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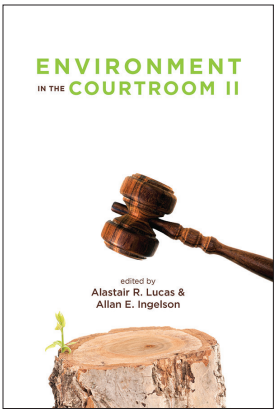

ENVIRONMENT IN THE COURTROOM II

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

Sophie Lavallée[1]

Introduction

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

Canadian Context

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

CANADIAN EMISSIONS

In 2018, Canada's total GHG emissions amounted to 725 megatonnes of carbon (CO_2 equivalent), or 21 percent (126 megatonnes CO_2 equivalent) above 1990 emissions (603 megatonnes CO_2 equivalent). Canada, which accounts for 0.5 percent of the world's population, accounts for about 1.5 percent of global CO_2 emissions. Oil sands account for 11.5 percent of Canada's GHG emissions and about 0.2 percent of global GHG emissions.[2] At first glance, Canada appears to be a country with relatively small global emissions, but in terms of per capita emissions, it is becoming a major player.[3] Amongst G-20 countries in 2018, only the United States and Australia are doing worse.[4]

By carefully examining the emissions for each Canadian province, it is clear that a great disparity exists between the emissions of the ten Canadian provinces, due to the disparate use of fossil fuels and hydroelectricity across the country. The provinces of Quebec and British Columbia have the best record, given their hydroelectric resources. The provinces of Alberta and Saskatchewan, on the other hand, have the worst record, with GHG emissions much higher than the worst ranked comparator, Australia. Canada's emissions have been largely flat since 2005, while Alberta's emissions increased 18 percent between 2005 and 2018, mainly due to increased oil and gas operations.[5] Overall, in Canada, emissions have increased by 21 percent since 1990, the base year of the *Kyoto Protocol*. The energy sectors (stationary combustion, transportation, and fugitive sources) account for 82 percent of Canadian emissions, with remaining emissions being attributable to agriculture (8 percent), industrial processes and product use (8 percent), and waste (2 percent).[6]

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

THE CANADIAN NATIONALLY DETERMINED CONTRIBUTION IN THE *PARIS AGREEMENT* AND THE *PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE*

Breaking with the Conservative government of Stephen Harper, Justin Trudeau's new Liberal government did well at COP 21, announcing significant support for the *Paris Agreement*, through expressed support for the text

of the Agreement, which stresses that states should strive not to exceed, if possible, 1.5 degrees Celsius. Canadian cooperation was also demonstrated by the announcement of $2.65 billion Canadian in financial support to the Green Climate Fund for 2015–2020.[7] However, the country's NDC was the one presented by the Canadian Conservative government in Copenhagen, which was in line with that of its neighbour and trading partner, the United States.

The Canadian Nationally Determined Contribution in the Paris Agreement

In its NDC under the *Paris Agreement*, Canada plans to reduce its GHG emissions by 30 percent from its 2015 emissions by 2030.[8] From 730 megatonnes of carbon dioxide equivalent (referred to as megatonnes of CO_2) to 511 megatonnes will result in a reduction of 219 megatonnes. This target represents a decrease of only 15 percent from 1990, which was the base year for the *Kyoto Protocol*, which Canada ratified in 2005. Canada adopted 2005 as the reference year because the United States, who were not bound by the *Kyoto Protocol*, had adopted, at the Copenhagen Conference, this reference year at the Copenhagen Conference under the Obama presidency.[9] Canada has an actual emission reduction target of only 15 percent with respect to 1990; instead of applying a reduction of 30 percent with respect to 1990 (603 megatonnes), it established it at a much higher level (730 megatonnes).[10]

