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Canada in International Law at 150 and Beyond | Paper No. 21 – April 2018

The Evolution of Canada's International and Domestic Climate Policy From Divergence to Consistency?

Silvia Maciunas and
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About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. "Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

"Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Authors

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Géraud's work has appeared in several peer-reviewed journals, including the *Canadian Yearbook of International Law*, the *McGill Journal of Sustainable Development Law* and the *Quebec Journal of International Law*. His doctoral thesis was published under the title *Droit international du climat et aspect économique du défi climatique* (Pedone, 2017). Prior to joining CIGI, Géraud was assistant director of the Goldcorp Research and Innovation Chair in Natural Resources and Energy Law at Laval University, as well as lecturer in law. Previously, he has worked as a consultant for the Quebec Ministry of Culture and the Quebec Sustainable Development Commissioner.

Introduction

Climate change is a global commons challenge and as such requires collective action and cooperation among states.¹ Although domestic policies and local measures are needed to advance climate action at the national level,² international cooperation remains crucial for climate protection. Absent a collective commitment to mitigate climate change within state territories, some nations may behave as “free riders” or jeopardize the efforts undertaken by other nations by continuing to emit large amounts of greenhouse gases (GHGs). International cooperation is also necessary to allocate the mitigation burden among states and define how each state will participate in the collective effort, and to enable developing countries to benefit from the financial and technological support of developed countries in their efforts to combat climate change.

International cooperation on climate change began at the end of the 1980s. One of its first tangible manifestations was the adoption, in 1988, of a United Nations General Assembly Resolution,³ recognizing the need for climate protection. Afterwards, international concern on climate progressively led to the elaboration of international rules on climate change and to the emergence of what is today called the “international climate law.”⁴ The centrepiece of this law is the United Nations climate regime, which encompasses three multilateral treaties: the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol and the 2015 Paris Agreement.⁵ That

said, global climate governance is characterized by an institutional fragmentation and many international rules relating to climate change are elaborated outside the UN climate regime.⁶

Like many states, Canada has been involved in this multilateral law-making process from the beginning. Canada participated in the negotiations of the UNFCCC, the Kyoto Protocol and the Paris Agreement. It signed and ratified each of these treaties but withdrew from the Kyoto Protocol in 2012. However, over these four decades of climate diplomacy, Canada’s position in climate negotiations has varied greatly.⁷

At the beginning of the 1990s, Canada strongly supported the idea of an international treaty on climate change.⁸ In 1997, during the Kyoto Protocol negotiations, it committed to an ambitious, legally binding GHG emissions-reduction target (a reduction of six percent below the 1990 levels to be achieved by 2012), notably to preserve the “country’s reputation as a supporter of international institutions and environmental protection.”⁹ When Prime Minister Stephen Harper, a Conservative, took office in 2006, changes were made to Canada’s foreign climate policy. Canada stepped back from active environmental multilateralism,¹⁰ as its decision to withdraw from the Kyoto Protocol exemplified. Moreover, some of Canada’s positions seemed designed to frustrate the UN negotiation process.¹¹ At that time, many delegates, international

1 William Hare et al, “The Architecture of the Global Climate Regime: A Top-Down Perspective” (2010) 10:6 *Climate Pol’y* 600. See also T Sandler, *Global Collective Action* (Cambridge: Cambridge University Press, 2004) at 299.

2 Elinor Ostrom, “Polycentric Systems for Coping with Collective Action and Global Environmental Change” (2010) 20:4 *Global Environmental Change* 550. See also Jaqueline Peel, Lee Godden & Rodney J Keenan, “Climate Change Law in an Era of Multi-Level Governance” (2012) 1:2 *Transnat’l Environmental L* 249.

3 *Protection of Global Climate for Present and Future Generations of Mankind*, A/RES/43/52, UNGAOR, 70th Plen Mtg (6 December 1988).

4 Ahmed Djoghaf, “The Beginning of an International Climate Law” in Irving M Mintzer & JA Leonard, eds, *Negotiating Climate Change: The Inside Story of the Rio Convention* (Cambridge: Cambridge University Press, 1994) 97.

5 For a presentation of this regime, see Cinnamon P Carlame, Kevin R Gray & Richard Tarasofsky, *The Oxford Handbook of International Climate Change Law* (Oxford: Oxford University Press, 2016). See also Daniel Bodansky, Jutta Brunée & Lavanya Rajamani, *International Climate Change Law* (Oxford: Oxford University Press, 2017).

6 Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Cheltenham, UK: Edward Elgar Publishing, 2014). See also Robert O Keohane & David Victor, “The Regime Complex for Climate Change” (2011) 9:1 *Perspectives on Politics* 7.

7 Elizabeth May, “When Canada Led the Way: A Short History of Climate Change”, *Policy Options* (1 October 2006), online: <<http://policyoptions.irpp.org/magazines/climate-change/when-canada-led-the-way-a-short-history-of-climate-change/>>.

8 Heather A Smith, “Canadian Federalism and International Environmental Policy Making: The Case of Climate Change”, Working Paper, Institute of Intergovernmental Relations (1998) at 4 [Smith, “Canadian Federalism”], online: <www.queensu.ca/iigr/sites/webpublish.queensu.ca/iigrwww/files/files/WorkingPapers/Archive/1998/1998-5HeatherSmith.pdf>.

9 Ingrid Barnsley, “Dealing with Change: Australia, Canada and the Kyoto Protocol to the Framework Convention on Climate Change” 95:385 *The Round Table* 399 at 402.

10 Robert Boardman, “Canadian Environmental Policy in the Global Context: Obligations and Opportunities” in Debora VanNijnatten & Robert Boardman, eds, *Canadian Environmental Policy and Politics: Prospects for Leadership and Innovation* (Oxford: Oxford University Press) 152.

11 Herman Ott, Wolfgang Sterk & Rie Watanabe, “The Bali Roadmap: New Horizon for Global Climate Policy” (2008) 81:1 *Climate Pol’y* 91.

governments and non-governmental organizations (NGOs) saw Canada as “a spoiler on climate change.”¹² After the federal election in October 2015, when the Liberal Party was elected, Prime Minister Justin Trudeau declared that Canada was “back” and “here to help” to build what would become the Paris Agreement,¹³ thereby suggesting a return to a more active international role on climate change.

As this brief overview shows, Canada’s foreign climate policy has varied significantly over the years and Canada’s approach to climate negotiations has not always been consistent. But in democratic states in which global warming remains a politically divisive issue, such sweeping changes in climate foreign policy are not uncommon. The dramatic reversal of the United States’ position on the Paris Agreement since President Donald Trump came to power testifies to this.¹⁴ The issue assessed in this paper is whether, despite political changes, there is some consistency between Canada’s international commitments and its national climate policy.

This paper considers the level of consistency between Canada’s domestic action and its international climate policy, from the 1980s to today. This review suggests that while great inconsistencies characterized Canada’s international and domestic positions on climate change for two decades (“The Early Years” section and “The Kyoto Years” section), these inconsistencies tended to subside during the years of the Harper government (2006–2015), although not in a way that was favourable to climate protection (“The Harper Years” section). The last part of the paper (“Canada at the Crossroads” section) discusses whether, under Prime Minister Justin Trudeau’s leadership, Canada could for the first time in its history adopt a federal climate policy consistent with its willingness to be, or at least appear to be, a leader in the international climate arena.

The Divergence between Canada’s International Climate Policy and its Domestic Action (1988–2006)

The divergence between Canada’s international climate policy and its domestic action emerged at the very beginning of multilateral cooperation on climate change. But the inconsistency became even more apparent between 1995 and 2005, during what could be called the “Kyoto years” (“The Kyoto Years” section, below).

