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# ARTICLES

## THE CANADIAN NET-ZERO EMISSIONS ACCOUNTABILITY ACT: A TEPID RESPONSE TO THE PARIS AGREEMENT

CHRISTOPHER CAMPBELL-DURUFLÉ<sup>†</sup>

### Dedication

*I would like to dedicate this article to the memory of Professor Meinhard Doelle, Dalhousie University, who tragically passed away in September 2022. Professor Doelle enriched my doctoral research through his insightful writing on international climate law, challenged me in a kind and constructive way as external examiner for my defense, and generously provided feedback on a draft of this article. His work will continue to inspire countless environmental law scholars in Canada and around the world.*

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“Canada’s record on climate change should be judged not only on the targets and commitments that Canada has made over the years, but also on its actions. Despite commitments from government after government to significantly reduce greenhouse gas emissions over the past 3 decades, Canada has failed to translate these commitments into real reductions in net emissions. Instead, Canada’s emissions have continued to rise.

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<sup>†</sup> I gratefully acknowledge insightful feedback on previous drafts by Professors Jutta Brunnée, Meinhard Doelle, Andrew Green, and Laura Tozer, enriching exchanges with Dr. Nathan Lemphers and Mr. Adam Scott, very helpful comments by the anonymous reviewers and the review’s fantastic editorial team, and excellent research assistance by Ms. Jane Fallis Cooper, J.D. Candidate, University of Toronto Faculty of Law. I disclose serving on the Legal Committee of the Quebec Environmental Law Centre, having contributed to its brief presented to the House of Commons Standing Committee on Environment and Sustainable Development regarding the *Canadian Net-Zero Emissions Accountability Act* (Bill C-12), and having appeared as witness before the Senate Standing Senate Committee on Energy, the Environment and Natural Resources on the same matter.

Meanwhile, the global climate crisis has gotten worse. However, the recent coronavirus disease (COVID-19) pandemic has shown that Canada does have the capacity to respond to crises. Will Canada finally turn the corner and do its part to reduce greenhouse gas emissions?"<sup>1</sup>

## I. INTRODUCTION

Canada has a long record of failing to achieve its international climate commitments. As referred to in the epigraph by the Commissioner of the Environment and Sustainable Development, these include the *UN Framework Convention on Climate Change* (UNFCCC) collective goal of returning to 1990 levels of greenhouse gas emissions by 2000, Canada's legally binding *Kyoto Protocol* target of 6% under 1990 levels by 2012, and its political target announced at the Copenhagen conference of achieving a 17% reduction in emissions from 2005 levels by 2020. Rather, national emissions of greenhouse gases (GHGs) rose 21% between 1990 and 2020, from 602 to 730 megatons of carbon dioxide equivalent (MtCO<sub>2</sub>e) per year.<sup>2</sup>

Despite this poor performance, Canada was an early supporter of the *Paris Agreement*, adopted by the state parties to the UNFCCC in 2015.<sup>3</sup> Prime Minister Justin Trudeau famously declared on the eve of the negotiations: "Canada is back, my friends. Canada is back, and here to help",<sup>4</sup> thus suggesting an impending change of behaviour by this country. Canada submitted a new target of 40–45% under 2005 levels by 2030 to the UN and, in the summer

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<sup>1</sup> Commissioner of the Environment and Sustainable Development, *Report 5: Lessons Learned from Canada's Record on Climate Change* (Reports of the Commissioner of the Environment and Sustainable Development to the Parliament of Canada) (Ottawa: Office of the Auditor General of Canada, 2021) at 5 [emphasis omitted].

<sup>2</sup> See *ibid* at 7.

<sup>3</sup> See *Paris Agreement*, 12 December 2015, 3156 UNTS 79 (entered into force 4 November 2016) [*Paris Agreement*].

<sup>4</sup> James Fitz-Morris, "Justin Trudeau Tells Paris Climate Summit Canada Ready to Do More", *CBC News* (30 November 2015), online: <cbc.ca/news/politics/trudeau-address-climate-change-paris-1.3343394>.

of 2021, enacted a goal of net-zero emissions by 2050 in the *Canadian Net-Zero Emissions Accountability Act (Net-Zero Act)*.<sup>5</sup> Can this legislation contribute to closing the gap between Canada's commitments and actions, a chronic problem noted by observers from legal academia and beyond?<sup>6</sup>

To contribute to answering this question, this article analyzes the *Net-Zero Act* from the perspective of its reception of international law. Indeed, the Act's preamble identifies Canada's ratification of the *Paris Agreement* among its very first rationales and its purpose section specifically refers to Canada achieving its international mitigation commitments.<sup>7</sup> Several Members of Parliament described the function of the *Net-Zero Act*, introduced as Bill C-12, as the pursuit of the *Paris Agreement's* goals. For example, the Honourable Majid Jowhari affirmed the following:

[I]n December 2015, Canada joined 194 parties in signing the Paris agreement, a historic agreement that would be the start of the commitment to address climate change. That agreement aimed to limit the global temperature increase to well below 2°C above the pre-industrial level and to pursue efforts to limit our temperature increase to 1.5°C. Since 2015, our government has been working hard to achieve this goal, listening to the advice of

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<sup>5</sup> *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22 [*Net-Zero Act*]. As will be discussed in Part IV, "net-zero" is generally understood as meaning that any remaining emissions in 2050 (e.g. from cement plants) would be compensated with removals by natural sinks and carbon removal technologies.

<sup>6</sup> See e.g. Cherie Metcalf, "Climate Law in Canada: International Law's Role under Environmental Federalism" (2014) 65 UNBLJ 86; Elisabeth DeMarco, Robert Routliffe & Heather Landymore, "Canadian Challenges in Implementing the Kyoto Protocol: A Cause for Harmonization" (2004) 42:1 *Alta L Rev* 209; Jane Matthews Glenn & José Otero, "Canada and the Kyoto Protocol: An Aesop Fable" in Erkki J Hollo, Kati Kulovesi & Michael Mehling, eds, *Climate Change and the Law* (Dordrecht: Springer Netherlands, 2013) 489; Silvia Maciunas & Géraud de Lassus Saint-Geniès, "The Evolution of Canada's International and Domestic Climate Policy: From Divergence to Consistency?" in Oonagh E Fitzgerald, Valerie Hughes & Mark Jewett, eds, *Reflections on Canada's Past, Present and Future in International Law: Réflexions sur le passé, le présent et l'avenir du Canada en droit international* (Waterloo, ON: Centre for International Governance Innovation, 2018) 281.

<sup>7</sup> See *Net-Zero Act*, *supra* note 5, s 4.

scientists and experts. This momentum of remaining accountable must continue. Bill C-12 would require a target and establish an emissions reduction plan to be put in place, both to be tabled in Parliament within six months of the coming into force of this act.<sup>8</sup>

As laid bare by the country's withdrawal from the *Kyoto Protocol*,<sup>9</sup> discussed below, the reception of international law provides no guarantee of achieving climate commitments. Rather, the *Net-Zero Act*'s establishment of a framework to implement the *Paris Agreement*'s norms relevant to climate mitigation can be understood as a first step toward net-zero emissions by 2050.<sup>10</sup> The Agreement's adoption at the 2015 climate conference was conditional to nearly two hundred parties reaching a consensus,<sup>11</sup> which could only be achieved through intense bargaining between different negotiation groups.<sup>12</sup> If anything, an emissions mitigation law truly aligned with the *Paris Agreement* provides bare-minimum standards to assist Canada in its energy transition.

I argue that the *Net-Zero Act* achieves an incomplete reception of the *Paris Agreement* and that, as such, it provides only limited support to closing the enduring gap between Canada's commitments and actions. My argument is structured as follows. Part II establishes the reception of international law as an

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<sup>8</sup> "Bill C-12, An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050", *House of Commons Debates*, 43-2, No 93 (3 May 2021) at 1325 (Hon Majid Jowhari).

<sup>9</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) [*Kyoto Protocol*].

<sup>10</sup> The *Paris Agreement* contains other important goals that pertain to, among others, climate adaptation, financial transfers between countries, and climate-induced damages. Because the *Net-Zero Act* does not aim at allowing Canada to achieve them, they are beyond the scope of the present article.

<sup>11</sup> All attempts to adopt rules on majority voting have been unsuccessful. See *UN Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994), art 7(3) [*UNFCCC*].

<sup>12</sup> See Jen Iris Allan et al, "Making the Paris Agreement: Historical Processes and the Drivers of Institutional Design" (2021) 71:3 *Political Studies* 914; Henrik Jepsen et al, eds, *Negotiating the Paris Agreement: The Insider Stories* (Cambridge: Cambridge University Press, 2021).

analytical framework and draws on legal anthropology and international relations scholarship to observe how this process inevitably entails adapting treaty provisions to a country's circumstances. Specifically, my framework allows to uncover whether the *Net-Zero Act* enhanced, downsized, or simply omitted the provisions of the agreement. Part III then describes the context for the introduction of Bill C-12 and its adoption as the *Net-Zero Act*. This includes an overview of past attempts to adopt and implement federal climate legislation, and of some of the social and political challenges faced.

In Part IV, I analyze the *Net-Zero Act's* reception of seven key norms of the *Paris Agreement* that pertain to mitigation. Throughout, I use the word "norm" to capture both binding and non-binding provisions of the treaty. The *Net-Zero Act* reveals an enhanced approach to two of these norms, including the *Paris Agreement's* timeframe to reach net-zero, as well as significant downsizing and omissions as far as the other five are concerned, especially when compared to other jurisdictions around the world. In Part V, lastly, I examine the avenues available in the Act to promote accountability. Because the *Paris Agreement's* mechanisms primarily focus on reporting and grant parties significant discretion over their levels of mitigation action, achieving the treaty's goals is highly dependent upon parties holding themselves accountable domestically. Indeed, the Act's long title (i.e., *An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050*) specifically identifies accountability as a means to achieve the end goal of decarbonization.

Based on a definition of accountability that emphasizes independent assessments of government action and the availability of consequences for failure to implement a given norm, I argue that the *Net-Zero Act* fails to meaningfully improve the options already available before its adoption. The legislative process points to multiple missed opportunities for Parliament to enable external engagement with the government's climate policy choices and, overall, is a tepid response to the *Paris Agreement*. Throughout this article, I also identify ways in which Canada could

warm up to the treaty over the critical decade ahead for the global response to the climate emergency.<sup>13</sup>

## II. RECEIVING THE *PARIS AGREEMENT*: ENHANCED, DOWNSIZED, OR OMITTED NORMS?

By virtue of the separation of powers, the executive branch of government cannot modify domestic law merely by entering into international agreements. In a “hybrid” system of reception that combines both dualist and monist elements,<sup>14</sup> the most straightforward way to incorporate international norms is through statutes of Parliament, the provincial legislatures, and Indigenous governments. Apart from legislating, reception can also be achieved through judicial notice of international law, incorporation of customary international law in the common law, the interpretive presumption that Canadian laws conform with international obligations, and interpreting the rights enshrined in the *Canadian Charter of Rights and Freedoms*<sup>15</sup> so as to make them at least as protective as international human rights law. These doctrines, however, are better suited for the reception of specific rules and do not adequately serve for a framework of binding and non-binding provisions as complex as that of the *Paris Agreement*'s.<sup>16</sup>

Canada's international law reception system is an object of debate. For example, the Canadian Human Rights Commission has

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<sup>13</sup> See generally United Nations, Press Release, SG/SM/21573 “To Reach Climate Goals Humanity Must Cooperate or Perish, Secretary-General Warns, Calling for Solidarity Pact among All Nations, at Implementation Summit Opening” (7 November 2022), UN Doc SG/SM/21573, online: <press.un.org/en/2022/sgsm21573.doc.htm>.

<sup>14</sup> See Gib van Ert, “The Domestic Application of International Law in Canada” in Curtis A Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (New York, NY: Oxford University Press, 2019) 501 at 502. See also Phillip M Saunders et al, *Kindred's International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Emond Publishing, 2019), Chapter 3.

<sup>15</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>16</sup> See generally Lavanya Rajamani, “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations” (2016) 28 J Envtl L 337.

described it as “flawed” insofar as human rights are concerned, chiefly because of a lack of enacting legislation and because of the judiciary’s limited use of the interpretive presumption of conformity.<sup>17</sup> For some scholars, Canada’s engagement with international law is at best “a hesitant embrace” because courts, while they often acknowledge international norms, rarely give obligations a determinative legal effect.<sup>18</sup> One recent development is the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples Act* in 2021, fourteen years after Canada abstained from the original UN General Assembly vote.<sup>19</sup> Another development relates to holding Canadian companies accountable for violations of international law committed abroad. After a failed attempt to enact legislation to this effect, the Supreme Court of Canada recently granted alleged victims of torture a comparatively narrow access to Canadian courts based on the incorporation of customary law doctrine.<sup>20</sup>

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<sup>17</sup> See Canadian Human Rights Commission, *Submission to the United Nations Human Rights Council on the Occasion of its Review of Canada during the 3rd Cycle of the Universal Periodic Review* (October 2017), online: <[upr-info.org/sites/default/files/documents/2018-04/chrc\\_upr30\\_can\\_e\\_main.pdf](http://upr-info.org/sites/default/files/documents/2018-04/chrc_upr30_can_e_main.pdf)>.

<sup>18</sup> See Jutta Brunnée & Stephen J Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002) 40 *Can YB Intl L* 3 at 3–5. See also Armand de Mestral & Evan Fox-Decent, “Rethinking the Relationship between International and Domestic Law” (2008) 53:4 *McGill LJ* 573; Amissi M Manirabona & François Crépeau, “Enhancing the Implementation of Human Rights Treaties in Canadian Law: The Need for a National Monitoring Body” (2012) 1:1 *Can J Human Rights* 25.

<sup>19</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [UNDRIP Act]; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [UNDRIP]. See also John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019).

<sup>20</sup> See *Nevsun Resources Ltd v Araya*, 2020 SCC 5. See also Richard Janda, “Note: An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries (Bill C-300): Anatomy of a Failed Initiative” (2010) 6:2 *JSDLP* 97.



