This enhanced transparency framework must provide a "clear understanding of climate change actions […] including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions" (s. 13.5). Thus, "[e]ach Party shall regularly provide […] b) Information necessary to track progress made in implementing and achieving its

[8] Environment Canada, Canada's Emissions Trends, *Id.*
[9] Hugues Hellio, "Les « contributions déterminées au niveau national », instruments au statut juridique en devenir ["Nationally determined contributions", instruments with a legal status in the making]", *Revue juridique de l'environnement*, Special, no. HS17, 2017, 33, para 8.
[10] *Id.*
[11] *Id.*, paras 21-22.
[12] Art. 13 of the Paris Agreement.
[13] Art. 4(3) of the Paris Agreement.

nationally determined contribution" (Article 13.7). These mechanisms are conventional in that they fall under the Paris Agreement, a multilateral international treaty.

Finally, if the State fails to comply with its NDC, Article 15 of the Paris Agreement establishes a "mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement". It is not a sanction mechanism but a compliance mechanism, frequent in international environmental law and focused on facilitation, transparency, non-adversarial and non-punitive (s. 15.2).

1.2.2 Pan-Canadian Framework on Clean Growth and Climate Change

To implement and respect its NDC, the federal government adopted the *Pan-Canadian Framework on Clean Growth and Climate Change*[14] in 2016. The key pillars of this Pan-Canadian Framework, a cornerstone of Canada's climate plan, are:

1. Putting a price on carbon: provinces must adopt a cap-and-trade system or a carbon tax.

2. Eliminate coal-fired power in the few remaining provinces, and other complementary measures to further reduce emissions in Canada.

3. Accommodation measures.

4. Make significant investments in green infrastructure and public transit.

This pan-Canadian framework was adopted in concert with the provinces, because constitutionally, the federal government did not have a solid legal basis for adopting a carbon tax and imposing it on the provinces. This carbon tax is now being challenged by the Province of Saskatchewan under constitutional law, as we will now see.

Part 2 Canadian Constitutional Debates on Energy and Climate

The Canadian constitution does not provide for the environment as a legislative head of power. The *Constitution Act* of 1867 provides for the division of powers between the federal and provincial legislatures in this country, and the environment is obviously not there. The result is that the environment is a shared jurisdiction between provincial and federal authorities. To determine which legislature, federal or provincial, has jurisdiction over a given environmental matter, the "*pith and substance*" must be determined.[15]

This has led to numerous court challenges, the most recent of which are the federal carbon price (2.3) and the approval of Kinder Morgan's Trans Mountain pipeline

[14] Government of Canada, Pan-Canadian Framework on Clean Growth and Climate Change Canadian Plan for Climate Change and Economic Growth, 2016 [https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html].
[15] *Ward* v. *Canada (A.G.)*, [2002] 1 S.C.R. 569 at para. 17 and fol.; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 at para. 16; R. v. *Morgentaler*, [1993] 1 S.C.R. 462.

expansion, the only crude and refined oil pipeline from Alberta to the B.C. coast through the Rocky Mountains (2.4).

Two other cases also involve the application of Canadian constitutional law, but under two other heads. These are constitutional law professor Daniel Turp's challenge to Canada's withdrawal from the Kyoto Protocol (2.1) and the challenge to the approval of a pipeline, Northern Gateway, also in Western Canada (2.2).

2.1 Repudiation of the Kyoto Protocol

In 2008, Canadian emissions were 31% above Canada's Kyoto Protocol target of reducing its 1990 emissions by 6% by the end of the first Kyoto Protocol commitment period, that is the end of 2012.[16] This was not a surprise for anybody since the federal government and the Alberta government had always supported carbon intensity reductions only, while the reduction that Canada had to meet according to the Kyoto Protocol could not be attained without strong legislative measures, such as severe regulations aimed at major emitters of GHGs, measures on the fuel efficiency of all vehicles sold in Canada, and the imposition of carbon pricing through the implementation of a carbon tax or a cap and trade system.

On December 15, 2011, the Canadian Conservative government of the day sent out the required notice of withdrawal to repudiate the Kyoto protocol. This repudiation was legal under international law, with Canada following the procedure set out in Article 27 of the Protocol:

> **Art. 27 *Kyoto Protocol*:**
>
> 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 (…)

However, this repudiation has been challenged in the courts. Being of the opinion that it was not legal under Canadian constitutional law, international law professor Daniel Turp requested that it be struck down through a judicial review process before the Federal Court. He argued that this repudiation was contrary to the *Kyoto Protocol Implementation Act* (S.C. 2007, ch. 30), a private member's bill passed by the House of Commons on June 22, 2007, at the initiative of the Opposition in the House of Commons, since this act, in his opinion, required the government to put measures in place to meet Canada's commitment under the Kyoto Protocol.