The Early Years of Climate Governance (1988–1995)

In the late 1980s and early 1990s, Canada’s international environmental leadership was at its apex.¹⁵ At that time, Canada was playing an active role in international negotiations on ozone depletion¹⁶ and in 1986 the idea of developing a broad law of the atmosphere encompassing rules on climate change, ozone depletion and long-range transport of toxic and acidifying substances began to emerge within the federal government.¹⁷ To promote this idea, then Prime Minister Brian Mulroney, in conjunction with the United Nations Environment Programme and the World Meteorological Organization, convened a conference in Toronto, in June 1988, entitled “Our Changing Atmosphere: Implications for Global Security” (the Toronto Conference).

The Toronto Conference was one of the first high-level conferences on climate change and it revealed the importance of this emerging issue for the federal government.¹⁸ The conference ended with the adoption of a statement calling

12 Annie Chaloux, Stéphane Paquin & Hugo Séguin, “Canada’s Multiple Voices Diplomacy in Climate Change Negotiations: A Focus on Québec” (2015) 20 *Intl Negotiation* 291 at 303.

13 Canada’s National Statement at COP 21 (30 November 2015), online: Prime Minister of Canada <<https://pm.gc.ca/eng/news/2015/11/30/canadas-national-statement-cop21>>.

14 Michael D Shear, “Trump Will Withdraw U.S. From Paris Climate Agreement” *The New York Times* (1 June 2017), online: <www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

15 Chaloux, Paquin & Séguin, *supra* note 12 at 300.

16 Elizabeth May, “Brian Mulroney and the Environment” in Raymond B Blake, ed, *Transforming the Nation: Canada and Brian Mulroney* (Montreal: McGill-Queen’s University Press) 381.

17 Heather A Smith, “Shades of Grey in Canada’s Greening during the Mulroney Era” in Kim R Nossal & Nelson Michaud, eds, *Diplomatic Departures: The Conservative Era in Canadian Foreign Policy, 1984–93* (Vancouver: UBC Press, 2001) 77 [Smith, “Shades of Grey”].

18 Chaloux, Paquin & Séguin, *supra* note 12 at 300.

for “immediate action” by governments, the UN, NGOs, industry and individuals to “counter the ongoing degradation of the atmosphere.”¹⁹ To that end, the statement listed a set of actions designed to “reverse the deterioration of the atmosphere,” including the adoption by the governments and the industry of a CO₂ emissions-reduction objective of approximately 20 percent below 1988 levels by the year 2005. The list also suggested that the UN develop a comprehensive framework convention on the protection of the atmosphere.²⁰ This conference represented a “breakthrough” that “put climate change on the political agenda of most governments in the industrialized world.”²¹ Even if a broader framework agreement for the protection of the atmosphere was not pursued by states, Canada continued to advocate during the years following the Toronto Conference for the elaboration of an international instrument on climate change.²² Thus, at the end of the 1980s, Canada was a strong supporter of the development of an international treaty in the field of climate change, with its prime minister reaffirming his determination to complete a framework convention on climate change.²³

However, even at that time, actions taken by the Canadian government raised questions of inconsistency with the position taken internationally. Indeed, as commentator Heather A. Smith explains, “Shortly after the Toronto Conference, the prime minister announced further subsidies to the Hibernia project [an offshore oil platform in Newfoundland and Labrador] — actions that seemed to contradict the concern expressed for climate change.”²⁴ More specifically, these subsidies were not consistent with some of the actions listed in the Toronto Conference statement

as possible means to protect the atmosphere, such as “[setting] energy policies to reduce the emissions of CO₂ and other trace gases, in order to reduce the risks of future global warming.”²⁵

In November 1990, in the non-legally binding Ministerial Declaration adopted at the end of the Second World Climate Conference hosted in Geneva, Canada declared, along with 136 other countries and the European Community, that “the ultimate global objective” of a collective action on climate change “should be to stabilize [GHG] concentration at a level that would prevent dangerous anthropogenic interference with the climate.”²⁶ In December 1990, the federal government unveiled Canada’s Green Plan for a healthy environment,²⁷ a document that detailed its national strategy on global warming. In this document, Canada expressed its commitment to the goal mentioned in the Ministerial Declaration, that is, “through a program to stabilize emissions of CO₂ and other [GHGs] at 1990 levels by the year 2000.”²⁸ This sequence of events could give the impression that what Canada accepted at the international level — even if not binding — would shape its domestic climate policy.

However, Canada’s Green Plan primarily focused on improving energy efficiency, promoting public awareness on climate change and encouraging voluntary actions and clearly lacked substance or enforceability. As George Hoberg and Kathryn Harrison wrote, the plan contained “a paucity of measures to directly protect the environment,”²⁹ like regulations or taxes, and “remarkably few commitments to address the pressing environmental problems.”³⁰ The plan was insufficient to achieve the stabilization target and, in fact, it did not achieve the desired outcome, leading to inconsistency between the aims of the declaration and the domestic outcome.

19 Secretariat of the World Meteorological Organization, *The Changing Atmosphere: Implications for Global Security*, Toronto, Canada, 27–30 June 1988: Conference Proceedings (Geneva: World Meteorological Organization, 1989) at 296 [WMO, *Changing Atmosphere*].

20 *Ibid* at 296–297.

21 Georg Børsting & Gunnar Fermann, “Climate Change Turning Political: Conference-Diplomacy and Institution-Building to Rio and Beyond” in Gunnar Fermann, eds, *International Politics of Climate Change: Key Issues and Critical Actors* (Oslo: Scandinavian University Press, 1997) 53 at 57.

22 Daniel Bodansky, “Prologue to the Climate Change Convention” in Mintzer & Leonard, *supra* note 4 at 53–54.

23 Eleonore Kokotsis, *Keeping International Commitments: Compliance, Credibility and the G7, 1988–1995* (New York: Garland Publishers, 1999) at 91.

24 Heather A Smith, “Political Parties and Climate Change Policy” (2008) 64:1 *Intl J* at 49 [Smith, “Political Parties”].

25 WMO, *Changing Atmosphere*, *supra* note 19 at 296.

26 UNESCO, Ministerial Declaration of the Second World Climate Conference, UN Doc DG/90/45 (7 November 1990), at para 10, online: <www.dgyn.de/fileadmin/user_upload/DOKUMENTE/WCC-3/Declaration_WCC2.pdf>. See also (1991) 1:1 *YB Intl Env L* 476.

27 Government of Canada, *Canada’s Green Plan for a Healthy Environment* (1990), online: <<http://cfs.nrcan.gc.ca/pubwarehouse/pdfs/24604.pdf>>.

28 *Ibid* at 100.

29 George Hoberg & Kathryn Harrison, “It’s Not Easy Being Green: The Politics of Canada’s Green Plan” (1994) 20:2 *Can Public Pol’y* 119 at 120.

30 *Ibid* at 135.

The divergence between Canada's position in climate talks and its domestic action became even more evident after the adoption of the UNFCCC. Canada strongly supported the negotiation of this treaty,³¹ and was among the first developed countries to ratify it.³² During the convention's negotiation (1991–1992), Canada co-chaired one of the two working groups in which the negotiations took place³³ and often acted as a facilitator and “worked to try to narrow the division between the United States and the European Community.”³⁴ Beyond defining general guiding principles for cooperation and establishing an institutional framework, the UNFCCC provided a “loosely worded” mitigation target for developed countries.³⁵ Article 4(2)(a) referred to the need to “return by the end” of 2000 to earlier levels of anthropogenic GHGs in order to prevent dangerous anthropogenic interference with the climate system. In article 4(2)(b), developed countries committed themselves to the “aim of returning individually or jointly to their 1990 levels of these anthropogenic” GHG emissions. As Philippe Sands noted, “The most that can reasonably be said of these provisions is that they establish soft targets and timetables with a large number of loopholes.”³⁶ Nevertheless, despite their ambiguity, these provisions and arguably this “soft” mitigation commitment legally bound Canada as a party to the UNFCCC.

