Bill C-12 for NetZero by 2050

Legislating the Impossible Dream

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Contents

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BILL C-12 FOR NET ZERO BY 2050 – LEGISLATING THE IMPOSSIBLE DREAM?

EXECUTIVE SUMMARY

On November 19, 2020, the government introduced Bill C-12, titled *an Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050*.

Why is this now Canada's legally required goal? It is not required by the Paris Accord of 2015, which set no national goals for greenhouse gas (GHG) emissions reductions. The federal government has previously set several GHG emission reduction goals without needing any new laws. Why legislate now?

The government will argue that C-12 adds an important element of transparency and accountability to the federal reporting requirements. But there is nothing to prevent the government from being more transparent and accountable without enacting this law. And, despite the "accountability and transparency" there is no requirement to disclose how costly it will be to reach the next milestone, who will bear the cost, or how the cost will be financed.

The Bill sets Canada's national GHG emissions target for net-zero by 2050. It also requires the Minister to set national GHG emissions targets for each of several "milestone years". The Minister must establish a plan for achieving the 2050 target and for each milestone year before then. If the target for a milestone year is not met, the Minister must explain what will be done to get back on track to meet the target.

An increasing number of cases are being brought before the courts in which environmental advocacy organizations argue that challenges to government climate policy are "justiciable", and therefore, should be decided by judges. ("Justiciable" means capable of being determined by a court.) The lawsuits have sought to compel governments to carry out the advocated climate policies.

The environmental non-governmental advocacy organizations that developed the criteria for Bill C-12 probably wanted to enable themselves to sue the government for failure to do more to achieve the legislated target. Political defendants in lawsuits are not always unhappy to be sued; they may even be delighted. Bill C-12 is a potential source of such lawsuits, enabling the government to justify its target as moderate compared to the claims in the lawsuits.

The central purpose of C-12 is to bake the net-zero 2050 goal into the public consciousness and into the Canadian political agenda. Lawsuits won't do the baking, just raise the temperature.

About the Author

Robert Lyman *is an economist with 27 years' experience as an analyst, policy advisor and manager in the Canadian federal government, primarily in the areas of energy, transportation, and environmental policy. He was also a diplomat for 10 years. Subsequently he has worked as a private consultant conducting policy research and analysis on energy and transportation issues as a principal for Entrans Policy Research Group. He is a frequent contributor of articles and reports for Friends of Science, a Calgary-based independent organization concerned about climate change-related issues. He resides in Ottawa, Canada.* *Full bio.*

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Introduction

On November 19, 2020 The Hon. Jonathan Wilkinson, Minister of Environment and Climate Change, introduced into the House of Commons *Bill C-12, an Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050*. In his letter to the Minister on January 15, 2020 Prime Minister Justin Trudeau added to the list of priorities he had already assigned the Minister the task of "legislating Canada's goal of net-zero emissions by 2050." The key words are "legislating net-zero".

Canadians who do not closely follow Canadian climate change policy might be surprised to learn that this is now Canada's legally required goal. **It is not required by the Paris Accord of 2015. That agreement, in fact, set no national goals for greenhouse gas (GHG) emissions reductions. It only required countries to submit five-year plans showing how much they intended to reduce emissions. In short, there is no binding international commitment requiring Canada to impose on its citizens legal obligations for any level of GHG emissions reduction.** In fact, several of the largest GHG emitters like China and India submitted plans showing how their intentions to **increase** their emissions substantially, for decades. And since 2015 few countries of any size are on track to meet their five-year plans. Canada isn't on track either, according to the Parliamentary Budget office.

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The Canadian government has previously set several GHG emission reduction goals as policies, without needing any legislation. So, one might well ask, "Why is this legislation being enacted now?" The short answer is to attempt to legislate the net-zero dream, in the hope that the law will make it come true.

First, let us explain what's in the Bill.

The Wording of the Bill

The following are some key points concerning the content of Bill C-12.