The Federal Court held that this was a decision of the political sphere ("*high policy*") and that it was not for the courts to rule on the exercise of this discretionary power

[16] Report of the Commissioner of the Environment and Sustainable Development of Canada, 2009, Chapter 2 "The Kyoto Protocol Implementation Act", [http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200905_02_e_32512.html].

of the government.[17] It followed the precedents of two cases, namely *Turp v. Chrétien* (T-369-03) – 12 March 2003, where the Court concluded that "except for a violation of the Canadian Charter of Rights and Freedoms (…), matters of high policy are not subject to review by the courts" [para. 13], and *Friends of the Earth* (T-2013-07; T-78-08; T-1683-07) – 20 October 2008, where the court ruled that section 7 of the *Kyoto Protocol Implementation Act* did not appear to contain an obligation for the Government to make the regulatory changes required to comply with the *Kyoto Protocol* [para. 37 and fol.] : "All of the above measures are directed at ensuring compliance with Canada's substantive Kyoto commitments (…) the subject matter of which is mostly not amenable or suited to judicial scrutiny." [para. 43].

2.2 Carbon Taxation

In Canada, the federal government has the exclusive monopoly to enter into international treaties under the Royal Prerogative,[18] but the implementation of these treaties in the domestic legal order requires respect for the constitutional division of legislative powers between the federal government and provincial legislatures. On the issue of climate change and GHG emissions control, the provinces have the bulk of the legislative authority to implement Canada's commitments in the *Paris Agreement* and their inaction or lack of ambition can seriously compromise the achievement of the reduction targets announced by the central government in the Canadian NDC.

Ottawa had initially adopted this framework one year after COP 21, after tense discussions with the provinces. It was originally adopted without the provinces of Manitoba and Saskatchewan. Manitoba has since rallied, but the Province of Saskatchewan did not. Premier Brad Wall, during his term, maintained his categorical refusal to have Ottawa impose a price on carbon on its businesses, fearing a negative economic impact on his province. In January 2018, Premier Wall reiterated that his government would not hesitate to take the case to court if the federal government "tried to impose a carbon tax on Saskatchewan families and businesses."[19] Prime Minister Scott Moe, his successor, has decided to take legal action to determine whether the federal government's legislation[20] to impose the carbon tax complies with the Constitution.[21] As well, Rachel Notley, Premier of Alberta, a province rich in oil sands, announced in early October 2016 that she would not support the federal government's carbon pricing plan until the federal government approved the construction of new pipelines to open up the province. In November 2016, the Trans Mountain pipeline project was approved by the federal government. On November 29, 2016, Alberta Premier Rachel Notley welcomed the announcement of the

[17] *Turp* v. *Canada (Justice)*, [2014] 1 F.C.R. 439. Abandoned on appeal.
[18] *Id.*
[19] Andréanne Apablaza , « La Saskatchewan entend mener une bataille judiciaire contre la taxe carbone fédérale »[Saskatchewan intends to fight the federal carbon tax], Radio-Canada, May 18, 2017, [https://ici.radio-canada.ca/nouvelle/1034579/saskatchewan-bataille-judiciaire-ottawa-taxe-carbone].
[20] Part 5 of Bill C-74, March 28, 2018.
[21] "La Saskatchewan conteste la taxe carbone d'Ottawa devant les tribunaux [Saskatchewan intends to fight the federal carbon tax]", [https://ici.radio-canada.ca/nouvelle/1097253/contestation-cour-cadre-pancanadien-climatique].

federal approval of this pipeline, a decision she welcomed as the decision that would allow her province to see "light at the end of the tunnel," as the oil produced could open up new markets in Asia, among others.[22] It is nevertheless surprising that Alberta is opposed to the federal government's carbon tax as it was the first province to impose a carbon tax in 2007, and, in 2016, it amended its legislation to expand the scope of the tax so that it could be applied to all areas of its economy and to raise it to about $20 per tonne in January 2017 and to $30 in 2018.[23]