What happens if Canada does not meet its 2030 target? Although the *Paris Agreement* does not define its legal status, it makes "NDCs supplements to its provisions and a condition of its ratification."[11] Article 4.2 states that "[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve."[12] It further states that "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."[13] However, these NDCs are not found in an annex to the Agreement, but in a separate register, depriving their contents of [translation] "an implied or explicit conventional value."[14] The NDC is therefore described by doctrine as a unilateral state act. Hugues Hellio explains the legal status as follows:

> [Translation] Formally, a unilateral state act is a legal act attributable to a single state which, acting in the name of its sovereignty and within its capacity, ensures sufficient publicity of its state will. In doing so, "the State has discretion and is determined essentially on the

> basis of its own interests." This is the case with NDCs. Attributable to a single Party, the NDC is the unilateral and sovereign act of that Party, which has discreetly and in accordance with its own interests, determined its climate objectives and actions.
>
> While NDCs are unilateral acts, they are linked to the *Paris Agreement*. Such acts are sometimes referred to as acts conditioned by conventional norms. They are frequently used to enhance conventional engagement without enshrining in the treaty differences in treatment between its Parties as revealed by the analysis of conditioned unilateral acts. This duality between the common conventional framework and the differentiated treatment of the Parties reinforces the qualification of unilateral acts conditioned by the NDCs, both of which, specific to each Party, remain governed by the common obligations of the *Paris Agreement*.[15]

For example, the common NDC obligations set out in the *Paris Agreement* mean that a transparency framework[16] requires disclosure and that the communicated NDC must represent progress against the previously communicated NDC by the state.[17] This enhanced transparency framework must provide a "clear understanding of climate change actions . . . including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions"[18]. Thus, "[e]ach Party shall regularly provide . . . b) Information necessary to track progress made in implementing and achieving its nationally determined contribution"[19]. These mechanisms are conventional in that they fall under the *Paris Agreement*, a multilateral international treaty.

Finally, if the State fails to comply with its NDC, Article 15 of the *Paris Agreement* establishes a "mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement." It is not a sanction mechanism but a compliance mechanism, frequent in international environmental law and focused on facilitation and transparency, while also being non-adversarial and non-punitive.[20]

Pan-Canadian Framework on Clean Growth and Climate Change

To implement and respect its NDC, the federal government adopted the *Pan-Canadian Framework on Clean Growth and Climate Change* in 2016.[21] The key

pillars of this *Pan-Canadian Framework*, a cornerstone of Canada's climate plan, are:

1. Putting a price on carbon: provinces must adopt a cap-and-trade system or a carbon tax;.
2. Eliminate coal-fired power in the few remaining provinces, and other complementary measures to further reduce emissions in Canada;.
3. Accommodation measures;.
4. Make significant investments in green infrastructure and public transit.

This *Pan-Canadian Framework* was adopted in concert with the provinces, because constitutionally, the federal government did not have a solid legal basis for adopting a carbon tax and imposing it on the provinces. The provinces of Alberta, Ontario, Manitoba, and Saskatchewan challenged the constitutional basis of this tax in the courts, as we will now see.[22]

Canadian Constitutional Debates on Energy and Climate

The Canadian constitution does not provide for the environment as a legislative head of power. The *Constitution Act* of 1867 provides for the division of powers between the federal and provincial legislatures in this country, and the environment is obviously not there. The result is that the environment is a shared jurisdiction between provincial and federal authorities. To determine which legislature, federal or provincial, has jurisdiction over a given environmental matter, the "*pith and substance*" must be determined.[23]

This has led to numerous challenges, the most recent of which are the federal carbon price (see section 2.3) and the approval of Kinder Morgan's Trans Mountain pipeline expansion, the only crude and refined oil pipeline from Alberta to the British Columbia coast through the Rocky Mountains (see section 2.4).

Two other cases also involve the application of Canadian constitutional law, but under two other heads. These are constitutional law professor Daniel Turp's challenge to Canada's withdrawal from the *Kyoto Protocol* (see section

2.1) and the challenge to the approval of a pipeline, Northern Gateway, also in western Canada (see section 2.2).