Preamble

The preamble states as untestable facts several points that are, in truth, highly debatable:

- *Whereas the science clearly shows that human activities are driving unprecedented changes in the Earth's climate; and*
- *Whereas climate change poses significant risks to human health and security, to the environment, including biodiversity, and to economic growth.*
- *Whereas the Government of Canada recognizes that its plan to achieve net-zero emissions by 2050 should contribute to making Canada's economy more resilient, inclusive and competitive;*
- *Whereas climate change is a global problem that requires immediate action by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians.*

Definitions

The definition of "net-zero emissions" is that "*anthropogenic emissions of greenhouse gases into the atmosphere are balanced by anthropogenic removals of greenhouse gases from the atmosphere over a specified period.*"

Her Majesty

The Act and its regulations are binding on Her Majesty in right of Canada. (They are only binding on the federal government itself, but if the federal objective is to be achieved Ottawa will have to impose economic measures on provincial or municipal governments as well as on individual Canadians living in provinces and municipalities.)

Purpose

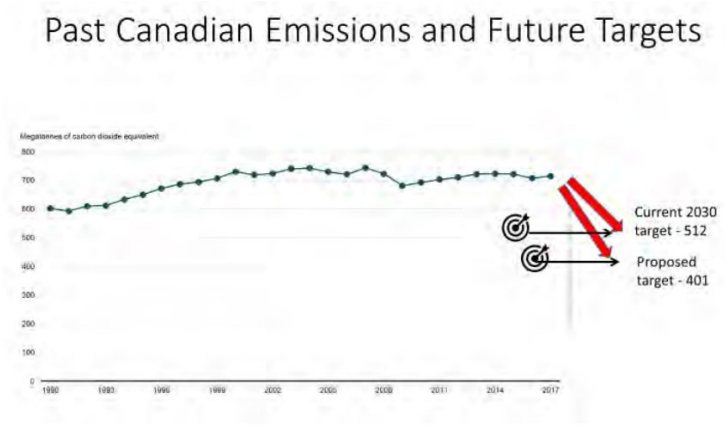
"The purpose of this Act is to require the setting of national targets for the reduction of greenhouse gas emissions based on the best scientific information available and to promote transparency and accountability in relation to achieving those targets, in support of achieving net-zero-emissions in Canada by 2050 and Canada's international commitments in respect of mitigating climate change." (Of course, national targets can be set without legislation, and Canada has no legal international commitments to achieve net zero by 2050.)

Targets and Plans

The Bill specifically states that Canada's national GHG emissions target for 2050 is net-zero emissions. It also requires the Minister to set national GHG emissions targets for each "milestone year" including for 2030 and for each subsequent milestone year as defined by the Minister.

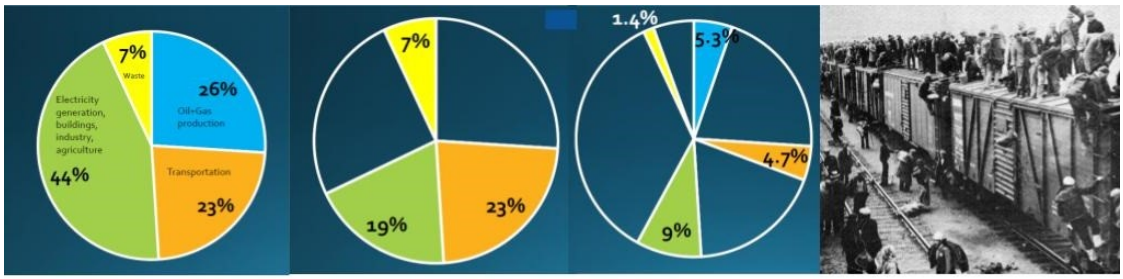
The Minister must establish a greenhouse gas emissions reduction plan for achieving the 2050 target and for each milestone year target. If the target for a milestone year is not met the Minister must explain what will be done to get back on track to meet the target.

The emissions reduction plans must contain the target for the year, a description of the key emissions reduction measures the Government of Canada intends to take to achieve the target, and descriptions of emissions reduction strategies for federal government operations.