As the examples of the *UNDRIP* and corporate accountability suggest, the reception of international law is a dynamic process whereby norms are confronted by a diversity of evolving national conditions. Engle Merry and Levitt describe this as the “vernacularisation” of international norms, or “their translation into ideas and practices that resonate with the values and ways of doing things in local contexts.”<sup>21</sup> They draw attention to the fact that international law is not simply transposed into national law, but adopted, resisted, used, and often transformed.<sup>22</sup> In her case study of the reception of the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in the United States, Wiener notes that certain norms were “downsized” (i.e., those substantive ones applicable to defining torture) whereas others were “expanded” (i.e., those procedural ones pertaining to litigation).<sup>23</sup> Similarly, Zimmerman shows how key actors in the Guatemalan Congress, government, military, and private sector contested rule of law promotion efforts by foreign actors, and negotiated modifications to international obligations and non-binding standards as a condition for their reception in domestic law.<sup>24</sup>

The reasons for a country to welcome certain international norms and to resist others are context specific. In his classic theory of the transnational legal process, Koh suggests that reception depends on how different actors (government, corporations, international organizations, NGOs, individuals, etc.) trigger forums capable of delivering interpretations that have “the

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<sup>21</sup> Sally Engle Merry & Peggy Levitt, “The Vernacularization of Women’s Human Rights” in Stephen Hopgood, Jack Snyder & Leslie Vinjamuri, eds, *Human Rights Futures* (Cambridge: Cambridge University Press, 2017) at 213.

<sup>22</sup> *Ibid.*

<sup>23</sup> See Antje Wiener, *Contestation and Constitution of Norms in Global International Relations* (Cambridge: Cambridge University Press, 2018) at 127–75; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>24</sup> See Lisbeth Zimmermann, “More for Less: The Interactive Translation of Global Norms in Postconflict Guatemala” (2017) 61:4 Intl Studies Q 774.

result of internalizing a global standard into domestic law.”<sup>25</sup> Scholarship on norm diffusion has drawn attention to the variety of roles that social actors play in such a transnational process. Those that advocate for amending domestic law in light of international law may be described as “norm entrepreneurs,” whereas others may be passive or even hostile to this process.<sup>26</sup> Norm qualities also have an important role to play. Provisions that are more precise are more amenable to be received in domestic law because they reduce opportunities for negotiated modifications,<sup>27</sup> and have greater potential to convince different actors to accept them as legitimate.<sup>28</sup>

This scholarship provides a foundation to problematize the reception of the *Paris Agreement’s* mitigation norms through the *Net-Zero Act*. Which international norms were received in the *Net-Zero Act* and which were omitted? Of the norms that were received, were any downsized, enhanced, or otherwise transformed? These are the questions that I address in this article, while acknowledging that the laws of Indigenous, provincial, territorial, and municipal governments across the country are also integral to this process. The federal government could also have sought to implement the *Paris Agreement* without adopting new legislation, through reliance on policymaking, existing statutes, and regulatory powers.<sup>29</sup> However, Parliament’s intent to promote

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<sup>25</sup> Harold Hongju Koh, “Transnational Legal Process After September 11th” (2004) 22:3 *BJIL* 337 at 343. See also Harold Hongju Koh, “Transnational Legal Process” (1996) 75:1 *Neb L Rev* 181.

<sup>26</sup> Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52 *Intl Organization* 887 at 897. See also Alan Bloomfield & Shirley V Scott, eds, *Norm Antipreneurs and the Politics of Resistance to Global Normative Change* (Abingdon, Oxon; New York, NY: Routledge, 2017).

<sup>27</sup> See Zimmermann, *supra* note 24 at 783.

<sup>28</sup> See Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (New York: Cambridge University Press, 2010) at 20–55.

<sup>29</sup> For example, the *Impact Assessment Act* refers to Canada’s climate commitments as one factor to be taken into account during impact assessments (s 22(1)(i)), the *Canadian Energy Regulator Act* identifies them as one factor to be taken into account in assessing applications for pipeline

“transparency, accountability and immediate and ambitious action” toward international climate commitments through the *Net-Zero Act* logically calls for an assessment of this legislation from the perspective of its reception of international law.<sup>30</sup>

### III. PARLIAMENT’S ADOPTION OF BILL C-12 IN CONTEXT

The *Net-Zero Act* comes against a backdrop of attempts to adopt and implement federal legislation on GHG emissions mitigation. These attempts reveal how, for years, the executive and legislative branches considered receiving international climate norms and adopting some of the approaches contained in the Act. One example is Bill C-30, which was introduced by a minority Conservative government as *Canada’s Clean Air Act* in 2006. Upon First Reading, the bill would have empowered the Governor in Council to regulate GHGs and referred generally to “Canada’s international obligations in relation to the environment and human health” as one factor to be taken into account.<sup>31</sup> After consideration by the Standing Committee on Environment and Sustainable Development (House Committee), the bill contained a far stronger framework of international law reception, including establishing national carbon budgets to reduce emissions by 6% below 1990 levels in 2012 (i.e., Canada’s *Kyoto Protocol* target), by 20% in 2020, by 35% in 2035, and between 60% and 80% in 2050. Renamed *Canada’s Clean Air and Climate Change Act*, it would also have empowered the Governor in Council to link domestic emissions trading systems to the protocol’s international

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certifications (s 183(2)(j)), the *Federal Sustainable Development Act* refers to international obligations in its purpose section (s 2), and the *Greenhouse Gas Pollution Pricing Act* and the *Canadian Environmental Protection Act, 1999* refer to Canada’s international obligations in their preamble. See *Impact Assessment Act*, SC 2019, c 28, ss 1, 22(1)(i); *Canadian Energy Regulator Act*, SC 2019, c 28, ss 10, 183(2)(j); *Federal Sustainable Development Act*, SC 2008, c 33, s 3; *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, Preamble; *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, Declaration.

<sup>30</sup> *Net-Zero Act*, *supra* note 5, s 4.

<sup>31</sup> “Bill C-30, Canada’s Clean Air Act”, 1st reading, *House of Commons Debates*, 39-1, No 65 (19 October 2006), s 103.09(5)(e) (Hon Rona Ambrose).

mechanisms.<sup>32</sup> Bill C-30 died on the Order Paper in 2007 and was not reintroduced by the government.

As a result, Parliament considered multiple private Members' bills aimed at implementing Canada's climate commitments.<sup>33</sup> The *Kyoto Protocol Implementation Act*, introduced as Bill C-288, is the most dramatic example.<sup>34</sup> The Act required the Governor in Council to "ensure that Canada fully meets its obligations under ... the Kyoto Protocol by making, amending or repealing the necessary regulations under this or any other Act."<sup>35</sup> It also mandated the Minister of the Environment (Minister) to table before Parliament the expected emissions reductions for each year from 2008 to 2012 as well as Climate Change Plans describing the measures to be taken to this end.<sup>36</sup> When it became clear that Canada would not achieve its target, however, the government withdrew from the protocol and repealed the Act in time to avoid international legal consequences.<sup>37</sup>

The *Kyoto Protocol Implementation Act* is far from being opposition Members' only attempt at closing the gap between Canada's international commitments and actions. Bill C-377 of 2006, the *Climate Change Accountability Act*, contained a mandate for the Minister to present Parliament with five-year targets toward reducing emissions 80% below 1990 levels by 2050.<sup>38</sup> Accountability would have been reflected by a mandate for the

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<sup>32</sup> See House of Commons, Legislative Committee on Bill C-30, "Committee Report", 39-1, No 132 (30 March 30, 2007), ss 94.1(2)(c), 103(2)(1).

<sup>33</sup> Indeed, Bill C-30 was immediately reintroduced by the opposition and also died on the Order Paper. See "Bill C-468, Canada's Clean Air and Climate Change Act", 1st reading, House of Commons Debates, 39-2, No 6 (23 October 2007) (Hon Nathan Cullen) at 283.

<sup>34</sup> "Bill C-228, Kyoto Protocol Implementation Act", *House of Commons Debates*, 39-1, No 25 (17 May 2006) at 1520 (Hon Pablo Rodriguez).

<sup>35</sup> *Kyoto Protocol Implementation Act*, SC 2007, c 30, s 7(1), as repealed by the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, s 699.

<sup>36</sup> See *Kyoto Protocol Implementation Act*, *supra* note 35, ss 5(1), 9(1).

<sup>37</sup> "Canada Pulls Out of Kyoto Protocol", *CBC News* (12 December 2011), online: <[cbc.ca/news/politics/canada-pulls-out-of-kyoto-protocol-1.999072](http://cbc.ca/news/politics/canada-pulls-out-of-kyoto-protocol-1.999072)>.

<sup>38</sup> "Bill C-377, Climate Change Accountability Act", 1st reading, *House of Commons Debates*, 39-1, No 73, (31 October 2006) at 1005 (Hon Jack Layton).

Governor in Council to ensure that the federal government's policy is consistent with interim targets and by new offences applicable to anyone contravening a regulation made under the Act. Bill C-377 was adopted by the House of Commons in 2008 and died on the Order Paper before the Senate. It was then re-introduced as Bill C-311, which was again adopted by the House of Commons but defeated in the Senate in 2010.<sup>39</sup> At the third attempt, Bill C-224 died on the Order Paper before the House of Commons.<sup>40</sup>

Parliament considered yet other private Member's bills shortly before the new Liberal government introduced Bill C-12. Bill C-215 proposed a *Climate Change Accountability Act* explicitly aimed at implementing the *Paris Agreement* through a commitment to achieving "zero net emissions" by 2050.<sup>41</sup> It was defeated at Second Reading in the House of Commons in February 2021. Bill C-232 proposed a *Climate Emergency Action Act* and was similarly defeated in March 2021.<sup>42</sup> This bill purported to fulfill Canada's commitments under the UNFCCC, the *Paris Agreement*, and the *UNDRIP*. Among other requirements, the Minister would have been mandated to table before Parliament a climate emergency action framework to reduce emissions and transition to a green economy.

Building on this long list of attempts to adopt and implement climate legislation in Canada, the Minister introduced Bill C-12 in November 2020.<sup>43</sup> The bill did not make much progress until May

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<sup>39</sup> See "Bill C-311, Climate Change Accountability Act", 1st reading, *House of Commons Debates*, 40-2, No 12 (10 February 2009) at 1020 (Hon Bruce Hyer).

<sup>40</sup> See "Bill C-224, Climate Change Accountability Act," 1st reading, *House of Commons Debates*, 41-1, No 9 (15 June 2011) at 1525 (Hon Megan Anissa Leslie).

<sup>41</sup> "Bill C-215, "Climate Change Accountability Act", 1st reading, *House of Commons Debates*, 43-1, No 22 (24 February 2020) at 1515 (Hon Kristina Michaud).

<sup>42</sup> See "Bill C-232, Climate Emergency Action Act", 1st reading, *House of Commons Debates*, 43-1, No 24 (26 February 2020) (Hon Leah Gazan).

<sup>43</sup> See "Bill C-12, An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050", 1st

2021, when it was rushed to adoption by a minority government before dissolution of Parliament in August 2021. The Standing Senate Committee on Energy, the Environment and Natural Resources (Senate Committee) even began its pre-study of the bill before the House of Commons' adoption to speed things up. The House Committee considered 75 briefs, heard 47 witnesses, and made 31 amendments; the Senate Committee considered 19 briefs and heard 34 witnesses. In the end, the House of Commons adopted the bill after making four amendments, with 176 members in favour and 149 against, and the Senate with 60 votes in favour, 19 against, and 2 abstentions. It received Royal Assent on 29 June 2021.

A comprehensive analysis of the reasons for Bill C-12's adoption almost three decades after Canada ratified the UNFCCC in 1992 is beyond the scope of this article. Key challenges described elsewhere include vigorous opposition by industry associations to fossil-fuel regulation (including to carbon pricing and cap-and-trade schemes), strong economic integration with the US (which did not ratify the *Kyoto Protocol* and saw its Senate fail to adopt the *Waxman-Markey Bill*<sup>44</sup>), lack of assurance that other large emitters—emerging economies in particular—would decarbonize their economies on the basis of the UNFCCC, provincial jurisdiction over natural resources, a desire by Alberta and other provinces to expand fossil-fuel production, and limited federal capacity to develop and implement climate policy (including cuts to Environment Canada's budget and institutional rivalry with Natural Resources Canada).<sup>45</sup>

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reading, *House of Commons Debates*, 43-2, No 32 (19 November 2020) (Hon Jonathan Wilkinson, Minister of the Environment) [Bill C-12 1st Reading].

<sup>44</sup> See US, Bill HR 2454, *American Clean Energy and Security Act of 2009*, 111th Cong, 2009.

<sup>45</sup> See e.g. Kathryn Harrison, "The Struggle of Ideas and Self-Interest in Canadian Climate Policy" in Kathryn Harrison & Lisa McIntosh Sundstrom, eds, *Global Commons, Domestic Decisions: The Comparative Politics of Climate Change* (Cambridge, Mass: The MIT Press, 2010); Robert MacNeil, *Thirty Years of Failure: Understanding Canadian Climate Policy* (Black Point, Nova Scotia: Fernwood Publishing, 2019); Angela V Carter, "Policy Pathways to Carbon Entrenchment: Responses to the Climate Crisis in Canada's

While these challenges had not disappeared when Bill C-12 was adopted, significant transformations had occurred. By contrast with the *Kyoto Protocol's* focus on binding mitigation targets for developed countries only, for example, the *Paris Agreement* calls on all parties to decarbonize. Indeed, in the run-up to the agreement, China pledged to peak its emissions in 2030 and the US announced a mitigation target of 26%–28% below 2005 levels by 2025.<sup>46</sup> In 2020, moreover, the US re-joined the *Paris Agreement* following the presidential election.<sup>47</sup> In Canada, the Liberal Party was elected in 2015 on the basis of a promise to reduce emissions<sup>48</sup> and the Supreme Court confirmed in March 2021 that the federal government has jurisdiction, under its peace, order, and good government power, to establish a minimum national price on carbon pollution.<sup>49</sup> These changes, among other factors, contribute to explaining the breakthrough represented by the *Net-Zero Act's* adoption. However, the tepid reception of several of

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Petro-Provinces” (2018) 99:2 Stud in Pol Econ 151. For a detailed overview, see also Nathan Lemphers, *Beyond the Carbon Curse: A Study of the Governance Foundations of Climate Change Politics in Australia, Canada and Norway* (PhD Dissertation, University of Toronto, 2020) [unpublished] Chapter 4.

<sup>46</sup> See The White House, Press Release, “US-China Joint Announcement on Climate Change” (12 November 2014) at para 3, online: *The White House Statements & Releases* <obamawhitehouse.archives.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>.

<sup>47</sup> See Oliver Milman, “Biden Returns US to Paris Climate Accord Hours After Becoming President”, *The Guardian* (20 January 2021), online: <theguardian.com/environment/2021/jan/20/paris-climate-accord-joe-biden-returns-us>.

<sup>48</sup> See Liberal Party of Canada, “Real Change: A New Plan for a Strong Middle Class” (2015), online (pdf): *Liberal Party of Canada* <liberal.ca/wp-content/uploads/sites/292/2020/09/New-plan-for-a-strong-middle-class.pdf> (for the platform’s recognition of the relevance of international law: “[w]e will instead partner with provincial and territorial leaders to develop real climate change solutions, consistent with our international obligations to protect the planet, all while growing our economy” at 39).