These efforts on the part of the federal government to convince the provinces to show themselves team players and to implement a carbon pricing system through a tax or a cap and trade system must be understood not only within the framework of cooperative federalism,[24] but also within a context where, under Canadian constitutional law, the imposition of carbon pricing by the federal government, as the main measure of its *Pan-Canadian Framework on Clean Growth and Climate Change*, is difficult to justify. It is complicated to find a solid constitutional basis by which the federal Parliament can establish its authority.[25]

Although this is an astonishing conclusion *a priori*, there is every reason to believe that it is through criminal regulation that the central government can achieve its ends.[26] Indeed, the other three constitutional options of federal taxation, national urgency and national interest[27] do not seem to be able to establish the legality of the federal tax. The federal government can tax only to create revenues independently of any other consideration,[28] while the theories of national emergency and national interest could only find application with difficulty, given that in the case of emergency, the provisional nature of the emergency, and in the case of national interest, the danger that this theory represents for the federal equilibrium, as was acknowledged by the Supreme Court.[29]

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22 «"Décision du fédéral sur les pipelines : l'Alberta est satisfaite [Federal decision on pipelines: Alberta is satisfied]", Radio-Canada, November 29,2016,
[https://ici.radio-canada.ca/nouvelle/1002930/rachel-notley--satisfaite-decision-ottawa-projets-enbridge-pipelines-northern-gateway-transmountain].].

[23] Alberta, *Climate Leadership Plan*, Progress Report, 2016-2017, table, p. 15, [online: https://open.alberta.ca/dataset/854af86e-309a-4727-90f9-6bba947dc66e/resource/989797fb-b-b890-4f52-9e91-43938fff566f/download/clp-progress-report-2016-17.pdf].

[24] *Québec (AG) v Canada (AG)*, 2015 SCC 14, [2015] 1 RCS 693, at para 154: "the principle of cooperative federalism—which permits a government at one level to pass laws that have an impact on the powers of the other level"; Brooke Jeffrey, "Intergovernmental Relations: A New Era?" , https://bdp.parl.ca/Content/LOP/ResearchPublicationsArchive/bp1000/bp111-f.pdf,1984, [https://bdp.parl.ca/Content/LOP/ResearchPublicationsArchive/bp1000/bp111-f.pdf].

[25] Nathalie Chalifour, "The Constitutional Authority to Levy Carbon Taxes," in Thomas J. Courchene and John Allan, eds., The State of the Federation, Institute of Intergovernmental Relations, McGill-Queen's University Press, 2009.

[26] *Id.*

[27] *R.* v. *Crown Zellerbach Canada ltd.,* [1988] 1 SCC. 401; Nathalie Chalifour, *Supra*, note 19.

[28] *Re: Exported Natural Gas Tax* [1982] 1 S.C.R. 1004 (Supreme Court of Canada).

[29] *R.* v. *Hydro Québec*, [1997] 3 SCR 213: "Determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism. In Crown Zellerbach, the minority (at p. 453) expressed the view that the subject of environmental protection was all-pervasive, and if

The federal legislative authority over criminal matters, which is based on section 91(27) of the *Constitution Act, 1867*,[30] would likely allow the federal government to impose this carbon tax if the federal legislator enshrined it in GHG regulations with criminal sanctions. Indeed, the Supreme Court of Canada has already found, on the basis of an extensive understanding of criminal law, that a prohibition with a criminal sanction is criminal law and that Part II of the *Canadian Environmental Protection Act* is valid under the federal criminal law power. Part II applies to the control of toxic substances, such as asbestos, lead, mercury and its vinyl chloride compounds, chlorinated biphenyls, that may be released to the environment. A substance is toxic if it is entering the environment in a quantity or concentration or under conditions that have a harmful effect on the environment and on human life and health. Part II authorizes the Government to make regulations respecting a substance listed in Schedule I, including regulations respecting the quantity or concentration that may be released to the environment. It does so through a series of prohibitions with criminal sanctions up to and including jail time. The Supreme Court found that Part II was legal under the federal criminal law power, rejecting the defence of Hydro-Québec that had been charged with committing an offence under the *Emergency Order on Chlorobiphenyl*, enacted under sections 34 and 35 of the *Canadian Environmental Protection Act*, Part II. Rather, the Supreme Court found that the impugned provisions were valid under the criminal law power; it argued that "human responsibility for the environment is a fundamental value of our society, and that Parliament can use its criminal law jurisdiction to highlight this value." According to the court, "[t]he criminal law must be able to adapt to and protect our new values."[31]

The difficulty of constitutionally entrenching the federal carbon tax in Canadian law probably explains why the federal government has announced that the proceeds of the federal carbon tax, for those provinces that do not adopt it, would be returned entirely and directly to the citizens of those provinces rather than to the provincial government.