REPUDIATION OF THE *KYOTO PROTOCOL*

In 2008, Canadian emissions were 31 percent above Canada's *Kyoto Protocol* target to reduce its 1990 emissions by 6 percent by the end of the first *Kyoto Protocol* commitment period, which was the end of 2012.[24] This was not a surprise for anybody since the federal government and the Alberta government had always supported carbon intensity reductions only, while the reduction that Canada had to meet according to the *Kyoto Protocol* could not be attained without strong legislative measures, such as severe regulations aimed at major emitters of GHGs, measures on the fuel efficiency of all vehicles sold in Canada, and the imposition of carbon pricing through the implementation of a carbon tax or a cap-and-trade system. On December 15, 2011, the Canadian Conservative government of the day sent out the required notice of withdrawal to repudiate the *Kyoto Protocol*. This repudiation was legal under international law, with Canada following the procedure set out in Article 27 of the Protocol:

> **Art. 27 Kyoto Protocol**:
>
> (1) At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary.
> (2) Any such withdrawal shall take effect upon expiry of one year (. . .)

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

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

this discretionary power of the government.[25] It followed the precedents of two cases, *Turp v. Chrétien* and *Friends of the Earth*.[26] In *Turp v. Chrétien*, the court concluded that "except for a violation of the Canadian Charter of Rights and Freedoms . . . matters of high policy are not subject to review by the courts"[27]. In *Friends of the Earth*, the court ruled that section 7 of the *Kyoto Protocol Implementation Act* did not appear to contain an obligation for the government to make the regulatory changes required to comply with the *Kyoto Protocol*: "[a]ll of the above measures are directed at ensuring compliance with Canada's substantive Kyoto commitments . . . the subject matter of which is mostly not amenable or suited to judicial scrutiny".[28]

CARBON TAXATION

In Canada, the federal government has the exclusive monopoly to enter into international treaties under the Royal Prerogative,[29] but the implementation of these treaties in the domestic legal order requires respect for the constitutional division of legislative powers between the federal government and provincial legislatures.[30] On the issue of climate change and GHG emissions control, the provinces have the bulk of the legislative authority to implement Canada's commitments in the *Paris Agreement* and their inaction or lack of ambition can seriously compromise the achievement of the reduction targets announced by the central government in the Canadian NDC.

Ottawa had initially adopted this framework one year after COP 21, after tense discussions with the provinces. It was originally adopted without the provinces of Manitoba and Saskatchewan. Manitoba briefly rallied, but the province of Saskatchewan did not. Premier Brad Wall, during his term, maintained his categorical refusal to have Ottawa impose a price on carbon on its businesses, fearing a negative economic impact on his province. In January 2018, Premier Wall reiterated that his government would not hesitate to take the case to court if the federal government "tried to impose a carbon tax on Saskatchewan families and businesses."[31] Premier Scott Moe, his successor, decided to take legal action to determine whether the federal government's legislation[32] to impose the carbon tax complied with the Constitution.[33] As well, Premier Rachel Notley of Alberta, a province rich in oil sands, announced in early October 2016 that she would not support the federal government's carbon pricing plan until the federal government approved the construction of new pipelines to open up the province. In November 2016, the Trans Mountain pipeline project was approved by the federal government.

On November 29, 2016, Alberta Premier Rachel Notley welcomed the announcement of the federal approval of this pipeline; it would allow the province to see "light at the end of the tunnel," because the oil produced could open up new markets in Asia, among others.[34] It was nevertheless surprising that Alberta opposed the federal government's carbon tax as it was the first province to impose a carbon tax in 2007. The province also, in 2016, amended its legislation to raise the tax to about $20 per tonne in January 2017 and to $30 in 2018 and to expand the scope of the tax to apply to all areas of its economy.[35]