Source: Environment Canada. Canada's emissions since 1990. (GHG reduction targets added)

Environmental groups often argue that a 'climate accountability law' is necessary because Canada has failed to meet targets set since 1990 – ignoring the fact that Canada's population grew by 37%. Each new person needed GHG emitting resources like a home, food, transportation, clothing, energy for heating, cooking and travel. Obviously, Canada's energy sector has become far more efficient as GHG emissions have not risen despite the birth of children and the welcoming of millions more immigrants to Canada. Meeting targets would require the shutdown of virtually all major job creating and export industries that provide most of Canada's GDP.



2014 ratios of emissions and sources in Canada

Canadian gov't committed to attain a 50% reduction from 2005 level by 2050

Canadian gov't notionally committed to an 80% reduction in GHGs

The result? The end of Canada as we know it today. Back to the Future 1930s.

Progress Reports

The Minister must prepare at least one progress report relating to each milestone year and to 2050 no later than two years before the beginning of the relevant year.

In an article published in the National Post on January 15, 2021 Cody Ciona described how the proposed bill accorded with the five "pillars" that were set out in a New Canadian Climate Accountability Act, a document produced in May 2020 by six environmental advocacy organizations: the Environmental Defence Fund, Ecojustice, Climate Action Network,[1] Equiterre, West Coast Environmental Law and the Pembina Institute. The document[2] set out five "pillars" that they wanted to see enshrined in legislation:

- The setting of ambitious long-term targets with the objective of attaining net-zero emissions by 2050
- The establishment of five-year carbon budgets for 2030, 2035, 2040, and 2045
- The preparation of five-year reports to assess progress, risks, and impacts
- The submission of these reports to Parliament
- The establishment of a publicly-funded expert climate advisory committee

It should come as no surprise that Bill C-12 almost exactly follows this model. Ciona comments that it is no wonder the ENGOs love Bill-C-12; "they wrote it".

Commentary

One must ask, "If the government can set targets without legislation why this unnecessary legislation?"

The sponsors of Bill C-12 will argue, no doubt, that the legislation adds an important element of transparency and accountability, in that it adds to the reporting requirements of the federal government. The necessity of this is far from clear. There is nothing to prevent the government from being more transparent and accountable without enacting this law.

As matters now stand, the federal government is committed to file reports with the United Nations every two years on all major climate change measures undertaken by the federal and provincial governments. It also is obliged to file reports every five years on emissions reduction measures to meet the reporting requirements of the 2015 Paris Accord. These reports are publicly available on the website of Environment and Climate Change Canada. There are also periodic reports issued by the Commissioner on the Environment and Sustainable Development, a branch of the Office of the Auditor General of Canada. The new

[1] Climate Action Network appears as one body, but it is actually made up of over 100 ENGOs and unions. https://climateactionnetwork.ca/meet-our-members/

[2] https://www.ecojustice.ca/wp-content/uploads/2020/06/A-New-Canadian-Climate-Accountability-Act-Detailed-Report-1.pdf

legislation will create more paperwork for federal officials, but transparency is clearly not its purpose, as even without it there is no impediment to transparency and accountability. And the information to be provided is uninformative on the most important issue.

But the accountability and transparency do not extend to costs. There is no requirement to disclose how costly it will be to reach the next milestone, or who will bear the cost, or how the cost will be financed. Changing the way Canadians heat and light their homes, transport themselves and their children, farm their fields, power their computers, transport food, and all the other ways we rely on energy, from methods used for centuries to wind farms and solar panels, all in 30 years, is unprecedented. It will be enormously costly. The way the law is written only the target matters; its impact on Canadians' lives does not.

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The name of the law itself is misleading because it does not disclose its real purpose. By passing a law with "net-zero emissions" as our national goal, the majority of the public will come to think that this is not merely a goal but a legal requirement for Canada to reach that goal. This implies that provinces, municipalities, and all Canadians have to accept that goal, and work to accomplish it, whatever its impact on the country.