2.3 Approval of new or expanded pipelines

As global conventional oil reserves eventually reach their peak, Alberta's oil sands resources are becoming increasingly important globally. Alberta's oil sands contain 1.80 trillion (a million millions) barrels of bitumen, an oil substance mixed with sand.

The U.S. economy is heavily dependent on oil imports and the U.S. is clearly the largest consumer of Canadian oil. Demand in other major countries, such as China and India, is growing even faster. The demand for fuel from Canada's oil sands will therefore exist for an indeterminate period of time; and, as analyses predict, the value of the resource will only increase over time as global oil supply becomes scarce. Many countries are indeed concerned about the security of their energy supplies. This is not the case for Canada, which will be able to meet its domestic needs for a long period of time. However, the picture is

accepted as falling within the general legislative domain of Parliament under the national concern doctrine, could radically alter the division of legislative power in Canada."

[30] 30 & 31 Victoria, ch. 3 (R.U.).

[31] *R.* v. *Hydro Québec*, *Supra*, note 24.

more complex when you consider the Canadian NDC and the necessary energy transition to achieve it.

As we know, the main problem with the oil sands is their energy-intensive extraction process, since extraction techniques result in significant greenhouse gas emissions. For every litre of gasoline produced, oil sands extraction emits three times more GHG emissions than conventional crude oil extraction. How should Canada's oil sands be developed? The answer to this question divides the powerful political forces that confront each other, some encouraging their rapid development to encourage foreign investment in Canada and ensure global energy security, others advocating a more gradual and limited development of this important resource in the name of combating climate change.

Currently, Canada's pipeline system can move nearly 4 million barrels per day, which is the average production for 2015. However, the Canadian Association of Petroleum Producers expects oil production to increase by 28% over the next 15 years, from 3.8 million barrels per day in 2015 to 4.9 million barrels per day by 2030. These increases will exceed the capacity of the existing pipeline system. "The need to build new energy infrastructure within Canada is clearly urgent," said Tim McMillan of the Canadian Association of Petroleum Producers, adding that this would allow Canada to prosper economically and better meet the world's energy needs.[32]

The federal government – under both Conservatives and Liberals – has approved pipeline projects in recent years. As noted above, in November 2016, the Canadian government authorized the expansion of the U.S. Kinder Morgan Trans Mountain pipeline and approved the replacement of Alberta's Enbridge Line 3 pipeline. It also approved the Pacific NorthWest LNG project in northern British Columbia, which has an estimated climate impact of between 6.5 and 8.7 million tonnes of GHG emissions per year.

2.3.1 Northern Gateway Pipeline Project

In addition, in 2014, the Canadian Conservative government approved the Northern Gateway project, which would build more than 1,000 kilometres of pipeline from northeast Edmonton to Kitimat in British Columbia to supply international oil sands markets. It was a 1,177 km twin pipeline from Bruderheim, Alberta to Kitimat, British Columbia, that would have transported an average of 525,000 barrels of oil per day. In June 2014, the Government of Stephen Harper approved this $7.9 billion project, subject to 209 conditions. These conditions were necessary as the pipeline would have crossed the Great Bear Rainforest and 1000 water bodies in Aboriginal territories.

The Federal Court of Appeal overturned the Canadian government's approval of the Northern Gateway project in June 2016, noting the lack of government consultation with West Coast First Nations. The Court ruled that consultation with First Nations, who had been denouncing the project for several years, was simply "*inadequate*". The constitutional obligation of the federal and provincial Crown to consult Aboriginal peoples

[32] "Il faut de nouveaux pipelines [New pipelines are needed]," says the Canadian Association of Petroleum Producers, CBC, June 23, 2016, [http://ici.radio-canada.ca/nouvelle/789101/petrole-pipeline-oleoduc-sables-bitumineux-production-economie].]

stems from section 35 of the *Constitution Act, 1982*, which is part of the Canadian Constitution and which confirms the existing rights of the Aboriginal peoples of Canada, be they land claims or claims of Aboriginal rights to fish or hunt.