The efforts on the part of the federal government to convince the provinces to show themselves team players and implement a carbon pricing system through a tax or a cap-and-trade system must be understood not only within the framework of cooperative federalism,[36] but also within a context where the imposition of carbon pricing by the federal government is complicated by the search for a solid constitutional basis on which the federal Parliament can establish its authority.[37] The difficulty of constitutionally incorporating the federal carbon tax into Canadian law undoubtedly explains why the federal government has announced that the proceeds of the federal carbon tax, for the provinces that do not adopt it, will revert entirely to the provinces.[38] Politically, it is true, it is difficult to make the Canadian oil-producing provinces accept this tax, as Professor Jean-Maurice Arbor explains:

> According to a report written for the Canadian government, it is recognized that carbon pricing can have significant negative repercussions for companies exposed very strongly to competition on national or international markets and push some of them to transfer their production and their investments abroad, where there is no such carbon pricing (a phenomenon called carbon leakage; according to the same working group, "establishing a price . . ."). The question is important in the Canada-US reports. This is the reason, it seems, for the federal government to impose performance or intensity standards on these companies for their various production activities, instead of a carbon tax.[39]

Parliament claimed its constitutional jurisdiction as the foundation for the *Greenhouse Gas Pollution Pricing Act*,[40] which came into force on January 1, 2019. This law, which imposes a price on polluting emissions from several

business sectors in provinces that do not have carbon pricing measures, was challenged in Canadian courts by the governments of the provinces of Alberta, Manitoba, Ontario, and Saskatchewan.[41]

The central government could have adopted its carbon tax through its constitutional jurisdiction over criminal matters, by providing for prohibitions with penalties. The Supreme Court had already ruled, in *R v. Hydro-Québec*, that this head of jurisdiction was less dangerous than the theory of national interest, that the responsibility of the human being towards the environment was a fundamental value of our society, that Parliament can use its criminal law power to highlight this value, "and that criminal law must be able to adapt to and protect our new values."[42]

Indeed, the other three constitutional options of federal taxation, national urgency, and national concern[43] do not seem to be able to establish the legality of the federal tax. In fact, the federal government can tax only to create revenues;[44] in the case of an emergency, it can only legislate provisionally, and as far as the national interest is concerned, the Supreme Court had already recognized that this is a theory which is dangerous for federal balance.[45] However, the federal government successfully argued the national interest before the courts of Ontario and Saskatchewan. The Saskatchewan Court of Appeal, majority (two-judges-to-one), held that the imposition of minimum national price standards for GHG emissions provides the flexibility necessary so that the carbon tax respects the contours of the national interest theory. It held that there was no constitutional requirement that federal laws should apply uniformly across the country and that the levies imposed by federal law were not taxes, rather they were many regulatory measures at the heart of the federal environmental regulations.[46] The majority of the Ontario Court of Appeal held that the environment is "an area of shared jurisdiction," that the "essence" of the federal regulations on the federal carbon tax was "the establishment of minimum national GHG pricing standards to reduce GHG emissions," and that following the criteria set out in *Crown Zellerbach*, the establishment of such minimum standards was a single, distinct, and indivisible matter of power under national interest based on "peace, order and good government." According to the Court, "no single province or group of provinces acting together can establish minimum national standards to reduce GHG emissions. Their efforts may be undermined by the action or inaction of other provinces. Therefore, the reduction of GHG emissions cannot be managed in a fragmentary fashion. It must be addressed as a single issue to ensure

its effectiveness. This is exactly what the establishment of minimum national standards do."[47]

The two judgments contain dissents. That of Justices Ottenbreit and Caldwell of the Saskatchewan Court of Appeal relied on the lack of distinctiveness of the Federal Act to find its constitutional validity in the national interest, and on the fact that GHG emissions are a sub-category of air pollutants previously considered to be a local issue under provincial jurisdiction. As for Justice Huscroft, the sole dissenter from the Ontario Court of Appeal, she concluded that the federal minimum standards were "floating" and left the question too vague to be circumscribed appropriately in order to be classified as a question of national interest. Regarding the majority decision that a national standard was necessary to regulate GHGs, she instead believed that the inaction of a single province was indicative not of a provincial inability to regulate GHG emissions but rather of a political disagreement.[48]