<sup>49</sup> See *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11. See also Jocelyn Stacey, “Climate Disruption in Canadian Constitutional Law: *References Re Greenhouse Gas Pollution Pricing Act*” (2021) 33:3 J Envtl L 711.

the *Paris Agreement*'s key norms, which I describe in Part IV, also suggests that some of the challenges identified above may persist throughout the Act's implementation.

#### IV. ANALYSIS OF THE *NET-ZERO ACT*'S RECEPTION OF KEY *PARIS AGREEMENT* NORMS

In this Part, I examine the reception of a key subset of *Paris Agreement* norms that apply to states' substantive mitigation actions: a) the treaty's global decarbonization timeframe, b) the non-binding expectations of progression, highest possible ambition, and fairness that apply to parties' mitigation targets, c) the obligation to foster public participation with regard to climate action, d) the treaty's preambular reference to Indigenous peoples' rights, and e) the obligation of conduct to pursue mitigation targets. I close this Part with general observations regarding Parliament's variable approaches to these norms, including enhancing them, downsizing them, and omitting them altogether.

The *Paris Agreement* contains other provisions relevant to emissions mitigation, including procedural obligations (e.g., to report biennially on progress and to undergo multilateral examinations) and substantive norms (e.g., the recommendations to formulate long-term low GHG strategies and to conserve forests and other carbon sinks).<sup>50</sup> In this article, I prioritize seven norms that go to the heart of the agreement's "bottom-up" logic, namely parties being obligated to set mitigation targets every five years and to continually report on implementation, but enjoying discretion over the content of their targets.<sup>51</sup> Only focussing on the reception of the obligations contained in the agreement, by contrast, would provide no sense of how countries are responding to this logic in their own laws. While respecting Indigenous peoples' rights when setting mitigation targets may not be a key issue for all parties, it clearly arises as such for Canada given the

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<sup>50</sup> See *Paris Agreement*, *supra* note 3, arts 4(19), 5, 13(7), 13(11).

<sup>51</sup> See e.g. Nicholas Chan, "Climate Contributions and the Paris Agreement: Fairness and Equity in a Bottom-Up Architecture" (2016) 30:3 *Ethics & Intl Affairs* 291; Robert Falkner, "The Paris Agreement and the New Logic of International Climate Politics" (2016) 92:5 *Intl Affairs* 1107.



well-documented heightened vulnerability of Indigenous peoples to climate impacts.<sup>52</sup>

#### A. NET-ZERO BY 2050: THE PARIS TIMEFRAME ENHANCED

The purpose of the *Net-Zero Act* set out in section 4 is “to require the setting of national targets for the reduction of greenhouse gas emissions . . . in support of achieving net-zero emissions in Canada by 2050 and Canada’s international commitments in respect of mitigating climate change.”<sup>53</sup> Before the House of Commons, the Parliamentary Secretary to the Minister emphasized the importance of such a goal in the following terms: “[n]et-zero’ is not a flashy catchphrase. If we do not reach net-zero emissions by 2050, we will not achieve the goals of the Paris Agreement. This is an existential threat to the planet on which there is a global consensus.”<sup>54</sup>

Significantly, global consensus around a 2050 target had not fully coalesced when parties adopted the *Paris Agreement*. At the 2015 climate conference, negotiators could not agree on a timeframe more specific than “in the second half of this century” at article 4(1) of the treaty and some even objected to the words “emissions neutrality” and “decarbonization” that appeared in

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<sup>52</sup> See e.g. Denise M Golden, Carol Audet & MA (Peggy) Smith, “Blue-Ice’: Framing Climate Change and Reframing Climate Change Adaptation from the Indigenous Peoples’ Perspective in the Northern Boreal Forest of Ontario, Canada” (2015) 7:5 *Climate and Development* 401; Ashlee Cunsolo Willox et al, “From This Place and of This Place’: Climate Change, Sense of Place, and Health in Nunatsiavut, Canada” (2012) 75:3 *Soc Sci & Med* 538; Human Rights Watch, *My Fear is Losing Everything: The Climate Crisis and First Nations’ Right to Food in Canada*, (USA: Human Rights Watch, 2020).

<sup>53</sup> *Net-Zero Act*, *supra* note 5, s 4.

<sup>54</sup> “Bill C-12, An Act Respecting Transparency and Accountability in Canada’s Efforts to Achieve Net-zero Greenhouse Gas Emissions by the Year 2050”, 2nd reading, *House of Commons Debates*, 43-2, vol 150 No 082 (16 April 2021) at 5761 (Mr Chris Bittle) [Bill C-12 2nd reading].

previous treaty drafts.<sup>55</sup> As a result, the Agreement's target is elliptically described as follows:

In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of [GHG] emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.<sup>56</sup>

The long-term temperature goal in question was also worded in ambiguous terms at article 2(1)(a) of the *Paris Agreement*: “well below 2° C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5° C above pre-industrial levels.”<sup>57</sup> A High Ambition Coalition convened by the Marshall Islands and eventually joined by Canada was successful at securing this reference to a 1.5° C temperature goal but had to make concessions in terms of clarity to large emitters and developing countries such as China, India, Saudi Arabia, and Malaysia that resisted a stricter timeframe.<sup>58</sup>

How did the *Paris Agreement's* latter half of the century target translate in a 2050 goal in Canadian law? Two factors can be credited for this enhancement. The first is the Intergovernmental Panel on Climate Change's (IPCC) report on the impacts of global warming of 1.5° C, which was requested in the *Paris Agreement* adoption decision under the impulse—once again—of the High

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<sup>55</sup> See *Draft Paris Agreement*, Ad Hoc Working Group on the Durban Platform for Enhanced Action, 5 December 2015, UN Doc FCCC/ADP/2015/L.6/Rev.1 art 3.

<sup>56</sup> *Paris Agreement*, *supra* note 3, art 4(1) [emphasis added].

<sup>57</sup> *Ibid*, art 2(1)(a).

<sup>58</sup> See Jane Bulmer, Meinhard Doelle & Daniel Klein, “Negotiating History of the Paris Agreement”, in Daniel Klein et al, eds, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford: Oxford University Press, 2017) at 52.

Ambition Coalition.<sup>59</sup> The implication of this request became apparent at the 2019 climate conference, when Saudi Arabia, the US, Kuwait, and Russia objected to welcoming the report's conclusions. A watered-down decision only "[w]elcomes the timely completion" of the report<sup>60</sup> but the bell couldn't be unring, so to speak. The report clearly showed that the risks of serious climate-related impacts (sea level rise, species loss, heat-related morbidity, reduced crop yield, water stress, etc.) are much higher at 2° C than at 1.5° C, and that reaching net-zero CO<sub>2</sub> emissions by 2050 is necessary to avoid overshooting 1.5° C.<sup>61</sup> After the *Net-Zero Act's* adoption, parties even formally recognized that limiting global warming to 1.5° C "requires rapid, deep and sustained reductions in global [GHG] emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century as well as deep reductions in other [GHGs]".<sup>62</sup>

Another factor that explains the *Net-Zero Act's* more ambitious goal is the groundswell of climate laws and non-binding corporate standards adopted since 2015. One early mover was France, which enacted an energy transition law with a goal of bringing GHG emissions down 75% by 2050 even before the *Paris Agreement's* adoption.<sup>63</sup> Another was Sweden, which in 2017 legislated a

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<sup>59</sup> See *Adoption of the Paris Agreement*, FCCC Dec 1/CP.21, UNFCCC, 2016, UN Doc FCCC/CP/2015/10/Add.1 at para 21 [*Adoption Decision*].

<sup>60</sup> *Preparations for the implementation of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*, FCCC Dec 1/CP.24, UNFCCC, 2019, UN Doc FCCC/CP/2018/10/Add.1, 2 at para 26.

<sup>61</sup> See IPCC, *Global Warming of 1.5°C: Summary for Policymakers* (Cambridge, UK: Cambridge University Press, 2018) at 11–12. See also IPCC, *Climate Change 2022: Mitigation of Climate Change Summary for Policymakers* (Cambridge, UK: Cambridge University Press, 2022) at para B.5.

<sup>62</sup> *Glasgow Climate Pact*, FCCC Dec 1/CMA.3, UNFCCC, 2022, UN Doc FCCC/PA/CMA/2021/10/Add.1, 2 at para 22.

<sup>63</sup> See *Loi n° 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte*, JO, 18 August 2015, 14263, art 1(III).

net-zero target for 2045 at the latest.<sup>64</sup> The United Kingdom also amended its *Climate Change Act 2008* to enact a 2050 net-zero target in 2019 under the recommendation of its Climate Change Committee<sup>65</sup> and the Netherlands adopted a 95% reduction by 2050 target that same year.<sup>66</sup> Private sector initiatives also reflect this enhanced interpretation of the *Paris Agreement*. The Science-based Targets Initiative, for example, offers a Net-Zero Standard to corporations desirous to contribute to the *Paris Agreement's* implementation that is built around a 2050 target.<sup>67</sup>

In sum, article 4(1) of the *Paris Agreement* provides an example of how constructive ambiguity allowed states to overcome their inability to agree on a decarbonization timeframe during the 2015 climate conference and to continue refining their understandings over the following years.<sup>68</sup> The *Net-Zero Act's* setting of a 2050 target—despite resistance by some Members of Parliament<sup>69</sup>—did not break new ground but added weight to a burgeoning practice. Following the Act's enhancement of the *Paris Agreement* timeframe, companies that operate nearly 90% of Canada's oil

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<sup>64</sup> See *Climate Policy Framework* (Sweden), Government Bill 2016/17:146. See also Mikael Karlsson, "Sweden's Climate Act – Its Origin and Emergence" (2021) 21:9 *Climate Policy* 1132.

<sup>65</sup> *Climate Change Act 2008* (UK), c 27, s 1 [*UK Climate Change Act*]. See also *The Climate Change Act 2008 (2050 Target Amendment) Order 2019* (UK), s 2.

<sup>66</sup> See *Climate Law* (Netherlands), No. 253 of 2019, s 2. See also Grantham Research Institute on Climate Change and the Environment & Sabin Center for Climate Change Law, *Climate Change Laws of the World* database, online: <climate-laws.org>.

<sup>67</sup> See Science-based Targets Initiative, *SBTI Corporate Net-Zero Standard* (2021), online: <sciencebasedtargets.org/net-zero>.

<sup>68</sup> See generally Susan Biniarz, "Comma but Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime" (2016) 6:1 *Mich J Envtl Admin L* 37.

<sup>69</sup> One Member of Parliament challenged the target, stating "[t]his is interesting because the Paris Agreement does not say 1.5°C. It has several models in it, too. The IPCC also talks about several different models": "Bill C-12, An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050", 2nd reading, House of Commons Debates, 43-2, No 093 (3 May 2021) at 6582 (Hon Tom Kmiec).

sands production even launched an Oil Sands Pathways to Net Zero initiative that references the treaty.<sup>70</sup>

B. PROGRESSION, HIGHEST POSSIBLE AMBITION, AND FAIRNESS: A TEPID RECOGNITION OF CLIMATE CHANGE'S GLOBAL DIMENSION

With a view to achieving net-zero in 2050, section 7 of the *Net-Zero Act* mandates the Minister to set mitigation targets (known as milestone targets) with a 10-year horizon, one year before Canada files each of its *Paris Agreement* pledges. These pledges are referred to as Nationally Determined Contributions in the treaty, or NDCs for short, and are due on 2025, 2030, 2035, etc.<sup>71</sup> The initial version of Bill C-12 called on the Minister, when setting a milestone target, to “take into account [(a)] the best scientific information available . . . [and (b)] Canada’s international commitments with respect to climate change.”<sup>72</sup> Without doubt, the expression “international commitments” extends beyond binding obligations.<sup>73</sup> Its scope is ambiguous, however, and at least two alternatives can be identified to determine its “true spirit, intent and meaning” in this section.<sup>74</sup> These alternatives must be weighed in view of their “entire context”, including other references to this expression in the *Net-Zero Act*, the Act’s object,

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<sup>70</sup> See Engineering and Mining Journal, News Release, “Canada’s Largest Oil Sands Producers Set Net Zero Target for 2050” (July 2021) at 8. See also Oil Sands Pathways Alliance, News Release, “Oil Sands Pathways Alliance Outlines Three-Phase Plan to Achieve Goal of Net Zero Emissions” (October 2021), online: <pathwaysalliance.ca/news/press-release-oil-sands-pathways-alliance-outlines-three-phase-plan-to-achieve-goal-of-net-zero-emissions/>.

<sup>71</sup> See UNFCCC, *NDC Registry*, online: <unfccc.int/NDCREG>.

<sup>72</sup> Bill C-12 1st reading, *supra* note 43, s 8. In French, “engagements internationaux”.

<sup>73</sup> For example, the *Impact Assessment Act* distinguishes Canada’s “environmental obligations and its commitments in respect of climate change” in the same provision: *Impact Assessment Act*, *supra* note 29, s 22(1)(i).

<sup>74</sup> *Interpretation Act*, RSC 1985, c I-21, s 10.

and Parliament's intention, in order to gain a clearer understanding of their reception of the *Paris Agreement*.<sup>75</sup>

One common interpretation is that "international commitments" refer to Canada's NDC targets presented under the *Paris Agreement*. For example, the Commissioner of the Environment and Sustainable Development describes the targets undertaken in the *Kyoto Protocol*, the Copenhagen Accord, and as NDCs under the *Paris Agreement* as such.<sup>76</sup> The *Net-Zero Act* includes seven mentions of "commitments" that are compatible with this interpretation. For example, section 10 requires the Minister to include, in the emissions reductions plan, "information relevant to the plan that Canada submitted under its international commitments with respect to climate change."<sup>77</sup> This likely refers to the information regarding "implementation plans" that states must include in their NDCs, such as describing institutional arrangements and national circumstances.<sup>78</sup> The problem with this interpretation is that, by focusing on Canada's international targets, it would exclude general *Paris Agreement* principles from the considerations that the Minister must "take into account" when establishing milestone targets.<sup>79</sup>

Three such principles can be identified. One is that successive NDC targets "will represent a progression",<sup>80</sup> which Rajamani and Brunnée have described as a "normative expectation" that stands

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<sup>75</sup> See *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193. See generally Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016).

<sup>76</sup> See Canadian Commissioner of the Environment and Sustainable Development, *supra* note 1 at 6.

<sup>77</sup> *Net-Zero Act*, *supra* note 5, s 10(1)(a.1).