In 2004, the Supreme Court clarified the content and scope of this consultation based on the Canadian Constitution, stating that:

- The purpose of these consultations is to preserve the honour of the Crown and to reconcile Aboriginal and Crown interests;
- These consultations must be held even when only "claims" of Aboriginal rights and title are involved;
- The consultation process should not be conducted by a third party (e.g. proponent, although often actively involved);
- This obligation may also involve, "where appropriate", accommodating the concerns of Aboriginal peoples, such as changing a route to minimize its impact on traditional activities or imposing strict environmental conditions. The Supreme Court of Canada has clarified that the scope of the duty to consult and accommodate Indigenous peoples varies depending on the circumstances of each case and the merits of the claim and the seriousness of the potential or apprehended harm. For example, where the claim is "based on sound prima facie evidence, where the right and potential harm are of high importance to Aboriginal people and where the risk of uncompensated harm is high", it may be incumbent upon the Crown to conduct extensive consultations with the parties involved.[33]
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With respect to the Northern Gateway Pipeline Project, the Federal Court of Appeal applied these principles and concluded that the federal government's decision to allow this pipeline was illegal because it had not been made following proper consultation with their nations:

> "[8] *When considering whether that duty has been fulfilled—i.e., the adequacy of consultation—we are not to insist on a standard of perfection; rather, only reasonable satisfaction is required.*
>
> *[325] We have applied the Supreme Court's authorities on the duty to consult to the uncontested evidence before us. We conclude that Canada offered only a brief, hurried and inadequate opportunity in Phase IV—a critical part of Canada's consultation framework—to exchange and discuss information and to dialogue.*
>
> *The inadequacies—more than just a handful and more than mere imperfections—left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. It would have taken Canada little time and little organizational effort to engage in meaningful*

[33] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.

[332] Overall, bearing in mind that only reasonable fulfilment of the duty to consult is required, we conclude that in Phase IV of the consultation process—including the execution of the Governor in Council's role at the end of Phase IV—Canada fell short of the mark.[34]

Subsequently, the Trans Energy East pipeline, which was to go and was also challenged by Indigenous groups in eastern Canada, was also abandoned by Transcanada.[35] Energy East was a 4,500-kilometre pipeline project that would transport about 1.1 million barrels of oil per day from Alberta and Saskatchewan to refineries in eastern Canada. Some have said that the abandonment of this pipeline was a business decision by Transcanada because it had already secured enough new pipelines in western Canada to reach international markets, especially in Asia.[36] Nevertheless, this corporate decision has certainly also been influenced by potential Aboriginal challenges, and by the fact that the new pipeline approval process must take into account the GHG emissions generated by oil sands extraction from the outset, and not just emissions caused by pipeline transportation itself.[37]

2.3.2 Authorization for Trans Mountain Pipeline Expansion

The Trans Mountain expansion has divided Canada, particularly western Canada, for several months now. British Columbia is opposed to this project, which runs through its territory, and has recently launched a court case in the province to determine its right to refuse such a project under its constitutional jurisdiction.

This pipeline was built in 1952 and is still operating today. The current route, which runs from Strathcona County (near Edmonton) in Alberta and Burnaby, British Columbia, a distance of 1,150 kilometres, is the subject of the expansion. On November 29, 2016, the Government of Canada approved the expansion project following a review that concluded on May 19, 2016, when the National Energy Board (NEB) concluded that the project was in the Canadian public interest and recommended to the Governor in Council that it approves the expansion, subject to 157 conditions. The expansion aims to build a combined pipeline that will increase its capacity from 300,000 barrels a day to 890,000 barrels a day toward international markets.

To put an end to the controversy surrounding this project, and in the face of the risk that it might end up as it did in the action recently brought by British Columbia, Ottawa

[34] *Gitxaala Nation et al. v. Canada (AG) et al.*, 2016 FCA 187.

[35] Alexandre Shields, "TransCanada annonce la fin du projet Énergie Est [TransCanada Announces End of Energy East Project]", *Le Devoir*, October 5, 2017.

[36] Joël-Denis Bellavance, « Abandon d'Énergie Est: une décision d'affaires », dit le ministre Carr ["Abandon Energy East: A Business Decision," says Minister Carr], *La Presse*, October 5, 2017.