These two dissents, along with the decision of the Alberta Court of Appeal, which, in a four-to-one majority decision, did not find that the national interest was a valid constitutional basis for the federal tax, were brought before the Supreme Court, which decided this delicate constitutional question on March 25, 2021. The Supreme Court majority decided that, "global warming causes harm beyond provincial boundaries and that it is a matter of national concern under the '*peace, order and good government*' clause of the Constitution."[49]

We must remember that as soon as a subject is qualified as being of national interest, Parliament has exclusive and absolute jurisdiction to legislate on this matter, including its provincial aspects.[50] If the federal government only prescribes a minimum standard allowing the provinces to act themselves through legislative initiatives, the balance of federalism can be preserved. The issue of the legal debate here is obviously the preservation of the constitutional division of powers in the fight against climate change.

APPROVAL OF NEW OR EXPANDED PIPELINES

As global conventional oil reserves eventually reach their peak, Alberta's oil sands resources become increasingly important globally. Alberta's oil sands contain more than 1.65 trillion barrels of bitumen, an oil substance mixed with sand.[51]

The US economy is heavily dependent on oil imports and the US is clearly the largest consumer of Canadian oil. Demand in other major countries, such

as China and India, is growing even faster. The demand for fuel from Canada's oil sands will therefore exist for an indeterminate period of time; and, as analyses predict, the value of the resource will only increase over time as global oil supply becomes scarce. Many countries are indeed concerned about the security of their energy supplies. This is not the case for Canada, which will be able to meet its domestic needs for a long period of time. However, the picture is more complex when you consider the Canadian NDC and the necessary energy transition to achieve it.

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

Canada's pipeline system can move about 4.6 million barrels per day, which was the average production for 2015.[52] However, the Canadian Association of Petroleum Producers (CAPP) expects oil production to increase by 28 percent over the next fifteen years, from 4.6 million barrels per day in 2015 to 5.9 million barrels per day by 2035.[53] These increases will exceed the capacity of the existing pipeline system. "The need to build new energy infrastructure within Canada is clearly urgent," said Tim McMillan of CAPP, adding that this would allow Canada to prosper economically and better meet the world's energy needs.[54]

The federal government—under both Conservatives and Liberal leaderships—has approved pipeline projects in recent years. As noted above, in November 2016, the Canadian government authorized the expansion of the US Kinder Morgan Trans Mountain pipeline and approved the replacement of Alberta's Enbridge Line 3 pipeline. It also approved the Pacific NorthWest LNG project in northern British Columbia, which has an estimated climate impact of between 8.8 and 9.3 million tonnes of GHG emissions per year.[55]

Northern Gateway Pipeline Project

The Northern Gateway project was a 1,177 kilometre twin pipeline from Bruderheim, Alberta to Kitimat, British Columbia, that would have transported an average of 525,000 barrels of oil per day to supply international markets. In June 2014, the government of Stephen Harper approved this $7.9 billion project, subject to 209 conditions. These conditions were necessary as the pipeline would have crossed the Great Bear Rainforest and 1000 water bodies in Indigenous territories.

The Federal Court of Appeal overturned the Canadian government's approval of the Northern Gateway project in June 2016, noting the lack of government consultation with West Coast First Nations. The Court ruled that consultation with First Nations, who had been denouncing the project for several years, was simply "inadequate." The constitutional obligation of the federal and provincial Crown to consult Indigenous peoples stems from section 35 of the *Constitution Act, 1982*, which is part of the Canadian Constitution and which confirms the existing rights of the Indigenous peoples of Canada, be they land claims or claims of Aboriginal rights to fish or hunt.