<sup>78</sup> See *Further Guidance in Relation to the Mitigation Section of Decision 1/CP.2*, FCCC Dec 4/CMA.1, UNFCCC, 2019, UN Doc FCCC/PA/CMA/2018/3/Add.1, "Annex I, Information to facilitate clarity, transparency and understanding of nationally determined contributions, referred to in decision 1/CP.21 para 28", 9 at para 4.

<sup>79</sup> *Net-Zero Act*, *supra* note 5, s 8.

<sup>80</sup> *Paris Agreement*, *supra* note 3 arts 3, 4(3).

at the very core of the treaty's architecture.<sup>81</sup> Other essential principles are those of "highest possible ambition" of mitigation targets and of "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."<sup>82</sup> This last principle, also known as CBDR, has played a major role in the evolution of the climate regime and has often been at the centre of disagreements between developed and developing countries.<sup>83</sup> It conveys an expectation that states' targets reflect the collective dimension of the climate challenge, including differences in historical responsibilities and current capacities. Parties should explain, in their regular reporting under the *Paris Agreement*, how their NDC targets are ambitious, fair, and reflect equity.<sup>84</sup> For greater simplicity, I refer to this principle as that of fairness.

I argue that, in the *Net-Zero Act*, the expression "international commitments" must be interpreted as encompassing more than Canada's NDC targets, since the act explicitly refers to Canada's "nationally determined contribution" on three occasions within its operative part.<sup>85</sup> Parliament would not have used two different expressions to refer to the same concept. A contextual interpretation suggests that "commitments" also include Canada's contribution to the collective goals affirmed in the *Paris Agreements*. The agreement's mitigation goal is to reach net-zero emissions in time to reduce risks of climate impacts, with a view to limiting temperature increase to 1.5° C and, in any case, well below 2° C, on the basis of equity and in the context of sustainable development. Indeed, it would be difficult to interpret the Act's

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<sup>81</sup> Lavanya Rajamani & Jutta Brunnée, "The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement" (2017) 29:3 J Envtl L 537 at 539.

<sup>82</sup> *Paris Agreement*, *supra* note 3 art 4(3).

<sup>83</sup> See Chukwumerije Okereke & Philip Coventry, "Climate Justice and the International Regime: Before, During, and after Paris" (2016) 7:6 WIREs Clim Change 834 at 837.

<sup>84</sup> See *Further Guidance in Relation to the Mitigation Section of Decision 1/CP.2*, *supra* note 78 at para 6.

<sup>85</sup> *Net-Zero Act*, *supra* note 5, ss 7(2), (3), (5).

purpose in a way that would allow the Minister to set targets that fall short of an effective contribution to reducing climate risks.<sup>86</sup> The challenge, obviously, is to determine how to translate this collective commitment into concrete factors that the Minister can take into account.

To this end, different witnesses called for explicitly including in Bill C-12 the relevant norms of the *Paris Agreement*, namely progression, highest possible ambition, and fairness. For example, the *European Climate Law* affirms that the 2040 mitigation target must give consideration to “the need to ensure a just and socially fair transition for all”<sup>87</sup> and Scotland’s climate act establishes the objective of respecting a “fair and safe” emissions budget.<sup>88</sup> A brief presented to the Senate Committee by Canadian youth explicitly linked the collective dimension of the climate challenge with the concept of fairness:

Considering Canada’s “fair share” of the global emissions reductions required to limit warming in setting our targets helps ensure that Canada does its part in addressing the climate crisis and does not pass the burden onto other states who are less responsible for causing climate change or less capable to fund mitigation efforts. Until Canada and other high-emitting states accept responsibility for the climate crisis and adopt aggressive

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<sup>86</sup> The *Pan Canadian Framework on Clean Growth and Climate Change* affirms that “[t]he Paris Agreement is a commitment to accelerate and intensify the actions and investments needed for a sustainable low-carbon future”, thus envisioning the treaty as a whole as a commitment by Canada: Government of Canada, *Pan Canadian Framework on Clean Growth and Climate Change: Canada’s Plan to Address Climate Change and Grow the Economy* (Gatineau, Quebec: Environment and Climate Change Canada, 2016) at 2 [*Pan Canadian Framework*].

<sup>87</sup> EC, *Regulation 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999* [2021] OJ, L 243/1, art 4(5)(c) [*European Climate Law*].

<sup>88</sup> See *Climate Change (Emissions Reduction Targets) Act 2019* (Scot), ASP 15, s 5 2B(1)(a). See also *Climate Change Response (Zero Carbon) Amendment Act 2019* (NZ), 2019/61, s 5ZC(2)(b)(x); *Climate Act* (Sweden), 2017:720, s 5(6).



targets that reflect this burden, other nations may be disincentivized from taking on more ambitious climate efforts.<sup>89</sup>

Ultimately, the amendments made to Bill C-12 did not clarify the expression “international commitments”, but partially enhanced the legislation’s reception of the *Paris Agreement* norms applicable to target-setting:

1. Parliament enacted the progression norm and even enhanced its status from an expectation (“will”) to an obligation (“must”).<sup>90</sup> Section 8 also directs the Minister to “take into account” the submissions of the Net-Zero Advisory Body as well as Indigenous knowledge, issues to which I return below.<sup>91</sup> These additions improve alignment between the Minister’s mandate and the *Paris Agreement*.
2. A reference to “ambitious action” was included in section 4, thus offering a downsized reading of the *Paris Agreement*’s principle of “highest possible ambition” applicable to NDCs.<sup>92</sup> The adjective “ambitious” establishes a low justificatory threshold against a counter-factual of non-ambitious action.<sup>93</sup> The superlative

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<sup>89</sup> Christie McLeod, “Youth Brief on Bill C-12”, submitted to the Senate Standing Committee on Energy, the Environment and Natural Resources (30 January 2021) at 6, online (pdf): <[sencanada.ca/content/sen/committee/432/ENEV/Briefs/2021-06-10\\_Brief\\_CMcleod\\_e.pdf](https://www.sencanada.ca/content/sen/committee/432/ENEV/Briefs/2021-06-10_Brief_CMcleod_e.pdf)>.

<sup>90</sup> See *Net-Zero Act*, *supra* note 5 (“[e]ach greenhouse gas emissions target must represent a progression beyond the previous one”, s 7(1.1)).

<sup>91</sup> *Ibid*, s 8.

<sup>92</sup> *Ibid*, s 4.

<sup>93</sup> See e.g. Government of Canada, *Nationally Determined Contribution Under the Paris Agreement*, submitted to Nationally Determined Contributions Registry (12 July 2021), online (pdf): [United Nations Climate Change <unfccc.int/sites/default/files/NDC/2022-06/Canada%27s%20Enhanced%20NDC%20Submission1\\_FINAL%20EN.pdf>](https://unfccc.int/sites/default/files/NDC/2022-06/Canada%27s%20Enhanced%20NDC%20Submission1_FINAL%20EN.pdf) (asserting that “Canada’s enhanced NDC is ambitious, necessary and achievable—reflecting both the scale of the climate crisis and economic opportunity that climate action presents” at 1).

“highest”, by contrast, would have required the Minister to explain how a chosen target is Canada’s best effort compared with other reasonable options. Moreover, section 4 describes the general purpose of the act rather than establishing parameters that are specific to the Minister’s target-setting mandate.

3. The Minister’s mandate entirely omits CBDR, fairness, equity, or the collective dimension of climate change. Subsection 7(3) affirms that each target “must be as ambitious as Canada’s most recent [NDC] communicated under the Paris Agreement”.<sup>94</sup> This could be read as meaning that the Minister’s target-setting will be informed, indirectly, by the principles that apply to NDCs. It is of little practical significance, however, to require that a given milestone target (e.g., that of 2024) will be as fair, equitable and ambitious as Canada’s NDC presented in 2021.<sup>95</sup> The sequencing of the *Net-Zero Act* allows enhancing the transparency and accountability of target-setting at the national level *before commitments are filed with the UN*, rather than deferring to the Crown’s prerogative power over foreign affairs.

In light of the foregoing, the *Net-Zero Act* demonstrates a tepid reception of the norms of highest possible ambition and fairness of the *Paris Agreement*. As argued, these should be interpreted as part of the Minister’s mandate to take into account Canada’s “international commitments with respect to climate change” when setting milestone targets.<sup>96</sup> Parliament’s intent is to effectively address the “existential threat” posed by climate change, not simply to ensure that Canada achieves its NDC targets.<sup>97</sup> However,

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<sup>94</sup> *Net-Zero Act*, *supra* note 5, s 7(3).

<sup>95</sup> For a layout of domestic and international timeframes, see Appendix 1: Timeline of Canada’s Targets and Reports, *below*. Due to the COVID-19 pandemic, the second round of NDCs was delayed from 2020 to 2021.

<sup>96</sup> *Net-Zero Act*, *supra* note 5, s 8(b).

<sup>97</sup> Bill C-12 2nd reading, *supra* note 54 at 5761.

the fact that Parliament downsized “highest possible ambition” at Section 4 and omitted fairness considerations displays an inward-looking approach to a problem that is quintessentially global.

### C. MAKING SUBMISSIONS: A DOWNSIZED APPROACH TO PUBLIC PARTICIPATION

Under the heading of “Public participation”, Bill C-12 as introduced for First Reading called on the Minister to provide the provinces, Indigenous peoples, the Net-Zero Advisory Body, and interested persons with “the opportunity to make submissions” prior to setting a milestone target or establishing a reduction plan.<sup>98</sup> This approach falls short of article 12 of the *Paris Agreement*, under which Canada undertook an obligation to “cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information.”<sup>99</sup> All state parties recognized in this article the “importance” of participation “with respect to enhancing actions under this Agreement.”<sup>100</sup>

The *Paris Agreement* must be interpreted in light of internationally accepted definitions of participation in environmental decision-making. In its guidelines on public participation, for example, the UN Environment Programme recommended that states “seek proactively public participation in a transparent and consultative manner” and “provide means for capacity-building, including environmental education and awareness-raising.”<sup>101</sup> The Inter-American Court of Human Rights even identified different mechanisms relevant to fulfilling the right to public participation in environmental matters, including “public hearings, notification and consultations, as well as participation in the elaboration and enforcement of laws [and in] mechanisms for

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<sup>98</sup> Bill C-12 1st reading, *supra* note 43, cl 13.

<sup>99</sup> *Paris Agreement*, *supra* note 3, art 12.

<sup>100</sup> *Ibid.*

<sup>101</sup> UN Environment Programme, *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*, Council Decision SS.XI/5, 26 February 2010, Part A, Guidelines 9 and 14.

judicial review.”<sup>102</sup> Such a proactive mandate was conferred to the European Commission in the *European Climate Law* regarding its actions toward net-zero:

The Commission shall engage with all parts of society to enable and empower them to take action towards a just and socially fair transition to a climate-neutral and climate-resilient society. The Commission shall facilitate an inclusive and accessible process at all levels, including at national, regional and local level and with social partners, academia, the business community, citizens and civil society, for the exchange of best practice and to identify actions to contribute to the achievement of the objectives of this Regulation.<sup>103</sup>

By contrast, Bill C-12’s downsized approach to the *Paris Agreement* persisted throughout the legislative process and section 13 of the *Net-Zero Act* does not mention “participation” beyond its heading.<sup>104</sup> One minor improvement is that a report on the submissions received will be published online.<sup>105</sup> However, the Minister does not have to “take into account” such submissions when setting milestone targets or establishing reduction plans, a requirement that would have generated greater buy-in from those having made submissions.<sup>106</sup> Nor does the Act establish a differentiated participation process for Indigenous peoples, the shortcoming which I turn to in the next section.

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<sup>102</sup> *Environment and Human Rights (Colombia)* (2017), Advisory Opinion OC-23/17, Inter-Am Comm HR, (Ser A) No 23 at paras 228, 232. Two regional treaties to which Canada is not a party also take expansive approaches to public participation in environmental matters, see *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001); *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, 4 March 2018, C.N.195.2018 (entered into force 22 April 2021).

<sup>103</sup> *European Climate Law*, *supra* note 87, art 9.

<sup>104</sup> *Net-Zero Act*, *supra* note 5, s 13.

<sup>105</sup> See *ibid*, s 13.1.

<sup>106</sup> *Ibid*, ss 8, 9(5).

## D. NO NATION-TO-NATION ENGAGEMENT WITH INDIGENOUS PEOPLES

Both sections 8 and 13 of the *Net-Zero Act*, previously discussed, mention Indigenous peoples. In this respect, it is worth probing whether the Canadian experience with the reception of the *Paris Agreement* enhances the agreement's principles and provides an example to follow for other settler-colonial jurisdictions around the world.

The *Paris Agreement's* references to Indigenous peoples are modest. The main mention is found in the treaty's preamble and is the result of a relatively unsuccessful campaign by a coalition of parties and civil society organizations, which Canada eventually supported, to include a reference to human rights in the treaty's operative part.<sup>107</sup> Instead, the relevant preambular recital reads as follows:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity<sup>108</sup>

Another mention is found at article 7(5), which acknowledges that climate adaptation should be based on "the knowledge of indigenous peoples and local knowledge systems."<sup>109</sup> Concurrently, the treaty's adoption decision established the Local Communities and Indigenous Peoples Platform to share "best practices on mitigation and adaptation in a holistic and integrated manner".<sup>110</sup> The preambular reference to Indigenous peoples' rights remains the most significant, especially when interpreted within the

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<sup>107</sup> See Sumudu Atapattu, "Climate Change, Human Rights, and COP 21: One Step Forward and Two Steps Back or Vice Versa?" (2016) 17:2 *Georgetown J Intl Affairs* 47.

<sup>108</sup> *Paris Agreement*, *supra* note 3, Preamble [emphasis omitted].

<sup>109</sup> *Paris Agreement*, *supra* note 3, art 7(5).

<sup>110</sup> *Adoption Decision*, *supra* note 59 at para 135.

context of relevant international human rights law instruments. Article 19 of the *UNDRIP* provides that any legislative or administrative measures “that may affect them” are subject to good faith consultation, in order to obtain their free, prior and informed consent.<sup>111</sup>

Apart from section 13’s downsized take on participation, Bill C-12 affirmed in its Preamble a commitment to “advancing the recognition-of-rights approach reflected in section 35 of the *Constitution Act, 1982* and in the [UNDRIP]” and afforded the Minister a possibility to include, in Canada’s reduction plans, information on the mitigation measures taken by Indigenous peoples.<sup>112</sup> Such drafting was deplored by the Assembly of First Nations, which called for “Nation-to-Nation” dialogues that “[d]ifferentiate the participation of First Nation governments from ‘Public Participation’ in all decision-making processes related to setting and amending national [GHG] emissions targets or establishing or amending emission reduction plans”.<sup>113</sup> Indigenous Climate Action expanded on this point before the Senate Committee:

[D]espite repeated mentions of the importance of Indigenous rights and knowledge, we were structurally excluded from the development of Canada’s recent climate policies and plans. This

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<sup>111</sup> *UNDRIP*, *supra* note 19, art 19. See also *Triunfo de la Cruz Garifuna Community and its members (Honduras)* (2015), Inter-Am Comm Human Rights (Ser C) No 305 at paras 158–59.