However, after the entry into force of the UNFCCC in March 1994, the implementation of meaningful mitigation measures at the federal level proved to be difficult. In 1995, the federal-provincial-territorial National Action Program on Climate Change (NAPCC) was adopted. The goal of this initiative was to set “the strategic directions for pursuing the nation's objective of meeting its current commitment of stabilizing greenhouse gas (GHG) emissions at 1990 levels by the year 2000.”³⁷ While this approach was consistent with the mitigation

goal mentioned in the UNFCCC,³⁸ the NAPCC primarily relied upon voluntary measures and was therefore characterized as a “weak and largely ineffective domestic implementation strategy.”³⁹ During the federal government's consultations prior to preparing the NAPCC, environmentalists called for the use of coercive instruments, including economic instruments such as a carbon tax.⁴⁰ However, “[e]ven before the consultations were completed, the then Liberal Prime Minister Chrétien ruled out a carbon tax in order to reassure a nervous Alberta” and protect the associated interests of the province and the oil industry.⁴¹ Thus, Canada's domestic action on climate change greatly contrasted with the strong support it had expressed at the international level for the elaboration of a climate treaty and more broadly for climate protection.

The Kyoto Years (1995–2005)

In 1995, during the first Conference of the Parties (COP 1), the members of the UNFCCC agreed to launch the negotiation of a protocol or another instrument to strengthen the mitigation commitments of developed countries under the UNFCCC.⁴² The negotiations ended in 1997 at COP 3, with the adoption of the Kyoto Protocol to the UNFCCC, which entered into force in 2005. Unlike the UNFCCC, this protocol established clear, individual, legally binding, quantified limitation or reduction targets for the GHG emissions of developed countries.

According to Ingrid Barnsley, during the Kyoto years, “Canada's attempts to respond to and to foster its international reputation as a supporter of environmental protection and multilateral cooperation were evident” at the international level.⁴³ During the negotiations of the protocol, the government played up its position “between the US and the EU and its desire to ‘help find

31 *The Rio Earth Summit: Summary of the United Nations Conference on Environment and Development*, Doc BP-317E, Government of Canada, Depository Services Program, 1992 at A.3.

32 In December 1992, after Monaco and the United States.

33 D Bodansky, “The UNFCCC: A Commentary” (1993) 18:2 *Yale J Intl L* 485.

34 Smith, “Shades of Grey”, *supra* note 17 at 78.

35 Smith, “Canadian Federalism”, *supra* note 8 at 3.

36 Philippe Sands, “The United Nations Framework Convention on Climate Change” (1992) 1:3 *RECIEL* 274. See also Bodansky, *supra* note 33 at 516.

37 Government of Canada, *Canada's Second National Report on Climate Change* (1997) at 33, online: <<http://unfccc.int/resource/docs/nat/cannce2.pdf>>.

38 UNFCCC, art 4 (2)(a) and (b).

39 Steven Bernstein, “International Institutions and the Framing of Domestic Policies: The Kyoto Protocol and Canada's Response to Climate Change” (2002) 35:2 *Pol'y Sciences* 203 at 223.

40 Douglas Macdonald, “Explaining the Failure of Canadian Climate Policy” in Hugh Compston & Ian Bailey, eds, *Turning Down the Heat* (Basingstoke, UK: Palgrave Macmillan, 2008) 223 at 225.

41 *Ibid.*

42 Decision 1/CP.1, *The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up*, UN Doc FCCC/CP/1995/7/Add.1 (1995).

43 Barnsley, *supra* note 9 at 402.

common ground in Kyoto,' reflecting an attempt to reinvigorate Canada's role as a facilitator of global agreement and compromise."⁴⁴ Moreover, in the final hours of the negotiations, Canada committed to a very ambitious reduction target (six percent below 1990 levels between 2008 and 2012). This target was far more stringent than the objective it had agreed with the provinces during federal-provincial consultation held in November 1997, which aimed at stabilizing GHG emissions at 1990 levels by 2010.⁴⁵ Some saw the decision of then Prime Minister Jean Chrétien to accept this ambitious target as motivated in large part by a desire to preserve Canada's international reputation on environmental issues and to go beyond its poor domestic performance on climate change.⁴⁶ At that time, Canada's emissions were continuing to rise — despite the adoption of the UNFCCC — and were 13.4 percent above 1990 levels.⁴⁷ Also, the fact that in 2002 Canada ratified the Kyoto Protocol, despite the US refusal to do so, was another element of its climate policy that reflected "the ideational importance of Canada's support for environmental protection and multilateral cooperation."⁴⁸

But some of the positions adopted by Canada in the climate talks during the Kyoto years on more technical issues also showed that Canada's support for multilateral action was not unconditional. For instance, Canada advocated strongly for forests to be accounted for as carbon sinks for the achievement of its reduction target and insisted on having flexibility in meeting its mitigation goal.⁴⁹ On these two issues, Canada's objectives, shared by some other developed countries, were achieved. The Kyoto Protocol allowed developed countries partially to fulfill their commitments by removing CO₂ from the atmosphere through carbon sinks,⁵⁰ and provided three flexibility mechanisms ("joint implementation," the Clean

Development Mechanism and the emissions trading scheme) designed to "assist developed countries to reduce the costs of meeting their emissions reduction target by entering into joint projects with developing countries or purchasing reductions in other countries."⁵¹ However, during the negotiation on the operating rules relating to carbon sinks and flexible mechanisms, the Canadian delegation adopted an inflexible attitude, and the "Canadian delegation was awarded the Fossil of the Day award more times than any other country" at COP 6.⁵² That said, on the whole, at the international level successive Canadian governments appeared, during the years of the elaboration of the Kyoto Protocol, to be rather "enthusiastic" about the protocol.⁵³

However, the support expressed internationally for this treaty was not reflected in federal domestic policy. It has been said that soon after the adoption of the protocol, Chrétien, in an attempt to appease the anger of some of the provinces, suggested that Canada would not ratify the protocol.⁵⁴ And in 2002, when Canada finally decided to ratify the protocol, some domestic political leaders implied that Canada had "no intention" of achieving its target.⁵⁵

Nevertheless, led by Chrétien, the Liberal government proposed three successive climate plans to achieve the Kyoto target. The first plan, entitled Action Plan 2000 on Climate Change, was unveiled in 2000.⁵⁶ The second plan was submitted in November 2002, a month before Canada's Kyoto

44 Bernstein, *supra* note 39 at 223.

45 Kathryn Harrison, "The Road not Taken: Climate Change Policy in Canada and the United States" (2007) 7:4 Global Environmental Politics at 101.

46 Bernstein, *supra* note 39 at 221.

47 Environment Canada, *Canada's Greenhouse Gas Inventory. 1997 Emissions and Removals with Trends*, Government of Canada (1999), online: <publications.gc.ca/collections/Collection/En49-5-5-9E.pdf>.

48 Barnsley, *supra* note 9 at 407.

49 Johanne Depledge, "Tracing the origins of the Kyoto Protocol: An article-by-article textual history", technical paper, UN Doc FCCC/TP/2002/2, (2000).

50 Kyoto Protocol, arts 3.3, 3.4.

51 Lee-Anne Broadhead, "Canada as a Rogue State: Its Shameful Performance on Climate Change" (2001) 56:3 Intl J 461.

52 *Ibid* at 475. The fossil fuel award is a "prize" awarded each day during the COP, by the NGO Climate Action Network (a coalition of more than 1,000 organizations from around the world) to the countries that obstruct the negotiation process or adopt positions unfavourable to climate protection.

53 Douglas Macdonald & Heather A Smith, "Promises Made, Promises Broken: Questioning Canada's Commitments to Climate" (2000) 55:1 Intl J 107 at 108.