Amending or repealing the law, which any future government could lawfully do, would encounter high profile opposition that politicians might be too fearful to undertake. The legislation is cleverly intended to bind successor Parliaments politically, even though one Parliament cannot legally bind its successor. Any successive government that failed to adhere to the target could be accused of failing to care about the environment. In short, the objective of the law is to cast the net-zero target in stone.

Read literally, the proposed law binds the federal government to report, but it does not legally bind it to meet the 2050 target. Whether it practically binds it to do so is a matter of politics, not law. Through carbon taxes and other regulatory measures with national application, even without the legal power to bind provinces to its target, Ottawa can effectively enforce provincial policies that contribute to its target.

There is a carbon tax constitutional case now before the Supreme Court of Canada that may add clarity to the federal powers to compel provinces to reduce GHG emissions to meet federal objectives.

Here is an excerpt from an analysis of that case by the Norton, Rose Fulbright law firm.[3]

[3] https://www.nortonrosefulbright.com/en-ca/knowledge/publications/7b195ef7/climate-change-and-canadian-federalism

"*The crux of the Ontario and Saskatchewan [Court of Appeal] decisions was a constitutional question regarding the appropriate balance of power between Canada's federal and provincial governments in regulating greenhouse gas emissions. The decisions were not directly concerned with the efficacy of carbon pricing or the viability of the federal government's strategy for reducing greenhouse gas emissions. In fact, both Ontario and Saskatchewan acknowledged that climate change is real and requires proactive measures.*[13] *Rather, the decisions concerned Ontario and Saskatchewan's disagreement with the federal government's approach to reducing greenhouse gas emissions through carbon pricing and denied that the federal government has the constitutional jurisdiction under the national concern branch to impose its chosen approach to greenhouse gas emissions on the provincial and territorial governments.*

The issue before the Court, in other words, was not "should this be done?" but "who can do this"? The Ontario and Saskatchewan governments did not question whether emissions should be reduced, or by how much. By limiting the scope of their appeal to the federal powers issues the provinces may have undercut their own cases. The opposing argument is that climate change is a global issue that can only be dealt with by a nation state in concert with other nation states. Sub-national entities like provinces cannot do it. For a court to hold that the power rests with the provinces, in whole or in part, would destroy that logic.

Lawsuits under Bill C-12

An increasing number of cases are being brought before the courts in Canada and elsewhere in which environmental advocacy organizations seek to establish that matters of government climate policy are "justiciable", and therefore, should be decided by judges. ("Justiciable" means capable of being determined by a court of law.) The lawsuits have tried to use the courts to compel governments to carry out the advocated climate policies whether or not they are required by legislation. David Wright, a professor of environmental law at the University of Calgary, provided an interesting commentary on this question under Bill C-12.

"*Those who view Bill C-12 as a potential source of legal hooks to be used in a lawsuit against a future non-compliant federal government may be disappointed. It is highly likely that a court will interpret at least some provisions of C-12 in a manner similar to the federal court in Friends of the Earth v Canada (2008 FC 1183 (CanLII); appeal dismissed, 2009 FCA 297 (CanLII)). That decision had a number of dimensions that are too nuanced to succinctly present here, but the key point for present purposes is that if the legislative intent behind a statutory obligation (in that case, under KPIA) is to make a matter non-justiciable and subject only to parliamentary review, the court will refrain from compelling the government to take action. In Friends of the Earth, the court also found that the content of the Minister's climate change plan was non-justiciable because there were "policy-laden considerations" that were "not the proper subject matter for judicial review" (at para 33)."*[4]

[4] https://ablawg.ca/2020/11/23/bill-c-12-canadian-net-zero-emissions-accountability-act-a-preliminary-review/

As to what is justiciable, in the case initiated by the Friends of the Earth (FOE) in 2008 that Mr. Wright discusses, both the facts and the applicable law were quite different from C-12. Therefore, we would respectfully disagree with his conclusion. Here is what the trial judge in 2008 said (upheld by the two courts above him):