<sup>112</sup> Bill C-12 1st reading, *supra* note 43, preamble, s 10(3).

<sup>113</sup> Assembly of First Nations, “Submission to the House of Commons Standing Committee on Environment and Sustainable Development (ENVI), Study on An Act respecting transparency and accountability in Canada’s efforts to achieve net-zero greenhouse gas emissions by the year 2050 (Bill C-12)” (17 May 2021) at 6–7, online: <[ourcommons.ca/Content/Committee/432/ENVI/Brief/BR11355346/br-external/AssemblyOfFirstNations-e.pdf?fbclid=IwAR37bWwrYMQSYFpI\\_Q8gnbAy\\_FBKbZtUof5H4LALmG3mBuT0ts6MWhXtnZA](https://ourcommons.ca/Content/Committee/432/ENVI/Brief/BR11355346/br-external/AssemblyOfFirstNations-e.pdf?fbclid=IwAR37bWwrYMQSYFpI_Q8gnbAy_FBKbZtUof5H4LALmG3mBuT0ts6MWhXtnZA)> [AFN Brief]. See also Tsleil-Waututh Nation, “Tsleil-Waututh Nation Written Submission on Bill C-12”, submitted to House of Commons Standing Committee on Environment and Sustainable Development, (2 February 2021) at 3, online: <[ourcommons.ca/Content/Committee/432/ENVI/Brief/BR11309579/br-external/Tsleil-WaututhNation-e.pdf](https://ourcommons.ca/Content/Committee/432/ENVI/Brief/BR11309579/br-external/Tsleil-WaututhNation-e.pdf)> [Tsleil-Waututh Nation Brief].

exclusion is not just poor process. It violates Indigenous rights to self-determination and free, prior and informed consent as affirmed by the [UNDRIP]. Therefore, what we need is an improved and focused consent-based process with Indigenous peoples, including adequate resources for community participation to ensure direct engagement with Indigenous Nations on this bill and other related climate legislation, regulations, policies and action plans. At the very least, the advisory body must include Indigenous representation. Better yet, we can ensure real transparency and accountab[ility] by creating a parallel oversight council of Indigenous experts appointed by Indigenous peoples.<sup>114</sup>

As a result of amendments, the *Net-Zero Act* calls on the Minister to “take into account” Indigenous knowledge when setting milestone targets, to “take into account” the UNDRIP when establishing reduction plans—but not milestone targets—and to afford Indigenous peoples an “opportunity to make submissions” regarding such targets and plans.<sup>115</sup> The Net-Zero Advisory Body’s composition must also consider the need for Indigenous knowledge.<sup>116</sup> However, the call for a nation-to-nation relationship in climate target-setting was ignored and Indigenous peoples’ role in plan-making is unclear.

The *Net-Zero Act* thus achieves a significantly downsized reception of the *Paris Agreement’s* preambular reference to Indigenous peoples’ rights, when interpreted in light of relevant international human rights instruments. This shortcoming would warrant further legal scrutiny from the perspective of section 35 of the *Constitution Act, 1982*,<sup>117</sup> which affirms Indigenous peoples’

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<sup>114</sup> Senate, Standing Senate Committee on Energy, the Environment and Natural Resources, *Evidence*, (10 June 2021) (Ms. Eriel Tchekwie Deranger) [emphasis added].

<sup>115</sup> *Net-Zero Act*, *supra* note 5, ss 8(c), 9(5), 13.

<sup>116</sup> Ms. Kluane Adamek (Aagé), Assembly of First Nations Yukon Regional Chief, was a member in 2022. After lacking an Indigenous member for most of 2023, Ms. Shianne McKay, Senior Project Manager at the Centre for Indigenous Environmental Resources was appointed in October of that year. See “Our Team”, online: *Net-Zero Advisory Body* <nzab2050.ca/our-team>.

<sup>117</sup> *Rights of the Aboriginal Peoples of Canada*, s 35, Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

distinctive place within Canada's constitutional order, and from that of the *UNDRIP Act*, which requires the laws of Canada to be consistent with the *UNDRIP*.<sup>118</sup> Indeed, the *UNDRIP Act* received royal assent on 21 June 2021 and was into force when the *Net-Zero Act* was assented to.

#### E. OMISSION OF THE OBLIGATION TO PURSUE MITIGATION TARGETS

Another striking feature of Bill C-12 as introduced for first reading is that it contains an obligation for the Minister to establish plans to achieve milestone targets and net-zero in 2050, but does not create an obligation for the federal government to pursue its targets and plans.<sup>119</sup> By contrast, when ratifying the *Paris Agreement*, Canada undertook an obligation to pursue its NDC targets.<sup>120</sup> This international obligation is one of conduct and is subject to a due diligence standard, meaning that states "ought to do as well as they can in designing, implementing and enforcing domestic measures aiming at achieving the objective of their respective NDC."<sup>121</sup> As a general rule, obligations such as the pursuit of NDC targets are subject to a standard of good faith performance.<sup>122</sup>

As I argue in the following Part of this article, the absence in the *Net-Zero Act* of any obligation for the Minister to pursue mitigation targets or plans has important implications for government accountability. For example, one of the Federal Court's main supervisory roles applies to eventual failures by the government to discharge a duty. The link between this downsized approach to

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<sup>118</sup> See *UNDRIP Act*, *supra* note 19, s 5.

<sup>119</sup> Bill C-12 1st reading, *supra* note 43, s 9(1).

<sup>120</sup> *Paris Agreement*, *supra* note 3 (stating that "[p]arties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions" at art 4(2)).

<sup>121</sup> Christina Voigt, "The Paris Agreement: What is the Standard of Conduct for Parties?" (2016) 26 *Questions Intl L* 17 at 20. See also Benoit Mayer, "International Law Obligations Arising in Relation to Nationally Determined Contributions" (2018) 7:2 *Transnational Environmental L* 251.

<sup>122</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 art 26 (entered into force 27 January 1980).



the *Paris Agreement* and the goal of promoting accountability through the *Net-Zero Act* was clearly made in a joint submission by civil society organizations to the House Committee:

Climate accountability must deliver the same types of accountability we expect in the financial realm – someone must be ultimately responsible for ensuring that all of the commitments add up. In contrast to the current text of Bill C-12, most climate accountability laws create clear obligations to ensure that targets are met. Bill C-12 does not currently even include a requirement that measures in plans add up to the reductions necessary to achieve targets, let alone that the target actually be met. Without clear expectations of how targets will be achieved and who is responsible, Canada is likely to continue missing its climate goals.<sup>123</sup>

As amended, the *Net-Zero Act* requires the Minister to provide information regarding the measures that the government “intends to take to achieve” its targets as well as “a projected timetable for implementation for each of the measures”.<sup>124</sup> However, these additions do not amount to an obligation to pursue milestone targets or even net-zero, despite the obligation undertaken by Canada in the *Paris Agreement*. On the one hand, this shortcoming significantly reduces the clarity with which the act signals to the different sectors of society a true intent to decarbonize human activity. As put by Senator Carignan: “A mere legislative promise that the government will come up with a [GHG] emissions reduction plan is not enough to convince Canadians and other

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<sup>123</sup> Climate Action Network Canada, Ecojustice Canada, Équiterre, West Coast Environmental Law Association, “A Climate Accountability Law for a Safe and Brighter Future”, Brief to the Standing Committee on Environment and Sustainable Development on how to strengthen Bill C-12, the Canadian Net-Zero Emissions Accountability Act, May 2021 at 6 [*Climate Action Network Brief*]. See also Quebec Environmental Law Centre, “Brief Submitted to the Standing Committee on Environment and Sustainable Development, as part of the Consultation on Bill C-12”, 2021 at 8–9 [*Quebec Environmental Law Centre Brief*].

<sup>124</sup> *Net-Zero Act*, *supra* note 5, s 10(1)(b), (e).

countries that Canada will achieve its targets.”<sup>125</sup> On the other hand, the absence of an obligation of conduct has significant implications for accountability, which is the focus of Part V.

## F. DISCUSSION

This Part identified two examples of the *Net-Zero Act* enhancing the *Paris Agreement*'s norms through their reception in Canadian law, namely the 2050 decarbonization timeframe and the expectation of progression applicable to targets. The alignment of many developed countries' laws with the IPCC's recommendation offers the best explanation of Parliament's interpretation of the treaty's ambiguous timeframe, topped-up by a pledge to this effect by the US in the midst of Bill C-12's study.<sup>126</sup> Indeed, members of the House Committee explicitly considered other countries' approaches as well as the *Paris Agreement* text when voting for a progression obligation.<sup>127</sup> Where lack of similar enhancement is surprising is with regard to nation-to-nation participation by Indigenous peoples in climate policy, given clear requests to this effect during the legislative process, the House of Commons' adoption of the *UNDRIP Act* in May 2021, and Canada's overarching commitment to reconciliation. The *Net-Zero Act* missed an important opportunity to offer a model for other jurisdictions around the world by enhancing the *Paris Agreement*'s

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<sup>125</sup> “Bill C-12, An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050”, 3rd Reading, *Senate Debates*, 152-56, (29 June 2021) at 2148 (Hon Claude Carignan).

<sup>126</sup> See The White House, Fact Sheet, “President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies” (22 April 2021), online: <[whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/](https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/)> (an executive order confirmed this pledge on 8 December 2021).

<sup>127</sup> See House of Commons, Standing Committee on Environment and Sustainable Development, *Minutes of Proceedings*, 43-2, No 16 (26 May 2021) at 18:15 and 18:25 (Hon Raj Saini and Hon Elizabeth May).

modest references to Indigenous peoples' rights and, in so doing, redressing the shortcomings of the *Pan Canadian Framework* in this respect.<sup>128</sup>

This section has also identified two major omissions in the *Net-Zero Act*, which risk having significant consequences for Canada's capacity to close the gap between commitments and actions. The first pertains to the principle of fairness, in view of Canada's greater historical responsibility for climate change and of its greater capacity to take immediate action.<sup>129</sup> The fact that the *Net-Zero Act* does not explicitly reflect this reality, unlike climate laws adopted in other jurisdictions, reveals an inward-looking approach to a global challenge that I questioned before the Senate Committee in the following terms: "We won't win the fight against climate change alone in Canada. We need to signal to other countries that we are all in this together and that we will do our part in good faith."<sup>130</sup> As long as Canada's per capita emissions remain the highest in the G7, it will continue to contribute disproportionately to climate risks while depriving itself of leverage to call on large emerging economies to embrace the low-carbon paths necessary to avoid worse case scenarios.<sup>131</sup>

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<sup>128</sup> See Graeme Reed et al, "Indigenizing Climate Policy in Canada: A Critical Examination of the Pan-Canadian Framework and the ZéN RoadMap" (2021) 3 *Frontiers in Sustainable Cities* 78.

<sup>129</sup> Simon Evans, "Which Countries Are Historically Responsible for Climate Change?", *CarbonBrief* (5 October 2021), online: <[carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change](https://carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change)>. See more generally Kate Dooley et al, "Ethical Choices Behind Quantifications of Fair Contributions under the Paris Agreement" (2021) 11 *Nature Climate Change* 300.

<sup>130</sup> Senate, Standing Senate Committee on Energy, the Environment and Natural Resources, *Evidence*, 43-2, No 9 (11 June 2021) (Mr. Christopher Campbell-Durufflé).

<sup>131</sup> See The World Bank, "CO2 emissions (metric tons per capita) - Canada, France, United States, United Kingdom, Germany, Italy, Japan, European Union", online: <[data.worldbank.org/indicator/EN.ATM.CO2E.PC?end=2018&locations=CA-FR-US-GB-DE-IT-JP-EU&name\\_desc=true&start=1960&view=chart](https://data.worldbank.org/indicator/EN.ATM.CO2E.PC?end=2018&locations=CA-FR-US-GB-DE-IT-JP-EU&name_desc=true&start=1960&view=chart)> (Canada's per capita emissions were 15.4 tons per year in 2019). See also Canadian Commissioner of the Environment and Sustainable Development, *supra* note 1 (per the Commissioner, "Canada's [GHG]

A second major omission is the *Paris Agreement*'s obligation of conduct that parties pursue their nationally determined mitigation targets. For Rajamani, this core provision of the treaty will only deliver on its promise of triggering an upward cycle of ambition if "a rigorous standard for due diligence is progressively developed, internalised, and implemented."<sup>132</sup> By contrast, the *Net-Zero Act* requires the Minister to prepare plans to achieve milestone targets and net-zero, but not to take reasonable measures to achieve them. Many interveners in the legislative process noted this discrepancy with the *Paris Agreement* and its adverse impacts on the availability of judicial review. As I explore in the next Part of this article, this outcome suggests that the value of government accountability has a far weaker footing in the *Net-Zero Act* than that of transparency, despite both being repeatedly invoked side by side in the Act.

## V. ANALYSIS OF ACCOUNTABILITY BASED ON THE *NET-ZERO ACT*

Parliament gave accountability a place of choice by embedding it directly in the Act's short title (i.e. *Canadian Net-Zero Emissions Accountability Act*) and its section 4 on purpose. Paradoxically, the act fails to define accountability in section 2 and to identify which mechanisms are meant to further it.<sup>133</sup> During third reading, when questioned on this issue, the Minister's hyperbolic response focused on the government's reporting requirements and the new mandate for the Commissioner of the Environment and Sustainable Development:

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emissions . . . increased since the Paris Agreement was signed, making it the worst performing of all G7 nations since the 2015 Conference of the Parties in Paris, France" at 8).

<sup>132</sup> Lavanya Rajamani, "Due Diligence in International Climate Change Law" in Heike Krieger, Anne Peters & Leonhard Kreuzer, eds, *Due Diligence in the International Legal Order* (Oxford: Oxford University Press, 2020) 163 at 164.

<sup>133</sup> Likewise, the legislative summary did not identify any mechanism as such. See Ross Linden-Fraser, "*Bill C-12: An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050*", Legislative Summary, Library of Parliament, (2021).