54 Smith, "Political Parties", *supra* note 24 at 51.

55 It has been reported that, prior to Canada's Kyoto ratification, then Minister of Natural Resources Herb Dhaliwal stated: "Canada has no intention of meeting the conditions of the Kyoto Protocol on greenhouse gases even though the government hopes to ratify it this fall." Bruce Cheadle, "Canada to Sign Kyoto, but Won't Abide by It", *Toronto Star* (5 September 2002), cited by Peter Stoett, "Looking for Leadership: Canada and Climate Change Policy" in Henrik Selin & Stacy VanDeveer, eds, *Changing Climates in North American Politics: Institutions, Policymaking, and Multilevel Governance* (Cambridge, MA: MIT Press, 2009) 47 at 54.

56 Government of Canada, *Action Plan 2000 on Climate Change* (2000), online: <<http://dsp-psd.pwgsc.gc.ca/Collection/M22-135-2000E.pdf>>.

ratification. The Climate Change Plan for Canada⁵⁷ was more elaborate than the first, but still privileged voluntary measures such as the negotiation of voluntary agreements with major emitters.⁵⁸ The third plan was adopted in April 2005 under then Prime Minister Paul Martin and after the entry into force of the Kyoto Protocol.⁵⁹ The declared objective of the third plan was to achieve Kyoto's target, as was explicit in its title, *Moving Forward on Climate Change: A Plan for Honouring Our Kyoto Commitment*. However, as with the plans that preceded it, the 2005 plan primarily focused on "offering information and subsidies to encourage voluntary emission reductions."⁶⁰ The 2005 plan provided for the creation of a nationwide cap-and-trade program with an intensity-based emissions-reduction target for major emitters, whereas the Kyoto Protocol called for absolute GHG emission reductions. The federal government may have had a genuine desire to honour its commitments, but the logic upon which its national 2005 plan was based did not correspond to the logic of the protocol, which imposed legally binding obligations to achieve absolute emission reductions.

As Jane M. Glenn and José Otero explained, some initial measures were taken by the government to implement the 2005 plan. "The...Climate Fund to facilitate the purchase of GHG credits nationally and internationally was set up and funded. A Greenhouse Gas Technology Investment Fund Act was enacted but not declared in force and thus not funded. And most importantly, the federal *Canadian Environmental Protection Act* was amended to add six GHGs to the 'List of Toxic Substances' in Schedule 1 of the Act."⁶¹ This amendment was probably the most substantial change in federal legislation to address the climate issue. However, the implementation of the 2005 plan was stopped after the election of a Conservative government in February 2006. Some studies have shown that, even if fully

implemented, the 2005 plan probably would not have enabled Canada to achieve its Kyoto target.⁶²

From the late 1980s to the mid-2000s, Canada "cultivated an identity as an environmentally progressive State" and a "good international citizen" on environmental issues and in its positions in climate talks.⁶³ However, this stance was largely aspirational and contrasted with Canada's inability to achieve its internationally agreed targets by implementing meaningful federal mitigation measures.

The Harper Years (2006–2015): Toward an Alignment of International and Domestic Climate Policy

Under the Conservative government led by then Prime Minister Stephen Harper (2006–2015), the inconsistencies between Canada's climate policy internationally and its domestic action diminished. Harper made no secret of his hostility to the Kyoto Protocol and his skepticism about climate change,⁶⁴ and when the Conservatives came to power, Canada's climate policy veered away from "the rhetorical green internationalism of the past."⁶⁵

In 2006, Canadian negotiators were instructed not to support the continuation of the Kyoto Protocol after 2012 and to oppose any proposal aiming to set stringent reduction targets in a second commitment period.⁶⁶ At COP 12 and COP 13, held in 2006 in Nairobi and in 2007 in Bali, respectively,

57 Government of Canada, *Climate Change Plan for Canada* (2002), online: <<http://publications.gc.ca/collections/Collection/En56-183-2002E.pdf>>.

58 Jane Glenn & José Otero, "Canada and the Kyoto Protocol: An Aesop Fable" in Erkki J. Hollo, Kati Kuloves & Michael Mehling, eds, *Climate Change and the Law: Comparative Perspectives on Law and Justice* (Dordrecht, Netherlands: Springer, 2013) 489 at 496.

59 Government of Canada, *Moving Forward on Climate Change: A Plan for Honouring Our Kyoto Commitment* (Ottawa: Government of Canada, 2005).

60 Mark Jaccard et al., "Burning our Money to Warm the Planet: Canada's Ineffective Efforts to Reduce Greenhouse Gas Emissions" CD Howe Institute Commentary No 234, Toronto (2006) at 27.

61 Glenn & Otero, *supra* note 58 at 497.

62 Jaccard, *supra* note 60 at 27.

63 Loren R. Cass, "A Climate of Obstinacy: Symbolic Politics in Australian and Canadian Policy" (2008) 21:4 *Cambridge Rev Int'l Affairs* 465 at 473.

64 CBC, "Harper's letter dismisses Kyoto as 'socialist scheme'" [30 January 2007], online: <www.cbc.ca/news/canada/harper-s-letter-dismisses-kyoto-as-socialist-scheme-1.693166>.

65 Smith, "Political Parties", *supra* note 24 at 57.

66 Bill Curry, "Ottawa Now Wants Kyoto Deal Scrapped", *The Globe and Mail* (20 May 2006), online: <www.theglobeandmail.com/news/national/ottawa-now-wants-kyoto-deal-scrapped/article709071>.

Canada strongly advocated for moving away from Kyoto and called for the elaboration of a new international treaty with commitments for all major emitters, including developing countries.⁶⁷ As Heather A. Smith noted, during these summits “the Conservatives continued to push their agenda to an international audience that considered them antagonistic, lacking a commitment to meet existing obligations, and generally obstructionist.”⁶⁸ In 2007, commenting on the Conservative Party, President of the Intergovernmental Panel on Climate Change Rajendra K. Pachauri stated, “This particular government has been a government of skeptics. They do not want to do anything on climate change.”⁶⁹

Canada’s rejection of the Kyoto Protocol became even more manifest in 2011, when the federal government invoked its legal right to withdraw from the treaty, as provided for in article 27 of the protocol. To justify this decision, the Harper government underscored that staying inside Kyoto would hurt Canada’s economy and that the strict differentiation between developed and developing countries upon which the protocol was based was not a good basis to address the climate crisis since it would allow countries like China and India to allow the growth of their GHG emissions without restriction.⁷⁰ Canada was certainly not the only developed country failing to meet its Kyoto commitment at that time. Countries such as Japan and New Zealand were also on track not to achieve their targets and therefore were not ardent supporters of the protocol.⁷¹ Nevertheless, Canada remained the only Kyoto party to take the drastic step of withdrawing. The withdrawal met with strong international criticism as it was interpreted as an abdication of responsibility. Yet, since Canada was failing to achieve its commitment, one could argue that the withdrawal was a legitimate avenue to avoid a situation of being in breach of

its international obligations. However, it must be noted that Canada could have chosen to stay inside Kyoto, to be in breach of its international obligations and to deal with the consequences of not achieving its targets.⁷² Canada could then have chosen not to join the second commitment period of the Kyoto Protocol.⁷³ Whatever the rationale for withdrawal, the decision to do so indicated that having a good international image for climate policy was definitely no longer a Canadian priority.

The move away from Kyoto was reflected in the position adopted domestically by the federal government on climate change. In October 2006, the government tabled Bill C-30, entitled Canada’s Clean Air and Climate Change Act.⁷⁴ In its first-reading version, the bill contained no mention of the Kyoto Protocol, and the notice of intent indicated that “no firm limit would be set on greenhouse gas emissions until 2020 or 2025” and that “emissions regulations on large final emitters would not take effect until 2010.”⁷⁵ Instead of killing the bill, the opposition parties in the House of Commons “rewrote the bill into forceful legislation that established targets consistent with Kyoto.”⁷⁶ However, in September 2007, Harper’s decision to seek prorogation of

67 Alec Castonguay & Alexandre Shields, “Kyoto: Baird affronte la tempête”, *Le Devoir* (27 November 2007), online: <www.ledevoir.com/politique/canada/166236/kyoto-baird-affronte-la-tempete>.