"*While the failure of the Minister to prepare a Climate Change Plan may well be justiciable, as evidenced by the mandatory term "shall" in section 5 of the KPIA, an evaluation of its content is not. The word "ensure" found in section 5 and elsewhere in the KPIA is not commonly used in the context of statutory interpretation to indicate an imperative. The Act also contemplates an ongoing process of review and adjustment within a continuously evolving scientific and political environment. These are not matters that can be completely controlled by the Government of Canada such that it could unilaterally ensure Kyoto compliance within any particular timeframe.*" *(underlining added)*

Kyoto was an enforceable multinational agreement with enforceable targets. Unlike Kyoto, Paris involves only unenforceable nationally determined "contributions" to the target, which Canada is free to determine any way it wishes, regardless of what others do. This key difference enables a lawyer challenging our government's failure to meet a milestone emissions reduction target to argue that this lawsuit is justiciable because, unlike the FOE case, both setting the target and compliance with the target are "completely controlled by the Government of Canada".

Another key difference from FOE and Kyoto was the court holding in that case that the Minister's decision had to be made "within a continuously evolving scientific and political environment". Today's lawyer would argue that the science is settled, something federal government lawyers have relied on, and provincial government lawyers conceded in the carbon tax cases described above. That would be enough to distinguish a Bill C-12 lawsuit from the FOE case.

It seems clear that the environmental non-governmental advocacy organizations (ENGOs) that developed the criteria for Bill C-12 wanted to enable themselves to sue the government for failure to do "more" to achieve the target in the legislation. The Prime Minister and the Minister of Environment and Climate Change must know this, and indeed, may want the lawsuits to be brought. Political defendants in lawsuits are not always unhappy to be sued; they may even be delighted.

Contrary to what Professor Wright has written, Bill C-12 is a rich potential source of lawsuits against the federal government. These may provide the federal government with an opportunity to justify its extreme measures as moderate compared to the claims in the lawsuits.

It is far from clear that the courts today will continue to take the 2008 FOE approach to deciding what is justiciable in C-12 litigation. In a recent court case brought by a group of children and youths in Ontario against the provincial government's climate change policies, the court held that their claim to a safe environment under the Charter of Rights and

Freedoms was justiciable. The court relied on uncontested evidence presented by federal lawyers and accepted by provincial lawyers in the carbon tax cases that we are in a climate crisis that must be resolved urgently. Courts today seem much more concerned about the climate and the environment as being an existential threat than was the case in 2008. Indeed, Ontario's lawyers in the children's lawsuit appeared to be presenting weak arguments in defending such lawsuits. Perhaps they don't mind losing these cases, either personally, or because they had been instructed by their Minister not to say anything that would deny the climate crisis arguments being made by the plaintiffs.

In its present form Bill C-12 may provide yet another powerful tool whereby ENGOs can exert political pressure on the federal government, which is already all-too-willing to oblige.

Conclusion

The purpose of C-12 is to bake the net-zero 2050 goal into the public consciousness and into the Canadian political agenda. Lawsuits won't do the baking, just raise the temperature. Bill C-12 would not make actions to attain that target enforceable by law. Meanwhile, there is no requirement to disclose how costly it will be to reach the goal, or who will bear the cost, or how the cost will be financed. Canadians will discover that the hard way, through rising unemployment even after the pandemic is over, and escalating costs of living creating energy poverty for middle- and low-income Canadians.

As part of pursuing that economically impossible goal in such a short time with currently available energy technology, we shouldn't be surprised to see climate lawsuits being brought to decrease Canada's emissions even faster. This would flow from the cozy relationship between the environmental advocacy organizations that developed the law and the government that enacted it.

About Friends of Science Society

Friends of Science Society is an independent group of earth, atmospheric and solar scientists, engineers, and citizens that is celebrating its 18th year of offering climate science insights. After a thorough review of a broad spectrum of literature on climate change, Friends of Science Society has concluded that the sun is the main driver of climate change, not carbon dioxide (CO2).

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