[T]his bill has an enormous number of accountability mechanisms in it. Not only does it require progressively more stringent targets on the pathway to 2050, but there will be a range of progress reports, some of which were brought forward through amendments by the environment committee. There are reports with respect to what has been achieved, and requirements to essentially do more if we are short of our goals. There are third party accountability mechanisms through the environment commissioner. There is also now a milestone mechanism for 2026 to ensure that accountability starts tomorrow. That is all appropriate, as it should be, and it is a very strong piece of legislation.<sup>134</sup>

Bill C-12's embrace of accountability reflects the surge of this concept as a "cultural keyword" in politics and governance since the 1960s.<sup>135</sup> Bovens defines it as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences."<sup>136</sup> While accountability is used differently depending on the context (e.g. criminal law, management, professional ethics), I retain the triad of i) justifications, ii) judgment, and iii) consequences as the core elements of government accountability for present purposes.<sup>137</sup> Its common association with a range of positive outcomes (good governance, responsiveness, integrity, etc.) also cautions against

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<sup>134</sup> "Bill C-12, An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050", 2nd reading, *House of Commons Debates*, 43-2, No 36 (25 November 2020) at 2420 (Hon Jonathan Wilkinson, replying to the Hon Taylor Bachrach).

<sup>135</sup> Melvin J Dubnick, "Accountability as a Cultural Keyword" in Mark Bovens, Robert E Goodin & Thomas Schillemans, eds, *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014) at 30.

<sup>136</sup> Mark Bovens, "Analysing and Assessing Public Accountability: A Conceptual Framework" (2006) 13 *Eur LJ* 447 at 450.

<sup>137</sup> For similar uses, see Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford: Oxford University Press, 2013); Richard Mulgan, "Accountability: An Ever-expanding Concept?" (2000) 78:3 *Public Administration* 555; Ruth W Grant & Robert O Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99 *American Political Science Rev* 29.

“hollow and manipulable” uses of this concept, which could obscure the underlying values being promoted.<sup>138</sup> To address this peril, this Part examines different avenues established in the *Net-Zero Act* to determine the extent to which they are conducive to holding the federal government accountable for its pursuit of the seven key norms of the *Paris Agreement* examined in the preceding Part.

The *Net-Zero Act*'s accountability potential is all the more important in view of the *Paris Agreement*'s “bottom up” logic. Firstly, states enjoy significant discretion regarding how to transition to net-zero, which has been described as bounded by the principles of progression, highest possible ambition, and fairness previously identified.<sup>139</sup> Moreover, the agreement's mechanisms mainly focus on procedural obligations, such as communicating successive NDCs and reporting on implementation.<sup>140</sup> Certain authors are cautiously optimistic about state-to-state accountability and about the global “stocktaking” process to be conducted every five years.<sup>141</sup> Others, however, have already suggested that “the primary drivers for government actions” will have to be located in domestic contexts in view of the *Paris Agreement*'s largely facilitative outlook.<sup>142</sup> This makes establishing domestic accountability mechanisms that are

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<sup>138</sup> Danielle H Rached, “The Concept(s) of Accountability: Form in Search of Substance” (2016) 29:2 *Leiden J Int'l L* 317 at 342. See also Amanda Sinclair, “The Chameleon of Accountability: Forms and Discourses” (1995) 20:2/3 *Accounting, Organizations and Society* 219.

<sup>139</sup> See Daniel Bodansky, Jutta Brunnée & Lavanya Rajamani, *International Climate Change Law* (New York, NY: Oxford University Press, 2017) at 223.

<sup>140</sup> See *Paris Agreement*, *supra* note 3 art 13.

<sup>141</sup> See Christina Voigt & Xiang Gao “Accountability in the Paris Agreement: The Interplay between Transparency and Compliance” (2020) 1 *Nordic Environmental LJ* 31; Aarti Gupta et al, “Performing Accountability: Face-to-Face Account-Giving in Multilateral Climate Transparency Processes” (2021) 21:5 *Climate Policy* 616.

<sup>142</sup> Sylvia I Karlsson-Vinkhuyzen et al, “Entry into Force and Then? The Paris Agreement and State Accountability” (2018) 18:5 *Climate Policy* 593 at 595.

conducive to achieving NDC targets an essential starting point to achieve the treaty's object and purpose.<sup>143</sup>

Based on the foregoing, this Part analyzes the main avenues for government accountability offered by the *Net-Zero Act*. I focus on a) the Minister's multiple obligations to table reports on the government's targets and actions before Parliament, b) the lack of clear foundations for judicial oversight of mitigation efforts, c) the Net-Zero Advisory Body's mandate to make recommendations to the Minister, and d) the new mandate given to the Commissioner of the Environment and Sustainable Development.

Stronger accountability mechanisms, based on the definition identified above, are characterized by requirements for the government to justify its targets and actions, opportunities for other actors to judge government action based on the law, and the availability of consequences. To be clear, identifying certain mechanisms of the *Net-Zero Act* as conducive to strong accountability provides no guarantee that Canada will achieve its international commitments. In comparison with weak accountability mechanisms, what they offer are more opportunities to convince, pressure, and otherwise seek to induce the federal government to implement the *Paris Agreement*, in a context where a myriad of other actors are also involved in charting Canada's pathway to net-zero.

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<sup>143</sup> The guidelines call parties to provide updated "information on legal, institutional, administrative and procedural arrangements for domestic implementation" of their NDC every two years: *Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement*, UNFCCC, Decision 18/CMA.1, Annex, UN Doc FCCC/PA/CMA/2018/3/Add.2 (2019) at para 52 [Decision 18/CMA.1]. Canada's most recent report presented under the UNFCCC contains different sections on domestic institutional arrangements that emphasize accountability. See Environment and Climate Change Canada, *Canada's Eighth National Communication on Climate Change and Fifth Biennial Report*, (Gatineau: Environment and Climate Change Canada, 2019) at 65 and following.

#### A. THE MINISTER'S REPORTING TO PARLIAMENT

One avenue for the independent assessment of government action toward net-zero is the obligation for the Minister to publicly table before Parliament the federal government's milestone targets, emissions reduction plans, progress reports toward each milestone, and assessment reports after each milestone has passed. Appendix 1 identifies no less than 21 documents due nationally between 2021 and 2054. This considerable volume and the Minister's response reproduced above suggest a legislative intent to make reporting to Parliament one of the Act's primary accountability avenues.

Based on Bill C-12 as initially introduced, the Minister would have been required to set Canada's target for 2035 in 2030 at the latest, breaking with the longer timeframes of previous targets and pledges.<sup>144</sup> Indeed, many interveners observed the discrepancy between Bill C-12's lack of target-setting obligation for 2025 and the obligation to that effect contained in the *Paris Agreement*.<sup>145</sup> The legislative process redressed this shortcoming. Firstly, the 2035 target must now be set in 2024, after the conclusion of the first Global Stocktake in 2023<sup>146</sup> and in time for Canada's submission of a revised NDC in 2025. Secondly, the 2021 reduction plan had to set a 2026 interim objective.<sup>147</sup> While an "objective" is less stringent than a "target", this distinction may be limited in practice since the act failed to create an obligation to pursue targets. Thirdly, the *Net-Zero Act* creates obligations to

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<sup>144</sup> See Bill C-12 1st Reading, *supra* note 43, s 7(4).

<sup>145</sup> See *Quebec Environmental Law Centre Brief*, *supra* note 123 at 9. See also Brief from Amnesty International Canada (1 February 2021) "Climate accountability bill (C-12) must be revised to protect human rights" at 3.

<sup>146</sup> The Global Stocktake is a collective examination of progress on mitigation, adaptation, and support provision that will take place every five years. See *Paris Agreement*, *supra* note 3 art 14.

<sup>147</sup> This objective was set at 20% below 2005 levels by 2026. See Canada, Environment and Climate Change Canada, *2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy* (Gatineau: Environment and Climate Change Canada, 2022) at 88 [*2030 Emissions Reduction Plan*].



present three progress reports over its first decade (i.e., in 2023, 2025, and 2027), which were described by one government representative as “meaningful accountability checkpoints.”<sup>148</sup>

The foregoing reveals the porosity, within the *Net-Zero Act*, between the concepts of accountability and transparency. Indeed, mentions of accountability in the act are always *preceded* by references to transparency. Whereas government transparency can be understood as the systematic collection and publishing of data on government activity,<sup>149</sup> accountability, as I previously defined it, includes justifications by government for its performance, the external assessment of such performance, and the availability of consequences. In the *Net-Zero Act*, several obligations for the Minister to explain targets and actions enhance government accountability. For example, if the government misses a target, the subsequent assessment report must provide *reasons* for this shortcoming and a description of the remedial actions envisioned.<sup>150</sup> The *Net-Zero Act* also creates assessment mandates for the Net-Zero Advisory Body and the Commissioner of the Environment and Sustainable Development, to which I turn in the following subsections.

The *Net-Zero Act* does not, however, explicitly identify consequences that would apply if the government were to miss a milestone target or even the 2050 net-zero objective, despite the “significant risks to human health and security, to the

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<sup>148</sup> “Bill C-12, An Act respecting transparency and accountability in Canada’s efforts to achieve net-zero greenhouse gas emissions by the year 2050”, 2nd Reading, *House of Commons Debates*, 43-2, No 123 (22 June 2021) at 9028 (Mr. Peter Schiefke).

<sup>149</sup> See “Open Government Declaration” (20 September 2011), online: *Open Government Partnership* <[opengovpartnership.org/process/joining-ogp/open-government-declaration/](http://opengovpartnership.org/process/joining-ogp/open-government-declaration/)>. See also “*Canada’s 2018-2020 National Action Plan on Open Government*” (last modified 12 December 2022), online: *Government of Canada* <[open.canada.ca/en/content/canadas-2018-2020-national-action-plan-open-government](http://open.canada.ca/en/content/canadas-2018-2020-national-action-plan-open-government)>.

<sup>150</sup> See *Net-Zero Act*, *supra* note 5, s 16; see also *ibid*, ss 8 (for factors which must be taken into account in setting a target), 9(5) (for factors which must be taken into account in establishing a reduction plan), 10(2) (for requirements to explain how targets and measures will contribute to achieving net-zero).

environment, including biodiversity, and to economic growth” at stake.<sup>151</sup> The Act leaves it to parliamentarians, the general public, and international actors to apply the political, judicial, or economic consequences that were already available before the *Net-Zero Act*’s adoption. For example, Parliament had already considered two motions calling on the country to enhance its mitigation action in line with international standards<sup>152</sup> and citizens had already launched *Charter*-based challenges to this end.<sup>153</sup> Increased transparency of targets and actions may facilitate future efforts not directly founded on the *Net-Zero Act* but doing so amounts at best to an indirect contribution to government accountability.

#### B. JUDICIAL OVERSIGHT

The *Net-Zero Act* creates obligations for the Minister to set milestone targets and to establish emissions reduction plans, but not to achieve such targets and plans (i.e. obligations of result) or even to pursue such targets and plans (i.e. obligations of conduct). As a result, extraordinary remedies in the Federal Court in the case of failure by government to discharge a duty (declaratory relief, mandamus, etc.)<sup>154</sup> would only apply to failures to table targets and plans, to the exclusion of their achievement or pursuit. Moreover, the *Net-Zero Act* does not create a *sui generis* role for the judiciary, such as the possibility of seeking a court declaration in

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<sup>151</sup> *Ibid*, Preamble.

<sup>152</sup> See Canada, House of Commons, *Government Business No. 29 (National climate emergency)*, 42-1, No 1366 (17 June 2019) (Hon Catherine McKenna); Canada, House of Commons, *M-6 Global Warming*, 43-1 (5 December 2019) (Hon Peter Julian).

<sup>153</sup> See e.g. *La Rose v Canada*, 2020 FC 1008 [*La Rose*]; *Misdzi Yikh v Canada*, 2020 FC 1059 [*Misdzi Yikh*]; *Environnement Jeunesse c Procureur général du Canada*, 2021 QCCA 1871 (leave to appeal to SCC refused on 28 July 2022). For a similar action against a provincial government, see *Mathur v Ontario*, 2023 ONSC 2316 [*Mathur*].

<sup>154</sup> See *Federal Courts Act*, RSC 1985, c F-7, s 18(1)(a).

New Zealand to the effect that an emissions budget or the 2050 target has not been met, with an award of costs.<sup>155</sup>

One eventual option for judicial oversight of the *Net-Zero Act* is review by the Federal Court of a target or plan presented by the Minister on the common law ground that it amounts to an unreasonable exercise of the powers conferred by Parliament.<sup>156</sup> This accountability avenue would entail significant deference to the Minister and its availability is unclear. In *Friends of the Earth v Canada*, the Federal Court of Appeal confirmed that the Minister's yearly Climate Change Plans prepared under the *Kyoto Protocol Implementation Act* were not subject to judicial review.<sup>157</sup> The Federal Court had ruled that the Act intended to provide parliamentary and public accountability regarding such plans, but no enforcement role for the courts. It found that the Act lacked "a simple and unequivocal statement" of intent that such plans would allow Canada to comply with the *Kyoto Protocol*, identified "policy-laden considerations" to be taken into account by the Minister, and lacked "objective legal criteria" to guide judicial review.<sup>158</sup>

While this issue deserves further legal analysis, one significant hurdle to the justiciability of targets or plans presented under the *Net-Zero Act* is the absence of a clear legislative intent to allow judicial review. Indeed, different interveners called for establishing in the act a statutory cause of action or a right of judicial review by the Federal Court.<sup>159</sup> The House Committee even

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<sup>155</sup> In New Zealand, once made by a court, the Minister must bring such a declaration to the attention of the House of Representatives with advice on the Government's response. See *Climate Change Response (Zero Carbon) Amendment Act 2019* (New Zealand), *supra* note 88, s 5ZM.

<sup>156</sup> See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23.

<sup>157</sup> See *Friends of the Earth v Canada (Environment)*, 2009 FCA 297.

<sup>158</sup> *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 at para 33 [*Friends of the Earth FC*].

<sup>159</sup> See Brief from Lawyers for Climate Justice (17 March 2021) "Climate Justice & Net-Zero: A submission to Standing Committee on Environment and Sustainable Development with amendments to Bill C-12" at 10; *Climate Action Network Brief*, *supra* note 123 at 7.

considered and rejected an amendment pertaining to judicial review.<sup>160</sup> Based on the *Friends of the Earth v Canada* analysis, two additional features of the *Net-Zero Act* also suggest the absence of the required legislative intent: the Act envisions the possibility of the Minister failing to achieve a target and mandates the Commissioner of the Environment and Sustainable Development to report to Parliament on the government's pursuit of its targets.<sup>161</sup>

Other factors distinguish the *Net-Zero Act* from the *Kyoto Protocol Implementation Act* and should be considered when determining whether the former provides a foundation for judicial review of mitigation targets or plans. In the *Net-Zero Act*, milestone targets are clearly linked to achieving net-zero by 2050<sup>162</sup> and the considerations that the Minister "must take into account"<sup>163</sup> can be defined with far more objectivity than in *Friends of the Earth v Canada*. Indeed, the Ontario Superior Court of Justice recently found an application challenging provincial targets on *Charter* grounds to be justiciable, ruling that the application impugned "specific state action and legislation" and displayed "a sufficient legal component to warrant the intervention of the judicial branch."<sup>164</sup> Similarly, when granting a motion to strike in a similar case, the Federal Court disagreed that the relevant facts were incapable of proof: "Canada has a role in GHG emissions that is more than speculative in this current

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<sup>160</sup> See House of Commons, Standing Committee on Environment and Sustainable Development, *Minutes of Proceedings*, 43-2, No 39 (9 June 2021) at 19:21 (Hon Elizabeth May).