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

- The purpose of these consultations is to preserve the honour of the Crown and to reconcile Aboriginal and Crown interests;
- These consultations must be held even when only "claims" of Aboriginal rights and title are involved; and
- The consultation process should not be conducted by a third party (e.g. proponent, although they are often actively involved).

This obligation may also involve, "where appropriate," accommodating the concerns of Aboriginal peoples, such as changing a route to minimize its impact on traditional activities or imposing strict environmental conditions. The Supreme Court of Canada has clarified that the scope of the duty to consult and accommodate Indigenous peoples varies depending on the circumstances of each case, the merits of the claim, and the seriousness of the potential or apprehended harm. For example, where the claim is "based on sound prima facie evidence, where the right and potential harm are of high

importance to Aboriginal people and where the risk of uncompensated harm is high," it may be incumbent upon the Crown to conduct extensive consultations with the parties involved.[56]

With respect to the Northern Gateway Pipeline Project, the Federal Court of Appeal applied these principles and concluded that the federal government's decision to allow this pipeline was illegal because it had not been made following proper consultation with their nations:

> [8] When considering whether that duty has been fulfilled—i.e., the adequacy of consultation—we are not to insist on a standard of perfection; rather, only reasonable satisfaction is required.
>
> [325] We have applied the Supreme Court's authorities on the duty to consult to the uncontested evidence before us. We conclude that Canada offered only a brief, hurried and inadequate opportunity in Phase IV—a critical part of Canada's consultation framework—to exchange and discuss information and to dialogue.
>
> The inadequacies—more than just a handful and more than mere imperfections—left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.
>
> [332] Overall, bearing in mind that only reasonable fulfilment of the duty to consult is required, we conclude that in Phase IV of the consultation process—including the execution of the Governor in Council's role at the end of Phase IV—Canada fell short of the mark.[57]

Subsequently, the TransCanada Energy East pipeline, which was to proceed and was also challenged by Indigenous groups in eastern Canada, was also abandoned by TransCanada.[58] Energy East was a 4,500-kilometre pipeline project that would have transported about 1.1 million barrels of oil per day from Alberta and Saskatchewan to refineries in eastern Canada. Some have said that the abandonment of this pipeline was a business decision by

TransCanada because it had already secured enough new pipelines in western Canada to reach international markets, especially in Asia.[59] Nevertheless, this corporate decision has certainly also been influenced by potential Aboriginal challenges, and by the fact that the new pipeline approval process must take into account the GHG emissions generated by oil sands extraction from the outset, and not just emissions caused by pipeline transportation itself.[60]

Authorization for Trans Mountain Pipeline Expansion

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

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

To put an end to the controversy surrounding this project, and in the face of the risk that it might end up as it eventually did in the action recently brought by British Columbia, Ottawa announced on May 29, 2018, that the project was in the national interest and that the federal government would purchase the pipeline expansion project from the Texas firm Kinder Morgan by August 2018. Canada decided to provide a loan to Kinder Morgan to begin work immediately.[61]

However, on August 30, 2018, the Federal Court of Appeal ruled that the government representatives had not conducted reasonable consultations based on a genuine dialogue with the Indigenous applicants and that the Governor in Council's authorization rested upon a flawed consultation framework, notably because the NEB's report did not address all the issues requiring consultations.[62] For example, the NEB had not reached a conclusion on the nature and scope of the established or asserted Aboriginal rights

(including title),[63] that neither Trans Mountain nor the NEB had assessed the effects of the project on each affected Aboriginal group,[64] nor had the assessment of the potential effects of the project on freshwater fisheries been considered. The paragraphs following in the judgment are relevant in this regard:

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

as a result of these impediments the opportunity for meaningful dialogue was frustrated.

The jurisprudence of the Supreme Court on the duty to consult is clear. The Indigenous applicants were entitled to a dialogue that demonstrated that Canada not only heard but also gave serious consideration to the specific and real concerns the Indigenous applicants put to Canada, gave serious consideration to proposed accommodation measures, and explained how the concerns of the Indigenous applicants impacted Canada's decision to approve the Project.