68 Smith, “Political Parties”, *supra* note 24 at 58.

69 Agence France Press, “Nobel Climate Panel Chief Raps Canada on Carbon Cuts”, 2007, cited in Chaloux, Paquin & Séguin, *supra* note 12 at 303.

70 *The Economist*, “Canada and Climate Change: Kyoto and Out” (17 December 2011), online: <www.economist.com/node/21541849>.

71 In 2012, Japan, New Zealand and Russia indicated their intention to not assume any quantitative emission limitation or reduction commitment for the second commitment period of the Kyoto Protocol (2013–2020). See *Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (the Doha Amendment)*, Dec 1/CMP8, UN Doc FCCC/KP/CMP/2012/13/Add.1.

72 Nigel Banks, “Why Canada Should Not Withdraw from the Kyoto Protocol”, *ABlawg* (1 December 2011), online: University of Calgary Faculty of Law <<https://ablawg.ca/2011/12/01/why-canada-should-not-withdraw-from-the-kyoto-protocol>>.

73 According to the rules of the compliance committee of the Kyoto Protocol, in case of non-achievement of a mitigation target at the end of the first commitment period, the “carbon debt” acquired by an Annex I party must be carried over to the second commitment period, plus an additional top-up penalty of 30 percent. See *Procedures and mechanisms relating to compliance under the Kyoto Protocol*, Dec 27/CMP1, UN Doc FCCC/KP/CMP/2005/8/Add.3, section XIV. The goal of these rules was to encourage states to achieve their target, and they were established under the assumption that all Annex I parties would take another commitment after 2012. However, this architecture turned out to be a weakness in the non-compliance mechanism, since there has never been an obligation for Annex I parties to take another commitment after 2012.

74 Canada, Bill C-30 (39-1) *An Act to Amend the Canadian Environmental Protection Act, 1999, the Energy Efficiency Act and the Motor Vehicle Consumption Standards Act (Canada’s Clean Air Act)*, 1st Sess, 39th Parl, 2006 (1st reading 19 October 2006), online: <www.parl.ca/DocumentViewer/en/39-1/bill/C-30/first-reading/page-32>.

75 Frédéric Beauregard-Tellier et al, “Bill C-30: Canada’s Clean Air and Climate Change Act”, Library of Parliament, LS-539E (14 November 2006), online: <https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c30&Parl=39&Ses=1&Language=E>.

76 Toby Sanger & Graham Saul, “The Harper Government and Climate Change: Lost at Sea?” in Teresa Healy, *The Harper Record* (Ottawa: Canadian Centre for Policy Alternatives, 2008) at 286, online: <www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/2008/HarperRecord/The_Harper_Government_and_Climate_Change.pdf>.

Parliament effectively killed Bill C-30.⁷⁷ Earlier, in April 2007, then Minister of Environment John Baird announced a new climate plan, entitled *Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution*.⁷⁸ The plan clearly echoed the government's rhetoric at the international level and the rejection of the Kyoto Protocol. While the protocol called for absolute emissions reductions by 2012, the plan only proposed to set intensity-based reduction targets for major emitters and indicated that Canada's overall target would be a 20 percent reduction from 2006 levels by 2020.⁷⁹

Despite the rejection of the Kyoto Protocol, the federal government continued to participate in climate negotiations and to make commitments on climate change. In 2010, Canada formally expressed its wish to be associated with the Copenhagen Accord,⁸⁰ a non-legally binding agreement. It had been adopted by a group of 28 countries, including Canada, outside the scope of the official negotiating process, in the final hours of COP 15, held in Copenhagen in 2009.⁸¹ Notably, the agreement called on all countries to communicate a voluntary mitigation pledge for 2020.⁸² Under the Copenhagen Accord, Canada chose to communicate a mitigation goal in line with the target selected by the United States and pledged to reduce its emissions by 17 percent below 2005 levels.⁸³

However, the government of the day did not hide its lack of enthusiasm for international mitigation commitments and, more broadly, for UN-style cooperation.⁸⁴ In the lead-up to COP 15, Harper "hewed to the view that most emissions targets would entail unacceptably adverse economic

and lifestyle changes,"⁸⁵ and declared: "I think modest, achievable targets...will get the planet on the right track....The key to all this is not the setting of targets. It is actually the development and implementation of the technology that over time will make significant targets possible."⁸⁶ Concurrently, Minister of Environment Jim Prentice stated, "There's always a lot of hype and drama that gets built into this sort of international event, much of it intended to force the hand of participants....We aren't going to buy into that."⁸⁷ As a result, Canada was criticized in Copenhagen for being obstructionist and uncooperative.⁸⁸

During the Harper years, Canada received "a flood of criticisms from many delegates from developing and developed countries at the Conferences of the Parties" for not having more progressive environmental positions and for not being more supportive of the UN process.⁸⁹ Canada "won" many Fossil of the Day awards (including a "Lifetime Unachievement" Fossil award at COP 19, in Warsaw in 2013)⁹⁰ and increasingly it was portrayed as an international "laggard"⁹¹ on the climate issue.

The lack of enthusiasm within the Harper government for meaningful action on climate change was also noticeable domestically. Following the adoption of the Copenhagen Accord, the federal government indicated that it would achieve its target through a "sector-by-sector regulatory approach" based on the implementation of various regulations under the Canadian Environmental

77 *Ibid.* at 291.

78 CBC, "Baird's 'Real' Emissions Plan Misses Kyoto Deadline by Years" (26 April 2007), online: <www.cbc.ca/news/canada/baird-s-real-emissions-plan-misses-kyoto-deadline-by-years-1.642692>.

79 Tim Williams, "The Climate Change Convention and the Kyoto Protocol" (30 January 2009) at 2007-21-E, online: Library of Parliament <<https://lop.parl.ca/content/lop/ResearchPublications/prb0721-e.htm>>.

80 Government of Canada, *Submission of Canada, Copenhagen Accord* (20 January 2010), online: <http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/canadacphaccord_app1.pdf>.

81 Lavanya Rajamani, "The Making and Unmaking of the Copenhagen Accord" (2010) 59:3 ICLQ 824.

82 *Ibid.*

83 Government of Canada, *Submission of Canada, Copenhagen Accord*, *supra* note 80.

84 Boardman, *supra* note 10.

85 Robert Everett, "Parliament and Politics" in David Mutimer, ed., *Canadian Annual Review of Politics and Public Affairs*, 2009 (Toronto: University of Toronto Press, 2015) 11 at 44.

86 *Ibid.*

87 Mike De Souza, "Canada won't be swayed by Copenhagen 'hype': Prentice", *The Financial Post* (4 December 2009), online: <www.financialpost.com/executive/hr/joint-venture/canada+swayed+copenhagen+hype+prentice/2304034/story.html>.

88 Matthew J Hoffman, *Climate Governance at the Crossroads: Experimenting with a Global Response after Kyoto* (Oxford: Oxford University Press, 2011) at 6.

89 Chaloux, Paquin & Séguin, *supra* note 12 at 303.

90 Climate Action Network, "Canada Wins 'Lifetime Unachievement' Fossil Award at Warsaw Climate Talks" (22 November 2013), online: <<https://climateactionnetwork.ca/2013/11/22/canada-wins-lifetime-unachievement-fossil-award-at-warsaw-climate-talks>>.

91 Omer Aziz, "Canada an International Laggard on Climate Change", *The Star* (30 April 2015), online: <www.thestar.com/opinion/commentary/2015/04/20/canada-an-international-laggard-on-climate-change.html>.