<sup>161</sup> See *Friends of the Earth FC*, *supra* note 158 at paras 35, 42.

<sup>162</sup> See *Net-Zero Act*, *supra* note 5 (the Minister must set a national GHG emissions target for each milestone year with a view to achieving the target set out in Section 6 at s 7(1)).

<sup>163</sup> *Ibid* (these are: the best scientific information available, Canada's international commitments, Indigenous knowledge, and the Advisory Body's submissions, s 8).

<sup>164</sup> *Mathur*, *supra* note 153 at para 106–07. Of note, the court ultimately dismissed the application on the merits. See also *Environnement Jeunesse c Procureur général du Canada*, 2019 QCCS 2885 at para 71.

case.”<sup>165</sup> In both cases, *Charter*-based challenges called for a more permissive standard of justiciability than that applicable to judicial review. Nonetheless, these cases and recent developments in jurisdictions around the world suggest that courts increasingly consider themselves capable of relying on the best available science to rule on legal issues that pertain to mitigation action.<sup>166</sup>

In sum, the potential of the *Net-Zero Act* to allow judicial oversight of the Minister’s actions is highly uncertain due to Parliament’s failure to provide a clear foundation for judicial review or to establish a new *sui generis* role for the courts. Like the enhanced reporting discussed in the previous section, the Act makes at best an indirect contribution to the avenues for judicial accountability already available before its adoption. For example, its purpose of achieving the *Paris Agreement’s* goals and the Minister’s ongoing reporting could inform the courts’ analyses of *Charter*-based challenges.

### C. NET-ZERO ADVISORY BODY

Another potential source of government accountability is the Net-Zero Advisory Body (Advisory Body), although the Minister did not identify the body as such in the response quoted earlier. Bill C-12 initially defined the core mandate of the Advisory Body as providing the Minister with “advice respecting measures and sectoral strategies . . . to achieve a [GHG] emissions target,” to the exclusion of the targets themselves.<sup>167</sup>

Many interveners in the legislative process observed that this mandate was overly narrow.<sup>168</sup> By comparison, the United Kingdom’s Climate Change Committee is mandated to offer advice

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<sup>165</sup> *La Rose*, *supra* note 153 at para 75. For a strong stance against justiciability, see also *Misdzi Yikh*, *supra* note 153 at para 77.

<sup>166</sup> See e.g. Francesco Sindico & Makane M Mbengue, eds, *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Cham, Switzerland: Springer International Publishing, 2021).

<sup>167</sup> Bill C-12 1st Reading, *supra* note 43, ss 20(1), 22(1).

<sup>168</sup> See e.g. *Climate Action Network Brief*, *supra* note 123 at 7–8; Dr. Sarah Burch, “A brief submitted to support the study of Bill C-12” at 7; *AFN Brief*, *supra* note 113 at 10; *Tsleil-Waututh Nation Brief*, *supra* note 113 at 6.

on carbon budgets for successive four-year periods in order to achieve net-zero and on the respective contributions of different sectors of the economy to the said budgets.<sup>169</sup> Similarly, the climate change committees established in New Zealand, Denmark, and Sweden have mandates that go beyond implementation strategies and include recommendations on target-setting.<sup>170</sup> Indeed, even the terms of reference of the Net-Zero Advisory Body established by the Minister before the *Net-Zero Act's* adoption included advice on emissions reductions milestones leading to 2050.<sup>171</sup>

The amendment process expanded the Advisory Body's mandate to providing advice regarding issues "including" milestone targets and reduction plans, and directed it to take into account environmental, economic, social and technological factors, the best available scientific information, and Indigenous knowledge.<sup>172</sup> The Minister must publicly respond to such advice within four months, thus impliedly calling on the Minister to justify whether the government will follow the advice received or not.<sup>173</sup> Based on the definition identified above, the relationship between the Advisory Body and the Minister may be described as one of accountability because the Advisory Body will assess the Minister's actions on the basis of the Act and because the release of its assessments (as well as the Minister's possible decision to diverge from the body's recommendations) could have adverse consequences for the federal government.

Whether such consequences will be meaningful in practice remains to be seen and will likely depend on the credibility of the

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<sup>169</sup> See *UK Climate Change Act*, *supra* note 65, s 34.

<sup>170</sup> See *Climate Change Response (Zero Carbon) Amendment Act 2019* (New Zealand), *supra* note 88, s 5]; *Climate Policy Framework* (Sweden), *supra* note 64, s 7; *Climate Act* (Denmark), Act. No 965 of 2020, s 3.

<sup>171</sup> The body was announced in February 2021. See Government of Canada, *Net-Zero Advisory Body* (27 January 2023), online: <[canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050/advisory-body.html](https://canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050/advisory-body.html)>.

<sup>172</sup> *Net-Zero Act*, *supra* note 5, ss 20(1), 22(1.1).

<sup>173</sup> See *ibid* at s 22(2).

Advisory Body's membership,<sup>174</sup> and the quality of its reports.<sup>175</sup> Two built-in limitations may nonetheless be identified from the outset. The first is that the Advisory Body's mandate does not specifically include advice on remedial actions to be taken if the government misses a milestone target. Indeed, its mandate to provide recommendations regarding reduction plans excludes the actions identified after a target has been missed.<sup>176</sup> A second and related limitation is that, even if the Advisory Body were to provide recommendations with regard to such actions on the basis of its non-restrictive mandate, the Minister's mandatory response risks failing to engage with them. Indeed, the Minister's obligation to respond is narrowly tailored to the Advisory Body's advice on targets, plans, and those matters referred to the Advisory Body by the Minister.<sup>177</sup>

In light of the foregoing, the Advisory Body's accountability potential can be described as threefold. Firstly, although it does not report directly to the Governor in Council or to Parliament as some interveners had proposed,<sup>178</sup> it is tasked with the independent assessment of Canada's mitigation efforts and may impose consequences in the form of public advice and recommendations. Indeed, it is the only institution given a clear mandate by the act to engage with the Minister's choice of targets and measures.<sup>179</sup> As such, it has a considerable opportunity to

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<sup>174</sup> The Governor in Council appoints its members upon the Minister's recommendation, which must consider the need for expertise in a variety of fields listed in the act. See *ibid*, s 21(1.1).

<sup>175</sup> See e.g. Net-Zero Advisory Body, *Compete and Succeed in a Net Zero Future: First Annual Report to the Minister of Environment and Climate Change, January 2023* (27 January 2023).

<sup>176</sup> See *Net-Zero Act*, *supra* note 5 (section 20(1)(b) on the Advisory Body's mandate specifically refers to Section 9, but remedial actions are called for at section 16(b); see ss 9, 16(b), 20(1)(b)).

<sup>177</sup> See *ibid*, s 22(2).

<sup>178</sup> See Brief from Canadian Association of Petroleum Producers (17 May 2021) "ENVI Committee Brief - C-12" at 6; *Climate Action Network Brief*, *supra* note 123 at 7; *Quebec Environmental Law Centre Brief*, *supra* note 123 at 6.

<sup>179</sup> Beyond the Act, the government also established the Canadian Climate Institute in 2019. The institute describes its mandate as to "help shape sound

remedy the act's shortcomings in terms of reception of the *Paris Agreement*, for example by scrutinizing whether Canada's targets and plans reflect highest possible ambition, fairness, and equity between nations.

A second opportunity for the Advisory Body is to hold the Minister accountable for the processes through which targets and plans are decided. For example, it could assess the Minister's efforts to create "appropriate" opportunities for participation under section 13 in light of Canada's climate education, training, and awareness-raising obligations under the *Paris Agreement* and of the applicable international human rights law on public participation in environmental matters.<sup>180</sup> The Advisory Body could also assess the Minister's decision-making in light of Indigenous peoples' right to consultation regarding targets and plans, triggered by the *UNDRIP Act* when these may affect them.<sup>181</sup> As such, the Advisory Body could scrutinize whether the *Net-Zero Act* is implemented in a way that furthers a "recognition-of-rights approach", nation-to-nation relationships, and reconciliation.

A third opportunity for the Advisory Body is to further public participation itself on the basis of its "engagement activities" mandate.<sup>182</sup> Its Terms of Reference in 2022 included discussing net-zero pathways "with provinces and territories, municipalities, and other stakeholders", soliciting "input from Indigenous governments, organizations, groups, communities, and individuals", organizing "meetings and roundtable discussions with civil society groups, industry associations and member companies, youth, and academic, scientific, and technical experts" and "[l]everaging innovative techniques for broad public

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public policies that enable all Canadians to thrive in the face of climate change and advance a net-zero future": "What We Do" (last visited 22 February 2023), online: *Canadian Climate Institute* <[climateinstitute.ca/what-we-do/](https://climateinstitute.ca/what-we-do/)>.

<sup>180</sup> *Net-Zero Act*, *supra* note 5, s 13.

<sup>181</sup> See *UNDRIP Act*, *supra* note 19, Schedule, art 19.

<sup>182</sup> *Net-Zero Act*, *supra* note 5, s 20(1.1).



engagement... such as citizen assemblies.”<sup>183</sup> If the Advisory Body conducts such activities meaningfully and distils their outcomes for the Minister’s benefit, the body could contribute to fulfilling Canada’s obligation to enhance public participation under the *Paris Agreement*. However, the current version of the Terms of Reference contains more modest language.<sup>184</sup> Moreover, the Advisory Body’s mandate and composition suggest that it is not in a position to discharge the Crown’s constitutional obligation to consult Indigenous peoples on its behalf.<sup>185</sup>

#### D. COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

A fourth avenue offering some promise of accountability is the mandate of the Commissioner of the Environment and Sustainable Development (Commissioner) to report to Parliament on the government’s actions at least once every five years.<sup>186</sup> The 2021 report quoted in the epigraph illustrates how such independent officers of Parliament<sup>187</sup> can assess government climate action by

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<sup>183</sup> “Terms of Reference” (archived 29 March 2022), online: *Net-Zero Advisory Body* <[web.archive.org/web/20220329142107/https://nzab2050.ca/terms-of-reference](http://web.archive.org/web/20220329142107/https://nzab2050.ca/terms-of-reference)>.

<sup>184</sup> “The NZAB will also undertake robust engagement based on its own priorities for engagement, which may include engaging with the Canadian public; provinces and territories; municipalities; Indigenous governments or organizations; youth; civil society, industry or other stakeholders; experts, including scientists and Indigenous Knowledge Holders; and, international bodies”: “Terms of Reference” (last visited 19 May 2023), online: *Net-Zero Advisory Body* <[nzab2050.ca/terms-of-reference](http://nzab2050.ca/terms-of-reference)> [Net-Zero Advisory Body, “Terms of Reference”].

<sup>185</sup> See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 (wherein the Court described consultation as “a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests” at para 74).

<sup>186</sup> See *Net-Zero Act*, *supra* note 5, s 24(1). See also *Net-Zero Act*, *supra* note 5, Appendix 1.

<sup>187</sup> The Commissioner is appointed by the Auditor General of Canada and reports to the auditor regarding the execution of its duties. Its annual reports to

adding a “respected, credible, and valued voice in the Canadian environmental and sustainable development landscape.”<sup>188</sup>

The Commissioner’s mandate was narrowly defined in Bill C-12 and remained unchanged throughout the legislative process. Its reports must focus on the “implementation of the measures” toward milestone targets and may include recommendations with respect to “improving the effectiveness” of measures previously announced in reduction plans.<sup>189</sup> Two consequential amendments were proposed to strengthen the Commissioner’s mandate but rejected by the House Committee. One amendment would have mandated the Commissioner to review whether milestone targets “allow Canada to fulfill its obligations under the Paris Agreement.”<sup>190</sup> The other would have mandated the Commissioner to review progress reports by the Minister, and to “recommen[d] changes to the emissions reduction plan.”<sup>191</sup> Other unsuccessful proposals made during the legislative process include mandating the Commissioner to protect Indigenous peoples’ rights and increasing the frequency of its reporting to once every two years.<sup>192</sup>

As a result, the Commissioner’s role regarding the *Net-Zero Act* exemplifies what Park and Kramarz have called a functionalist approach to accountability, in the sense that its reports are restricted to assessing the implementation of measures that have

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Parliament are submitted on behalf of the Auditor General. See *Auditor General Act*, RSC 1985, c A-17, ss 15.1, 23(2).

<sup>188</sup> David Wright & James McKenzie, “Canadian Commissioner of the Environment and Sustainable Development” in Marie-Claire Cordonier Segger, Marcel Szabó & Alexandra R Harrington, eds, *Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights Through National Institutions* (Cambridge: Cambridge University Press, 2021) at 477.

<sup>189</sup> *Net-Zero Act*, *supra* note 5, s 24(1), (2).

<sup>190</sup> House of Commons, Standing Committee on Environment and Sustainable Development, *Minutes of Proceedings*, 43-2, No 39 (9 June 2021) at 17:40 (Hon Monique Pauzé).

<sup>191</sup> *Ibid* at 18:50 (Hon Monique Pauzé).

<sup>192</sup> See *Tsleil-Waututh Nation Brief*, *supra* note 113 at 3 and *Quebec Environmental Law Centre Brief*, *supra* note 123 at 6.

already been announced.<sup>193</sup> In particular, subsection 24(2) provides unclear authority for the Commissioner to identify remedial measures when the government misses a milestone target, beyond those already identified by the Minister in the relevant assessment report. A transformative approach to accountability, by contrast, engages with goal setting and policy design choices in order to promote learning and better environmental outcomes.<sup>194</sup> It would have mandated the Commissioner to provide Parliament with independent assessments of the government's milestone targets and reduction plans, as well as recommendations regarding possible new measures.