[37] C. Krolik and Raphaëlle Bach, "L'émergence d'un « test climatique » en droit fédéral canadien : vers une meilleure prévention des dommages climatiques [The Emergence of a Climate Test in Canadian Federal Law: Towards Better Climate Damage Prevention]", in M. Torre-Schaub et al. (Ed.), *Quel(s) Droit(s) pour les changements climatiques ? [What Right(s) for Climate Change?]* , Mare et Martin, 2018, 301.

announced on May 29, 2018, that the project was in the national interest and that the federal government would purchase the pipeline expansion project from Texas firm Kinder Morgan by August 2018. Canada decided to provide a loan to Kinder Morgan to begin work immediately.[38]

However, on August 30, 2018, the Federal Court of Appeal ruled that the government representatives had not conducted reasonable consultations based on a genuine dialogue with the Indigenous applicants and that the Governor in Council's authorization rested upon a flawed consultation framework, notably because the National Energy Board's report did not address all the issues requiring consultations.[39] For example, the Board had not reached a conclusion on the nature and scope of the established or asserted Aboriginal rights (including title) [para 567], that neither Trans Mountain nor the Board had assessed the effects of the project on each affected Aboriginal group (para 568), nor had the assessment of the potential effects of the project on freshwater fisheries been considered. Paragraphs 559 and following of the judgment are relevant in this regard:

> "[559] On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants. While there are some examples of responsiveness to concerns, these limited examples are not sufficient to overcome the overall lack of response. The Supreme Court's jurisprudence repeatedly emphasizes that dialogue must take place and must be a two-way exchange. The Crown is required to do more than to receive and document concerns and complaints. The Supreme Court's jurisprudence repeatedly emphasizes that dialogue must take place and must be a two-way exchange. The Crown is required to do more than to receive and document concerns and complaints.
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> [560] Further, Phase III was to focus on two questions: outstanding concerns about Project-related impacts and any required incremental accommodation measures. Canada's ability to consult and dialogue on these issues was constrained by two further limitations: first, Canada's unwillingness to depart from the Board's findings and recommended conditions so as to genuinely understand the concerns of the Indigenous applicants and then consider and respond to those concerns in a genuine and adequate way; second, Canada's erroneous view that it was unable to impose additional conditions on Trans Mountain.
>
> (…) [562] I begin the analysis by underscoring the need for meaningful two-way dialogue in the context of this Project and then move to describe in more detail the three significant impediments to meaningful consultation: the Crown consultation team's implementation of their mandate essentially as note takers, Canada's reluctance to consider any departure from the Board's findings and recommended conditions, and Canada's erroneous view that it lacked the ability to impose

[38] Peter Dietsch, «Un vrai compromis est possible au sujet du pipeline Trans Mountain [True compromise is possible on the Trans Mountain Pipeline]", *Le Devoir*, [https://www.ledevoir.com/opinion/idees/529107/un-vrai-compromis-est-possible-au-sujet-du-pipeline-trans-mountain], May 31, 2018.

[39] Tseil-Waututh Nation v. Canada (Attorney General), 2018 FCA 153.

> additional conditions on Trans Mountain. I then discuss Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants. Finally, I review instances that show that as a result of these impediments the opportunity for meaningful dialogue was frustrated.
>
> [563] The jurisprudence of the Supreme Court on the duty to consult is clear. The Indigenous applicants were entitled to a dialogue that demonstrated that Canada not only heard but also gave serious consideration to the specific and real concerns the Indigenous applicants put to Canada, gave serious consideration to proposed accommodation measures, and explained how the concerns of the Indigenous applicants impacted Canada's decision to approve the Project.

The following examples show how Canada fell short of its obligations.

> (i) The need for meaningful two-way dialogue
>
> [564] As a matter of well-established law, meaningful dialogue is a prerequisite for reasonable consultation. As explained above at paragraphs 499 to 501, meaningful consultation is not simply a process of exchanging information. Where, as in this case, deep consultation is required, a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must be prepared to make changes to its proposed actions based on information and insight obtained through consultation.