Protection Act, 1999 (CEPA).⁹² Accordingly, several sectoral regulations were implemented under the CEPA, mainly in the fields of transportation, coal-fired electricity generation, and renewable fuel.⁹³ The glaring weakness of this sectoral and regulatory approach was that no regulations were implemented to address the emissions of the oil and gas industry, which was at that time the second-largest emitting sector in Canada. Consequently, in 2012, the commissioner of Environment and Sustainable Development indicated that “the forecast shows that in 2020, Canada’s GHG emissions will be 7.4 percent above the 2005 instead of 17 percent below, which indicates that the 2020 target will not be met with existing measures.”⁹⁴ Two years later, the commissioner noted that “the evidence is stronger that the growth in emissions will not be reversed in time and that the target will be missed.”⁹⁵

Therefore, it can be said that Canada’s positions at the international level and domestically were fairly aligned and symmetrical during the Harper years. The rhetoric rejecting the Kyoto Protocol and the unwillingness to be bound by international reduction targets at the international level were consistent with the choice of the federal government not to impose absolute quantified emission targets on the larger domestic emitters. This convergence between Canada’s international and domestic voices on climate change policy did nothing to help Canada achieve international mitigation targets. However, it still represented a break from the divergence and contradiction that dominated Canada’s foreign and domestic policy from 1988 to 2006.

Canada at the Crossroads: International and Domestic Climate Policy under the Trudeau Government (2015 and beyond)

Justin Trudeau’s Liberal government, elected in October 2015, had campaigned on a strong environmental platform that included addressing climate change. Notably, Trudeau vowed to put a price on carbon and to collaborate with the provinces and territories to establish national emissions-reduction targets.⁹⁶ After the election, he promised to restore Canada’s international reputation and leadership in the fight against climate change, and to adopt a constructive attitude in climate talks. COP 21, in December 2015, provided a first opportunity to put this promise into practice.

The goal of COP 21 was to finalize the adoption of “a protocol, another legal instrument or an agreed outcome with legal force under the [UNFCCC] applicable to all Parties.”⁹⁷ After two weeks of intense negotiations, the conference ended with the adoption of an international treaty, the Paris Agreement.⁹⁸ At the beginning of the conference, Trudeau declared that Canada would “take on a new leadership role internationally” and play a “constructive role at COP 21.”⁹⁹ In fact, Canada was generally viewed as having a constructive attitude in the negotiations, as well as taking rather progressive environmental positions.¹⁰⁰ In particular, Minister of Environment Catherine McKenna supported a proposal from the island nations that aimed to limit

92 Government of Canada, *Canada’s Sixth National Report on Climate Change* (2013) at 57, online: <http://unfccc.int/files/national_reports/annex_i_natcom/submitted_natcom/application/pdf/nc6_can_resubmission_english.pdf>.

93 See e.g. *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations* (SOR/2013-24); *Regulations to Reduce Carbon Dioxide Emission from Coal-fired Electricity* (SOR/2012-167); *Renewable Fuels Regulations* (SOR/2010-189).

94 Commissioner of the Environment and Sustainable Development, *2012 Spring Report of the Commissioner of the Environment and Sustainable Development* (2012) at para 2.38, online: <www.oag-bvg.gc.ca/internet/English/parl_cesd_201205_02_e_36774.html>.

95 Commissioner of the Environment and Sustainable Development, *2014 Fall Report of the Commissioner of the Environment and Sustainable Development* (2014) at para 1.13, online: <www.oag-bvg.gc.ca/internet/English/parl_cesd_201410_01_e_39848.html>.

96 Liberal Party of Canada, *Real Change: A New Plan for Canada’s Environment and Economy* (30 June 2015), online: <www.liberal.ca/wp-content/uploads/2015/08/A-new-plan-for-Canadas-environment-and-economy.pdf>.

97 *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, Dec 1/CP.17, 15 March 2012, UN Doc FCCC/CP/2011/9/Add.1, at para 2.

98 Daniel Bodansky, “The Paris Climate Change Agreement: A New Hope?” (2016) 110:2 AJIL 288.

99 Justin Trudeau, *Canada’s National Statement* (delivered at COP 21, Paris, France, 30 November 2015), online: <<https://pm.gc.ca/eng/news/2015/11/30/canadas-national-statement-cop21>>.

100 Erin Flanagan, “Pembina Reacts to Paris Agreement Tabled at COP21” (12 December 2015), online: Pembina Institute <www.pembina.org/media-release/pembina-reacts-to-paris-agreement-tabled-at-cop21>.

the temperature increase below 1.5°C above pre-industrial levels. She also strongly advocated for the recognition in the agreement of the importance of protecting human rights and rights of Indigenous peoples in the fight against climate change.¹⁰¹ During the second week of the conference, Canada joined an informal alliance of developing and developed states, the so-called high ambition coalition, the members of which were committed to ensuring that the agreement would be ambitious.¹⁰²

On certain items of the negotiations, however, Canada had a more cautious attitude. For instance, Canada shared the view that the Paris Agreement should not serve as a legal basis to compensate developing countries for their loss and damage caused by climate change, and backed the United States in its opposition to legally binding mitigation pledges.¹⁰³ Also, along with the Umbrella Group (a negotiating group which included, inter alia, Canada, the United States, Australia, New Zealand, Japan and Russia), Canada earned a Fossil of the Day award for “standing in the way of increasing ambition before 2020.”¹⁰⁴ However, Canada’s change of tone in the climate talks was evident and viewed by many as a welcome change from the “Conservative government’s antagonism to these international negotiations.”¹⁰⁵

In October 2016, Canada ratified the Paris Agreement (which entered into force on November 4, 2016) and submitted its initial National Determined Contribution (NDC). In its NDC, Canada committed to reduce its GHG emissions by 30 percent below

2005 levels by 2030.¹⁰⁶ It should be noted that this target was first established by the Harper government in the run-up to COP 21 and then adopted by the Trudeau government, despite efforts by the environmental community to have the NDC increased and Trudeau’s commitment that Canada would and could do more.

Nevertheless, since the 2015 change of government, Canada has continuously expressed its commitment to climate change and the federal government has striven to appear as an international leader on the issue. For instance, in June 2017, Canada along with the other members of the G7 pledged to phase out inefficient fossil fuel subsidies by 2025.¹⁰⁷ The pledge to phase out fossil fuel was mentioned in previous international declarations but never with a specific timetable. In September 2017, Canada, together with the European Union and China, hosted a meeting in Montreal to advance the implementation of the Paris Agreement. At COP 23, in November 2017, Canada partnered with the United Kingdom to launch the Powering Past Coal Alliance, an international initiative designed to advocate for the phase-out of traditional coal-fired power plants.¹⁰⁸ As this diplomatic activity demonstrates, Canada has spared no effort since October 2015 to restore its international reputation on climate change and to affirm its commitment to both climate action and multilateralism. One may well ask, however, whether the Trudeau government’s international climate policy is consistent with or diverging from its domestic actions.

It must be noted that to a certain extent the rhetorical green internationalism of the Trudeau government has been followed by concrete actions at the domestic level. Convening a federal-provincial-territorial meeting in March 2016 in Vancouver was one of the federal government’s first steps in the implementation of the Paris Agreement. During that meeting, the federal government and the provinces and territories adopted the Vancouver Declaration on Clean Growth and Climate Change.

101 “A Day-by-Day Recap of COP 21”, *The Globe and Mail* (1 December 2015), online: <www.theglobeandmail.com/news/world/paris-climate-deal-primer/article27539363>.

102 Meghan Holloway & Guy Edwards, “Canada Joins Climate Ambition Coalition, But Questions Persist”, *Climate Home News* (10 December 2015), online: <www.climatechangenews.com/2015/12/10/canada-joins-climate-ambition-coalition-but-questions-persist>.