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

(i) The need for meaningful two-way dialogue

[564] As a matter of well-established law, meaningful dialogue is a prerequisite for reasonable consultation. As explained above at paragraphs 499 to 501, meaningful consultation is not simply a process of exchanging information. Where, as in this case, deep consultation is required, a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must be prepared to make changes to its proposed actions based on information and insight obtained through consultation.[65]

Following this ruling, the premier of Alberta announced that the province was withdrawing from its commitment to impose an increase in its Alberta carbon tax to meet the price of the federal carbon tax.[66] The central government's decision to purchase the project aimed to end the jurisdictional wrangling between the different levels of government on this issue. Having not decided to appeal the judgment to the Supreme Court of Canada, the federal government complied with the requirements of this judgment by resuming the process to respect the framework for consultations, so as to meet, this time, the constitutional requirements for Indigenous consultation interpreted by the Court in this judgment. This bet was won if we believe the Federal Court of Appeal, which decided that the additional consultations surrounding the Trans Mountain project had been adequate, conducted in good faith, and conducted following discussions to try to understand and

take into account the main concerns of the First Nations and to consider and consent to accommodation measures in certain cases. The Federal Court of Appeal recalled that case law stated that although Indigenous peoples can express their opposition to a project, they cannot use the consultation process as a tactic to try to veto it.[67] The Supreme Court of Canada refused to hear the First Nations' appeal. This legal debate is therefore over. In a unanimous decision, the Supreme Court also dismissed British Columbia's claim to have recognition that it had the right to limit the transportation of petroleum on its territory, ruling that the federal government has sole jurisdiction to regulate interprovincial transportation of petroleum.[68]

Conclusion

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

> Internationally, Canada is a small economy. Its GDP represents just 1.76% of world output. Nevertheless, it ranks among the world's leading energy producers, sixth with 3.1% of global production, behind China, the United States, Russia, Saudi Arabia and India.
>
> Thanks to the diversity of its natural resources, Canada is able to position itself as a leader in the production of many forms of energy:
>
> Oil: In 2011, Canada was the sixth-largest black-gold producer in the world, producing 169 megatonnes (Mt) of crude oil or 4.2% of world production. It was overtaken by Saudi Arabia, Russia, the United States, Iran and China. In the same year, it was also the 8th largest producer of petroleum products with 2.6% of world production.[69]

In this context, it is not surprising that in March 2017, a report from the Canadian Senate shows that Canada's NDC cannot be reached without a gradual decline in oil production and a consequent change in the way energy is produced and consumed in Canada.[70] An energy transition master plan would be required to meet Canada's 2030 emission reduction target under its

NDC. Our political leaders know this, but the economic forces and the limited role of non-renewable resource development in the Canadian economy hold them back. This energy transition is nevertheless necessary, even if it must be done gradually. Some energy policy experts use Germany and Denmark as examples, whose energy consumption has declined significantly since 1990, but without hindering their economic growth.[71] Canada uses twice as much energy to produce the same growth.[72] Germany's emissions fell in all sectors, and globally they fell by 28 percent between 1990 and 2014. In Canada, over the same period, emissions increased by 20 percent in all sectors, except in the energy-producing industries, and our emissions increased by 37 percent in the transportation sector.[73]

Achieving this energy transition requires realizing the full "technical-economic potential of Canada,"[74] by investing public funds in renewable energy and public transit, by "developing Canada on existing railways"[75] and by increasing the insulation and renovation of buildings in an energy-efficient manner as quickly as possible. Without government decisions in the direction of this energy and ecological transition, climate trials such as those brought by young people in *Environnement Jeunesse*[76] or *La Rose*[77] will multiply, thereby imitating the climate trials around the world,[78] hundreds of which are taking place among our neighbours, the Americans, who have become the world champions of shale oil, in an attempt to influence federal and provincial policies in the country.

NOTES

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