Following this ruling, the Premier of Alberta announced that her province was withdrawing from its commitment to impose an increase in its Alberta carbon tax to meet the price of the federal carbon tax.[40]

The decision by the central government to purchase the project was to end the jurisdictional wrangling between the different levels of government on this issue, but it will need to be more carefully guarded in terms of consultation with affected Indigenous peoples. The federal government's reaction to this ruling is not yet known. It could decide to appeal the decision to the Supreme Court of Canada, which would considerably delay the project and would be politically criticized, or it could comply with the requirements of that judgment by going through the process again to respect the framework of consultations, in order to meet, this time, the constitutional requirements for Indigenous consultations that the court interpreted in that decision.[41]

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[40] "Notley se retire du plan sur le climat après la décision sur Trans Mountain [Notley withdraws from climate plan after Trans Mountain decision]", *La Presse*, August 30, 2018, [http://www.lapresse.ca/affaires/economie/energie-et-ressources/201808/30/01-5194799-notley-se-retire-du-plan-sur-le-climat-apres-la-decision-sur-trans-mountain.php].

[41] "Marché du carbone : Greenpeace poursuit le gouvernement de l'Ontario [Carbon market: Greenpeace sues the Government of Ontario]," September 11, 2018, [https://ici.radio-canada.ca/nouvelle/1123187/marche-carbone-greenpeace-government-ontario]; "L'Ontario sort du marché du carbone avec le Québec [Ontario exits the carbon market with Quebec]", Radio-Canada, July 3, 2018, [https://ici.radio-canada.ca/news/1110554/ontario-fin-marche-carbone-quebec-californie].

Conclusion

The parameters of Canada's energy policy cannot be ignored in order to fully understand Canada's international and domestic climate change policy. When you read the data on where the country is in global energy production, you can see that nothing is less easy than being the Minister of the Environment in this country:

> "Internationally, Canada is a small economy. Its GDP represents just 1.76% of world output. Nevertheless, it ranks among the world's leading energy producers, sixth with 3.1% of global production, behind China, the United States, Russia, Saudi Arabia and India.
>
> Thanks to the diversity of its natural resources, Canada is able to position itself as a leader in the production of many forms of energy:
>
> Oil: In 2011, Canada was the sixth-largest black-gold producer in the world, producing 169 megatonnes (Mt) of crude oil or 4.2% of world production. It was overtaken by Saudi Arabia, Russia, the United States, Iran and China. In the same year, it was also the 8th largest producer of petroleum products with 2.6% of world production."[42]

In this context, it is not surprising that a March 2017 report from the Canadian Senate shows that Canada's NDC is not achievable without a gradual decline in oil production and a consequent change in the way energy is produced and consumed in Canada.[43] An energy transition master plan would be required to meet Canada's 2030 emission reduction target under its NDC. Our political leaders know this, but the economic forces and the place of non-renewable resource development in the Canadian economy are holding them back. This energy transition is nevertheless necessary, even if it must be done gradually. Some energy policy experts[44] use Germany and Denmark as examples, whose energy consumption has declined significantly since 1990, but without hindering their economic growth. Canada uses twice as much energy to produce the same growth.[45] Germany's emissions fell in all sectors, and globally they fell by 28% between 1990 and 2014. In Canada, over the same period, emissions increased by 20% in all sectors, except in the

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[42] International Energy Agency, *Key World Energy Statistics 2012*; Montreal Economic Institute, "Canada's Energy Profile in 40 Questions", 2012.

[43] Senate Canada, Positioning Canada's electricity sector in a constrained carbon future. Report of the Standing Senate Committee on Energy, the Environment and Natural Resources, March 2017 [http://gardn.org/wp-content/uploads/2017/03/2017-02-24-ENEV-Interim-Electricity-Report_FINAL_e.pdf].

[44] J. Whitmore and P.-O Pineau, *État de l'énergie au Québec 2018 [State of Energy in Quebec 2018]*, Energy Sector Management Chair, HEC Montréal, December 2017; Conference by Pierre-Olivier Pineau, Pierre-Olivier Pineau, "Transition énergétique au Québec : prospérer dans la sobriété [Energy Transition in Quebec: Growing in Sobriety]", Université Laval, Quebec, February 13, 2017, [https://www.drne.ulaval.ca/fr/pierre-olivier-pineau-transition-energetique-au-quebec-prosperer-dans-la-sobriete].

[45] *Id.*

energy-producing industries, and our emissions increased by 37% in the transportation sector.

Achieving at least this energy transition requires realizing the full "technical-economic potential of Canada",[46] by investing public funds in renewable energy and public transit, by "developing Canada on existing railways"[47] and by increasing the insulation and renovation of buildings in an energy-efficient manner as quickly as possible.

[46] Pierre-Olivier Pineau, "Transition énergétique au Québec : prospérer dans la sobriété [Energy transition in Quebec: thriving in sobriety], Supra, note 36.
[47] *Id.*