103 CBC News, “Canada Backs U.S., Saying Carbon-Reduction Targets Shouldn’t Be Legally Binding” (27 November 2015), online: <www.cbc.ca/news/politics/cop21-canada-climate-change-deal-1.3341423>.

104 Mychaylo Prystupa, “Canada Wins ‘Fossil of the Day Award’ at the COP 21”, *National Observer* (10 December 2015), online: <www.nationalobserver.com/2015/12/10/news/canada-wins-fossil-day-award-cop21>.

105 Martin Lukacs, “Trudeau’s climate rhetoric is riveting. So what about the reality?”, *The Guardian* (3 December 2015), online: <www.theguardian.com/environment/true-north/2015/dec/03/trudeaus-climate-rhetoric-is-riveting-so-what-about-the-reality>.

106 Canada’s INDC submission to the UNFCCC (5 October 2016), online: <www4.unfccc.int/ndcregistry/PublishedDocuments/Canada%20First/INDC%20-%20Canada%20-%20English.pdf>. Canada submitted a revised NDC in May 2017, which indicates the measures that it intends to implement to achieve the 2030 target.

107 G7 Ise-Shima Leaders’ Declaration (27 May 2016) at 28, online: <www.mofa.go.jp/files/000160266.pdf>.

108 Canada, “Coal Phase-Out: The Powering Past Coal Alliance”, online: <www.canada.ca/en/services/environment/weather/climatechange/canada-international-action/coal-phase-out.html>.

The declaration indicated that Canada's international mitigation pledge would be achieved through the Pan-Canadian Framework for Clean Growth and Climate Change (PCF) and that carbon pricing would be a central component of this framework.¹⁰⁹

The framework was unveiled in December 2016 and provided for the creation of a federal carbon-pricing benchmark.¹¹⁰ The benchmark required that all provinces and territories have carbon pricing by 2018.¹¹¹ The PCF allows each jurisdiction to choose to put a price on carbon through a price-based system (such as a carbon tax) or a cap-and-trade system.¹¹² However, in either case, the provincial and territorial pricing mechanisms must meet certain criteria set in the PCF. In the case of a carbon tax, the carbon price must be at least \$10 per tonne in 2018 and rise by \$10 each year to reach \$50 per tonne in 2022. For the jurisdictions with a cap-and-trade system, the 2030 emissions-reduction target must be equal to or greater than Canada's 30 percent target and the system must have declining annual caps to at least 2022.¹¹³ The PCF also provides a federal carbon-pricing backstop that will apply in the jurisdictions that do not meet the benchmark.¹¹⁴ In May 2016, a technical paper from Environment and Climate Change Canada indicated that this federal carbon-pricing mechanism would be composed of a "carbon levy applied to fossil fuels" and an "output-based pricing system for industrial facilities that emit above a certain threshold."¹¹⁵ In January 2018, the federal government released draft legislative and regulatory proposals relating to the Greenhouse Gas Pollution Act for public comment.¹¹⁶

Federal regulations on the phase-out of hydrofluorocarbons and methane are currently being prepared.¹¹⁷ Other initiatives, such as reforms to the federal Environmental Impact Assessment process are also being developed and could affect the outcome of permitting processes for projects. In February 2018, the federal government tabled a bill in Parliament to enact a new Impact Assessment Act and repeal the Canadian Environmental Assessment Act, 2012. The bill provides that the extent to which the effects of a project hinder or contribute to Canada's ability to meet its commitments in respect of climate change must be considered prior to approving new development projects.¹¹⁸ With all these legal initiatives under way, it appears that the federal government's climate policies internationally and domestically are consistent, or at least more so than between 1988 and 2005, a period during which very few normative developments occurred in relation to climate change at the federal level. However, it is too early to conclude that success in domestic implementation and consistency with international positions will be achieved.

Indeed, many of the legislative and regulatory reforms undertaken by the Trudeau government are not yet fully implemented. And if there is something to be learned from the history of Canadian climate policy, it is that the course of implementing comprehensive federal mitigation measures can be bumpy. The jury is still out on whether Canada, with its current federal climate policy, can meet its target under the Paris Agreement. Some sources anticipate that with the full implementation of the PCF, Canada could achieve its target, but others do not.¹¹⁹ It is interesting to note that the output-based pricing system of the federal backstop will only set emission-intensity standards for the major emitters, while achieving Canada's 2030 mitigation

109 Vancouver Declaration on Clean Growth and Climate Change (3 March 2016), Preamble, para 2, and section 3, online: <www.itk.ca/wp-content/uploads/2016/04/Vancouver_Declaration_clean_Growth_Climate_Change.pdf>.

110 Environment and Climate Change Canada, *Pan-Canadian Framework for Clean Growth and Climate Change*, (2016) at 78, online: <http://publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf>.

111 *Ibid.*, Annex 1 at 50.

112 *Ibid.*

113 *Ibid.*

114 *Ibid.*

115 Environment and Climate Change Canada, *Technical Paper: Federal Carbon Pricing Backstop* (2017) at 5, online: <www.canada.ca/en/services/environment/weather/climatechange/technical-paper-federal-carbon-pricing-backstop.html>.

116 Canada, News Release, "Government of Canada Releases Further Details on Federal Carbon-Pollution Pricing System" (15 January 2018), online: Environment and Climate Change Canada <www.canada.ca/en/environment-climate-change/news/2018/01/government_of_canadareleasesfurtherdetailsonfederalcarbonpollut.html>.

117 Environment and Climate Change Canada, "Proposed Methane Regulations", online: <<http://ec.gc.ca/lcpe-cepa/default.asp?lang=En&xml=BF68F2B3-03F9-4B3D-B5A9-1D5BC0A25A21>>.

118 Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl (2018), art 22(1)(i). See also *Building Common Ground: A New Vision for Impact Assessment in Canada; The Final Report of the Expert Panel for the Review of Environmental Assessment Processes* (2017) at 38, 90, 104, 108, online: <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>.

119 Bruce Cheadle, "Canada's 2030 Climate Target: Experts Weigh In on Whether It Can Be Achieved", *Huffington Post* (2 February 2016), online: <www.huffingtonpost.ca/2016/02/28/can-canada-meet-its-current-2030-climate-target-four-experts-chart-a-path_n_9341802.html>.

target requires absolute emission reductions. Also, with regard to the benchmark, some studies have shown that to achieve Canada's reduction target, "a price of \$100 per tonne would need to be in place by 2020."¹²⁰ Finally, Canada's action on fossil fuel subsidies raises issues of consistency with Canada's commitment to climate protection. In 2017, an Auditor General report criticized the Department of Finance Canada for not having "an implementation plan with timelines" to phase out inefficient fossil fuel subsidies by 2025, and for having "refused to provide all the analyses" requested.¹²¹

This point leads to the uncomfortable question of whether continuing to develop the oil and gas industry is compatible with a meaningful climate policy. From a legal perspective, the Paris Agreement does not explicitly prescribe how state parties make their energy choices. The word "energy" is not even mentioned in the text of the agreement. According to article 26 of the Vienna Convention on the Law of Treaties, however, the Paris Agreement, being a "treaty in force is binding upon the parties to it and must be performed by them in good faith."¹²² This implies that Canada and the other states parties should refrain from acts that would defeat the object and purpose of the Paris Agreement.¹²³ Thus, one could ask whether the approval of new pipelines and the granting of subsidies to the oil and gas industry would be compatible with the purpose of the Paris Agreement. For the moment, the federal government seems to have taken the position that developing GHG-intensive energy projects is compatible with the fight against climate change. In March 2017, during a speech at an energy conference in Texas, Trudeau declared, "No country would find 173 billion barrels of oil in the ground and just leave them."¹²⁴ According to some analysts, however, "It is wishful

thinking to assert that it is possible to develop a "climate plan" that would allow Canada to meet its commitments while at the same time substantially increasing oil and gas production."¹²⁵ In sum, the gap between Canada's international discourse and its domestic action on climate change is diminishing, but whether the two will fully align over the term of the Paris Agreement remains to be seen.