To conclude, the Commissioner's new mandate has limited government accountability potential. While its assessments are highly respected, the *Net-Zero Act* does not associate any specific consequences with the assessments beyond report tabling before Parliament. One option would have been to require the Minister to publicly respond to the Commissioner's recommendations, and to explain whether the government would follow them or not. The *Net-Zero Act's* focus on measures that have already been announced is also a missed opportunity to increase government accountability for its climate policy choices. However, the Commissioner's powers that predate the *Net-Zero Act* already provided a strong foundation for doing so, and even offer an opportunity to remediate the *Net Zero Act's* incomplete reception of the *Paris Agreement*. Indeed, its annual reports may deal with "anything that the Commissioner considers should be brought to the attention of Parliament in relation to environmental and other aspects of sustainable development", including "meeting international obligations" and "promoting equity".<sup>195</sup>

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<sup>193</sup> See Susan Park & Teresa Kramarz, eds, *Global Environmental Governance and the Accountability Trap* (Cambridge, Massachusetts: The MIT Press, 2019) at 219.

<sup>194</sup> See *ibid* at 220. See also David Cipler et al, "The Transformative Capability of Transparency in Global Environmental Governance" (2018) 18:3 *Global Environmental Politics* 130.

<sup>195</sup> See *Auditor General Act*, *supra* note 187, ss 21.1, 23(2).

## E. DISCUSSION

The foregoing analysis reveals that, despite its title, the *Canadian Net-Zero Emissions Accountability Act* offers a weak accountability framework for Canada to achieve its commitments under the *Paris Agreement*. The Senate Committee reached the same conclusion in its final report on Bill C-12:

Your committee feels that the climate accountability process under Bill C-12, which includes a cycle of GHG target setting, emission reduction plan development, and reporting on progress and performance audits, is weak and will not lead to actual reductions of GHGs in line with national targets. More needs to be done to bolster how Canadian governments are held to account for GHG emission reductions.<sup>196</sup>

In particular, the Minister's new reporting obligations do not amount to accountability in and of themselves, despite the constant association of both terms in the Act. Although obviously the government could lose a vote of no confidence or an election on the basis of the targets and plans tabled, these hallmarks of responsible government were available prior to the *Net-Zero Act's* adoption.<sup>197</sup> Moreover, the range of factors considered in such instances goes far beyond assessing climate targets and plans, making them extremely diffuse ways of holding the government to account for its mitigation efforts. As such, subject to narrow exceptions that mirror the development of a "culture of justification" in Canadian administrative law,<sup>198</sup> I conclude that enhanced reporting by the Minister under the *Net-Zero Act* enhances transparency, but not accountability.

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<sup>196</sup> Senate of Canada, Standing Committee on Energy, the Environment and Natural Resources, *Third Report* (22 June 2021) (Chair: Paul J Massicotte).

<sup>197</sup> See Peter W Hogg, *Constitutional Law of Canada* (Scarborough, Ont: Thomson Reuters/Carswell, 2017) at 9:1.

<sup>198</sup> These exceptions include the Minister's obligation to "explain" how targets and measures will contribute to achieving net-zero, to "respond" to the Net-Zero Advisory Body's advice, and to provide "reasons" if the government misses a milestone target or the 2050 net-zero target. See generally *Canada (Minister of Citizenship and Immigration) v Vavilov*, *supra* note 156 at para 14.

Beyond reporting, the *Net-Zero Act* also establishes two processes that meet the above-identified definition of accountability because they specifically provide for the assessment of the Minister's actions under the *Net-Zero Act* and for the imposition of some consequences. Firstly, the Advisory Body has a capacious mandate that allows it to engage directly with the federal government at the goal-setting level and to contribute to the reception (in practice rather than in law) of the *Paris Agreement's* norms on fairness, public participation, and Indigenous peoples' rights. One key challenge raised by the multiple types of expertise required from the body's membership and its preference for consensus decision-making is whether it will be able to agree on pursuing more demanding types of engagement with the government.<sup>199</sup> Secondly, the Commissioner has a much stronger standing as an independent officer of Parliament with a convincing track record of government accountability for climate action, but its new mandate is narrowly tailored toward the achievement of existing targets and measures rather than reflecting the global dimension of the climate challenge.

Judicial oversight, lastly, appears to have been deliberately left out of the *Net-Zero Act* through an omission of the *Paris Agreement's* obligation of conduct to pursue mitigation targets, refusal to create an explicit right of judicial review regarding the Minister's targets and plans, and failure to create a *sui generis* role for the courts. Despite Parliament's professed commitment to government accountability, the act suggests an underlying fear of generating legal risks both domestically and internationally. Obviously, creating new recourse against the federal government's targets, plans or implementation actions could have costly consequences. Moreover, no court can provide definitive answers to a challenge as complex as Canada's transition to net-zero. This

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<sup>199</sup> See Net-Zero Advisory Body, "Terms of Reference", *supra* note 184 (the Advisory Body's Terms of Reference identify the co-chairs' responsibility to ensure that "objectives are met, all members are heard and respected, discussions are within the mandate, consensus is built, and decisions or next steps are clear and communicated" at Membership).

said, foregoing the judiciary's contribution to implementing the *Net-Zero Act* might only displace legal risks to other forums. There is at least one climate-related petition against Canada before the Inter-American Commission on Human Rights<sup>200</sup> and Vanuatu recently succeeded in convincing the United Nations General Assembly to ask the International Court of Justice to clarify states' climate obligations beyond the *Paris Agreement*.<sup>201</sup> Every additional year Canadians make a disproportionate contribution to global climate change, legal risks increase alongside physical ones.<sup>202</sup>

## VI. CONCLUSION: WARMING UP TO THE *PARIS AGREEMENT* OVER TIME?

This article analyzed the legislative process that led to the *Net-Zero Act's* adoption and identified multiple missed opportunities to receive the *Paris Agreement's* norms and to establish strong accountability mechanisms for their achievement. Obviously, international norms must be translated in ways that resonate with local mores rather than being mechanically transposed in

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<sup>200</sup> See Earthjustice, "Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada" (23 April 2013), online (pdf): <[earthjustice.org/sites/default/files/AAC\\_PETITION\\_13-04-23a.pdf](http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf)>. See also Agnieszka Szpak, "Arctic Athabaskan Council's Petition to the Inter-American Commission on Human Rights and Climate Change—Business as Usual or a Breakthrough?" (2020) 162 *Climatic Change* 1575.

<sup>201</sup> See *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect to Climate Change*, UNGAOR, 77th Sess, Annex, Agenda Item 70, UN Doc A/77/L.58 (2023). See also Blue Ocean Law, *Pacific Firm to Lead Global Legal Team Supporting Vanuatu's Pursuit of Advisory Opinion on Climate Change from International Court of Justice* (23 October 2021), online: <[blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatus-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice](http://blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatus-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice)>.

<sup>202</sup> See Sarah Mason-Case & Julia Dehm, "Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present" in Benoit Mayer & Alexander Zahar, eds, *Debating Climate Law* (Cambridge: Cambridge University Press, 2021).

domestic law.<sup>203</sup> Yet the *Net-Zero Act* reveals a tepid reception: Parliament enhanced the agreement's decarbonization timeframe and the expectation of progression applicable to mitigation targets, but also downsized states' obligation to foster public participation, the principle of highest possible ambition, and the preambular reference to Indigenous peoples' rights, and omitted altogether the principle of fairness applicable to target setting and states' obligation of conduct to pursue their targets. Moreover, the *Net-Zero Act* only minimally improved the accountability potential of two pre-existing institutions (i.e., the Advisory Body and the Commissioner) despite the absolute centrality of this goal to the statute. This unfavourable assessment yields three overarching observations.

A first observation is the deficient drafting of Bill C-12, as initially introduced by the Minister, from the perspective of its rationale of achieving the *Paris Agreement's* goals and Canada's commitments thereunder. Surely, the shortcomings identified in this article are due to other factors than lack of resources or skill within the federal public service. One question that would warrant further exploration is whether the omission of several obligations and non-binding norms that are central to the agreements' implementation in Canada also characterizes reception legislation pertaining to other treaties. As previously argued, using this approach to mitigate legal risks may in fact displace such risks to other forums rather than truly reducing them. Indeed, if ever it contributed to Canada failing its energy transition by 2050, limiting the new duties conferred upon the executive branch and the applicable accountability avenues would in fact had *amplified* legal risks over the long run, over and above social and economic ones.<sup>204</sup>

A second observation is that the legislative process successfully identified Bill C-12's main shortcomings when compared with the *Paris Agreement*. Civil society briefs, witness testimonies, and

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<sup>203</sup> See Engle Merry & Levitt, *supra* note 21.

<sup>204</sup> See e.g. Office of the Parliamentary Budget Officer, *Global Greenhouse Gas Emissions and Canadian GDP* (Ottawa: Office of the Parliamentary Budget Officer, 8 November 2022).

proposed amendments addressed all the issues analyzed in this article. Nevertheless, negotiations between political parties at the House of Commons failed to remedy most of these shortcomings and ultimately gave stronger footing to transparency than to accountability. This outcome reveals that the obstacles to adopting climate legislation identified in Part III had not subsided as much as what the *Net-Zero Act's* adoption may suggest at first glance. For example, even after its entry into force, Alberta's Premier vigorously opposed the federal government's announcement to cap emissions from the oil and gas sector.<sup>205</sup> In the US, struggle to achieve bi-partisan support for the Build Back Better Plan during Parliament's consideration of Bill C-12 exemplifies the absence of a clear signal in support of decarbonization from Canada's main economic partner.<sup>206</sup> The evolution of such obstacles will have a determinative impact on Canada's pursuit of its international commitments throughout the *Net-Zero Act's* implementation.

A third observation is that the Advisory Body and the Commissioner enjoy some latitude in holding the government accountable on the basis of the *Net-Zero Act*. For example, it remains to be seen whether the Advisory Body will hold the Minister accountable for the process through which it sets Canada's targets and plans, including the extent of the public's participation and whether Indigenous peoples are consulted. Or whether the Commissioner will engage with the norms of highest possible ambition and fairness of Canada's climate targets, on the basis of its pre-existing mandate under the *Auditor General Act* rather than the *Net-Zero Act*. Both institutions have an opportunity to increase the Minister's accountability over time by drawing on

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<sup>205</sup> See Bill Kaufmann, "Trudeau in Glasgow Should Champion Alberta's Climate Change Efforts Rather Than Imposing Emissions Goals, Says Kenney", *The Calgary Herald* (1 November 2021), online: <[calgaryherald.com/news/politics/trudeau-in-glasgow-should-champion-albertas-climate-change-efforts-rather-than-imposing-emissions-goals-says-kenney](http://calgaryherald.com/news/politics/trudeau-in-glasgow-should-champion-albertas-climate-change-efforts-rather-than-imposing-emissions-goals-says-kenney)> ("[i]f in fact what this announcement is about today is to try to leave (oil and gas) in the ground, we would fight that with every tool at our disposal").

<sup>206</sup> See Burgess Everett & Marianne Levine, "'Time to Move On': Infrastructure Talks Near Collapse", *Politico* (24 May 2021), online: <[politico.com/news/2021/05/24/infrastructure-talks-near-collapse-490637](http://politico.com/news/2021/05/24/infrastructure-talks-near-collapse-490637)>.



the *Paris Agreement*'s norms applicable to the processes followed and to the substantive policy choices made under the *Net-Zero Act*. In other words, the reception of the agreement in Canada is an ongoing process, rather than a destination that was reached with the *Net-Zero Act*'s adoption.

Indeed, the opportunity for Canada to warm up to the *Paris Agreement* stands before all sectors of society that can “trigger interactions that yield legal interpretations” of international law.<sup>207</sup> One key juncture is Parliament's “comprehensive review of the provisions and operation” of the *Net-Zero Act* in 2026, which could allow redressing the shortcomings identified in this article.<sup>208</sup> Yet improving Canada's reception of *Paris Agreement* cannot wait until then, nor rest entirely on the shoulders of the Advisory Body and of the Commissioner. The *Paris Agreement* is immediately relevant to interpret a range of other statutes, to inform ongoing and future litigation launched on the basis of other legal grounds than the act, and to galvanize the engagement of civil society, businesses, academia, etc. with government officials at all levels. In this sense, despite its many weaknesses, the *Net-Zero Act* offers tools that Canadian society cannot afford to ignore if it is ever going to close the gap between its international commitments and its actions.

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<sup>207</sup> Koh, *supra* note 25 at 339 [emphasis in original].

<sup>208</sup> *Net-Zero Act*, *supra* note 5, s 27.1.

**Appendix 1: Timeline of Canada’s Targets and Reports**

<b>NDC</b>	<b>Milestone Target</b>	<b>Reduction Plan</b>	<b>Progress Report</b>	<b>Assessment Report</b>	<b>Commissioner Report</b>
2015 <sup>209</sup>					
2021 <sup>210</sup>	2021 <sup>211</sup> (for 2030)	2021 (for 2030 + 2026 <sup>212</sup> )			
2022 <sup>213</sup>					
			2023		
	2024 (for 2035)				2024
2025 (for 2035 <sup>214</sup> )			2025		
			2027		
	2029 (for 2040)				2029
2030 (for 2040)		2030 (for 2035)			
				2032 <sup>215</sup>	
			2033		
	2034 (for 2045)				2034
2035 (for 2045)		2035 (for 2040)			
				2037	
			2038		
					2039
2040 (for 2050)		2040 (for 2045)			
				2042	
			2043		
					2044
2045 (for 2055)		2045 (for 2050)			
				2047	
			2048		
					2049
2050 (for 2060)				2052	
					2054

<sup>209</sup> Canada’s intended NDC, presented before the Paris Conference, was 30% below 2005 levels by 2030.

<sup>210</sup> The due date for second NDCs was moved to 2021 due to COVID-19. Canada’s second NDC is 40–45% below 2005 levels by 2030 and net-zero by 2050.

<sup>211</sup> The 2021 target is Canada’s second NDC already communicated under the *Paris Agreement*. See *Net-Zero Act*, *supra* note 5, s 7(2).

<sup>212</sup> The 2026 interim objective is 20% below 2005 levels. *2030 Emissions Reduction Plan*, *supra* note 147.

<sup>213</sup> The *Glasgow Climate Pact* contains a voluntary invitation to strengthen NDCs by 2022. See *Glasgow Climate Pact*, *supra* note 62 at para 29.

<sup>214</sup> Parties are encouraged to use 10-year horizons. See *Common Time Frames for NDCs Referred to in Art. 4(10) Paris Agreement*, UNFCCC, Decision 6/CMA.3, UN Doc FCCC/PA/CMA/2021/10/Add.3 at para 2.

<sup>215</sup> See *Net-Zero Act*, *supra* note 5, s 15(1). Inventories must be submitted within two years of their reference year. See Decision 18/CMA.1, *supra* note 143 at para 57.