Conclusion

As this paper illustrates, Canada's foreign climate policy has greatly varied over time since its inception in the late 1980s. In some periods, Canada has been in "the rhetorical vanguard of greenhouse concern"¹²⁶ and has shown much enthusiasm for multilateral cooperation on climate change. At other times, Canada has not been inclined to adopt progressive climate positions or to strive to appear as a good international environmental citizen. In contrast, implementing meaningful climate measures at the federal level and achieving the internationally agreed mitigation targets has continuously proven to be a difficult task.¹²⁷ As a result, most of Canada's climate policy history has been dominated by a divergence between its positions in the climate talks — often enthusiastic and rather progressive — and its domestic actions.

Various reasons have been suggested to explain this divergence and Canada's inability to follow up on its international commitments. One explanation is economic. Canada's economy is "largely resources-driven" and "inextricably connected to

120 Marie-Daniell Smith, "Secret Briefing Says Up to \$300-per-tonne Federal Carbon Tax by 2050 Required to Meet Climate Targets", *National Post* (30 March 2017), online: <<http://nationalpost.com/news/politics/secret-briefing-says-up-to-300-per-tonne-federal-carbon-tax-by-2050-required-to-meet-climate-targets>>.

121 Office of the Auditor General of Canada, *Report 7 – Fossil Fuel Subsidies*, online: <www.oag-bvg.gc.ca/internet/English/parl_oag_201705_07_e_42229.html>.

122 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980), art 26.

123 *Ibid.*, arts 18, 26.

124 Justin Trudeau, 9 March 2017, cited in Jeremy Berke, "'No Country Would Find 173 Billions Barrels of Oil in the Ground and Just Leave Them': Justin Trudeau Gets a Standing Ovation at an Energy Conference in Texas", *Business Insider* (10 March 2017), online: <www.businessinsider.com/trudeau-gets-a-standing-ovation-at-energy-industry-conference-oil-gas-2017-3>.

125 David Hughes, *Can Canada Expand Oil and Gas Production, Build Pipelines and Keep Its Climate Change Commitments?* (June 2016) at 33, online: Canadian Centre for Policy Alternatives <www.policyalternatives.ca/publications/reports/can-canada-expand-oil-and-gas-production-build-pipelines-and-keep-its-climate>.

126 James K Sebenius, "Designing Negotiations Toward a New Regime: The Case of Global Warming" (1991) 15:4 *Intl Security* 110 at 132.

127 As the commissioner of the Environment and Sustainable Development recently noted, "During the past 25 years, Environment and Climate Change Canada developed a number of climate change plans aimed at reducing greenhouse gas emissions. However, Canada's overall greenhouse gas emissions increased between 1990 and 2015." Commissioner of the Environment and Sustainable Development, *2017 Fall Reports of the Commissioner of the Environment and Sustainable Development to the Parliament of Canada* (2017) at para 1.13, online: <www.oag-bvg.gc.ca/internet/English/parl_cesd_201710_01_e_42489.html>.

the development of those resources,”¹²⁸ and their development, especially oil and gas, comes with a high carbon footprint. Thus, it has been said that the “federal perception is that implementing Canada’s short-term obligations is simply too costly.”¹²⁹ Institutional reasons may also have played a role. For instance, some consider that Environment and Climate Change Canada, which was involved in the climate talks, was more committed to taking strong actions on climate change than other departments more involved in economic development and resource exploitation, such as Natural Resources Canada and Innovation, Science and Economic Development.¹³⁰ The fact that implementation of the Paris Agreement in Canada requires coordinated action by federal and provincial governments exercising their respective legislative authority also appears to be a relevant factor. As Douglas Macdonald and Heather Smith noted, “implementation strategies constitutionally required the involvement of the provinces because natural resources are under provincial jurisdiction.”¹³¹ According to these authors, “Jurisdictional interests, combined with powerful economic interests, made many provincial leaders wary of commitments to emissions reduction.”¹³²

Regardless of the reasons, the divergence between Canada’s foreign climate policy and its domestic action raises the more fundamental question of how Canada truly envisions international climate law. Generally speaking, one of the traditional functions of international law is to define legal rules to guide state behaviour.¹³³ But in the case of Canada — at least at the federal level — it appears that the necessity of acting in conformity with international climate law has not been fully “internalized”¹³⁴ by the legal system so that policy makers feel compelled

to act in accordance with Canada’s commitments.¹³⁵ In a famous article entitled “What is International Law for?,” Martti Koskenniemi suggests that international law is just a tool available to states to achieve the goals they desire.¹³⁶ A similar question could be asked about Canada and international climate law: what exactly does Canada wish to achieve with international climate law?

Canada’s foreign and domestic policy on climate change since the 1980s has been characterized by inconsistencies and difficulties in respect of domestic action. International climate law seems to have been envisioned as largely aspirational in nature. The time has come for Canada to rethink its approach to international climate law and use it as a means to shape and energize its domestic climate policy.

128 Jim Prentice & Jean-Sebastien Rioux, *Triple Crown: Winning Canada’s Energy Future* (Toronto: HarperCollins, 2017) at 16.

129 Cherie Metcalf, “Climate Law in Canada: International Law’s Role under Environmental Federalism” in *Forum Topic: The Impact of International Law on Canadian Law* (2014) 65 UNBLJ 86 at 108.

130 Macdonald & Smith, *supra* note 53 at 113.

131 *Ibid* at 118.

132 *Ibid*.

133 Christopher C Joyner, *International Law in the 21st Century: Rules for Global Governance* (Lanham, MD: Rowman & Littlefield, 2005) 8.

134 Harold Hongju Koh, “Why Do Nations Obey International Law?” (1997) 106:8 Yale LJ 2599 at 2602. In that sense, it could be argued that international climate law never fully penetrated Canada’s legal system to become part, as Hongju Koh puts it, of the “nation’s internal value set” (*ibid* at 2603).

135 Metcalf, *supra* note 129. The author rightly suggests that the UN climate regime did, nevertheless, have an influence, even at the federal level, in Canada. “[T]he international regime’s potential influence is apparent in enhanced transparency on climate change and governments’ responses, a move toward accountability in the form of setting targets and timetables, coordinated and cooperative methods of attacking climate change, and through a shift toward climate change adaptation planning” at 88.

136 Martti Koskenniemi, “What is International Law for?” in Malcolm Evans, ed, *International Law*, 4th ed (Oxford: Hart Publishing, 2014).

ON CANADA'S PAST, PRESENT AND FUTURE
IN INTERNATIONAL LAW

REFLECTIONS RÉFLEXIONS

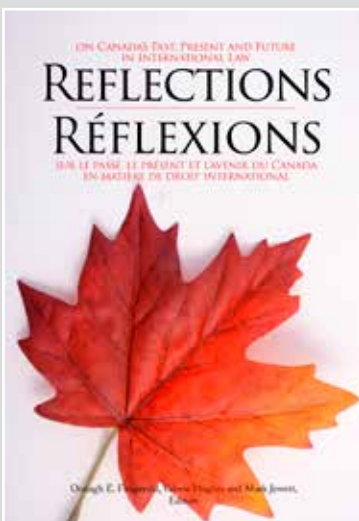
SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA
EN MATIÈRE DE DROIT INTERNATIONAL

Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett,
Editors

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's rich history in international law and governance, where we find ourselves today in the community of nations, and how we might help shape a future in which Canada's rules-based and progressive approach to international law gains ascendancy. These essays, each written in the official language chosen by the authors, provide a critical perspective on Canada's past and present in international law, survey the challenges that lie before us and offer renewed focus for Canada's pursuit of global justice and the rule of law.

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