Lawyers' Rights Watch Canada

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Canada's failure to reduce emissions: Unlawful or above the law?

By Gail Davidson and Rohan Shah

No matter how you look at it, Canada is a climate change laggard. Carbon dioxide emissions—the largest contributor to global warming—are now 18% greater than they were in 1990. The pledge Canada made following the international meeting of nations in Copenhagen in 2009—a 17% reduction in greenhouse gas (GHG) emissions from 2005 levels by 2020—was not only weak, but is not being met.

As if this wasn't enough, Canada in 2012 became the only one of 195 countries to withdraw from the Kyoto Protocol, the emissions agreement made under the United Nations Framework Convention on Climate Change (UNFCCC), to which Canada remains a party. In fact, by 2013, Canada's carbon emissions were only 3% lower than they were in 2005. This translates into an average yearly reduction rate of 0.38%, far below the average rate of 0.88% required to meet our Copenhagen target.

Year	GHG (*kt CO_2 eq*)	Change since 1990 (*%*)	Kyoto target (% change since 1990 by 2012)	Kyoto shortfall (%)
2013	726,000	18.43		
2012	715,000	16.64	-6	22.64
2011	709,000	15.66		
2010	707,000	15.33		
2005	748,000	22.02		
2000	745,000	21.53		
1995	665,000	8.48		
1990	613,000	N/A		

The Canadian government's stance ahead of the upcoming Paris Conference of the Parties (where the international community will create a successor to the Kyoto Protocol) is predictably disappointing. On May 15, Environment Minister Leona Aglukkaq announced that Canada would commit to a reduction in GHG emissions of 30% below 2005 levels by 2030. This equates to around a 14% reduction compared with 1990 levels—the weakest pledge among G7 countries, and less than what is deemed necessary by the Intergovernmental Panel on Climate Change (IPCC) to avoid the catastrophic

consequences of global warming, namely a reduction of 25-40% below 1990 levels by 2020.

The IPCC, a UN scientific body tasked with supporting the United Nations Framework Convention on Climate Change (UNFCCC) by reviewing and assessing climate change data, has concluded that a temperature increase of more than 2°C over pre-industrial (1850) levels will cause "severe, pervasive and irreversible impacts on all the world's people and ecosystems." The IPCC predicts that if extensive reduction measures are not taken now, meeting the 2°C target will have become impossible by 2030. That a 25-40% reduction by 2020 will create only a 50% chance of avoiding catastrophic global warming makes Canada's weak pledge even more damning. And our Copenhagen target, which is not being met, would only have reduced our GHG emissions by a paltry 2.5% during this same period.

Canada's climate profile: key dates	
1992	Canada signs and ratifies the United Nations Framework Convention on Climate Change (UNFCCC).
1994	The UNFCCC enters into force in Canada.
1998	Canada signs the Kyoto Protocol.
2005	The Kyoto Protocol enters into force in Canada. It commits Canada to reducing GHG emissions to an average of 6% below 1990 levels between 2008 and 2012.
2010	Under the 2009 Copenhagen Accord, Canada commits to reducing GHG emissions by 17% below 2005 levels by 2020. This target, to be aligned with the final economy-wide emissions target of the U.S., is in stark contrast with the majority of other countries, which use 1990 as the reference year.
2012	Canada formally withdraws from the Kyoto Protocol.
2015	In advance of the Paris Conference of the Parties in November, Canada announces that it will commit to a reduction in GHG emissions of 30% below 2005 levels by 2030.

Canada's failure to meet targets considered necessary to avoid global disaster is extremely discouraging, but could it also be against the law? A recent international victory for climate litigation raises this interesting possibility.

The *Urgenda* decision

The June 2015 decision of the District Court of The Hague in *Urgenda v. The Netherlands* may provide some hope. The Urgenda Foundation, a non-governmental organization, submitted that the Netherlands' policy to reduce GHG and CO_2 emissions to 17% below 1990 emission levels by 2020 did not fulfil the country's domestic and international law obligations. It further submitted that this policy contravened Holland's

duty of care arising from the international no-harm principle, the UNFCCC, and the right to life guaranteed by the European Convention on Human Rights.

The Dutch court accepted that anthropogenic GHG emissions are causing climate change. Importantly, it accepted as certain the IPCC's finding that emissions are increasing, and concurred with the IPCC that a global temperature increase of more than 2°C would lead to an extremely dangerous situation for humanity and the living environment. It therefore concluded that a reduction in the current rate of GHG emissions was necessary to avoid catastrophic consequences.

The court found that "the state is obliged to take measures in its own territory to prevent dangerous climate change" and that "the state has acted negligently and therefore unlawfully towards Urgenda by starting from a reduction target for 2020 of less than 25% compared to the year 1990."

In asserting that the Netherlands was obligated to take measures immediately, the court accepted that current emissions reduction targets are insufficient to achieve the 2°C IPCC target, and that without immediate and far-reaching remedial measures achieving this goal will be impossible by 2030.

In other words, the court held that states are responsible for the well-being of their citizens, and it is unlawful for them to pursue mitigation policies not in line with those mandated by the IPCC.

To arrive at this decision, the court found that because of the global nature of the hazard, and the necessity of shared management to prevent impairment of the living climate, the state's discretionary powers under the Dutch constitution (Article 21) did not prevent judicial review. To then determine and balance the state's discretionary power and its duty of care toward its citizens, the court looked to the UNFCCC (Article 3) duties regarding fairness, precautionary measures and sustainability. Two key considerations flowed from the fairness principle, according to the court: the need to protect future generations from being disproportionally burdened by the consequences of global warming, and the recognition that industrialized nations primarily responsible for global warming are best able to combat it.

It was further determined that by becoming a party to the UNFCCC, the Netherlands had accepted a duty to reduce GHG emissions as much as necessary to prevent dangerous climate change. In addition, the court held that governments have a crucial role in enabling countries to transition to more sustainable societies. It therefore concluded that the Netherlands was obligated to make laws that ensured that IPCC emission reduction targets—necessary to preserve a living environment—were met.

Looking to the courts in Canada?

To date, legal obligations arising from the UNFCC, uncontroverted science, and the entreaties of experts have not been able to move the government of Canada to fulfill its obligation to reduce GHG emissions to a level sufficient to create a 50% chance of

avoiding catastrophic climate change. Even ridicule has proven ineffective: in 2013, Canada received, for the fifth year in a row, the Colossal Fossil award given annually by 700 NGOs to the country that has done the most to inhibit global warming solutions.

Past attempts to have courts restrain Canada's recklessness were not successful. In December 2005, Sheila Watt-Cloutier, with the support of the Inuit Circumpolar Conference and many affected individuals, sought relief from the Inter-American Commission on Human Rights for violations resulting from global warming caused by the United States and Canada. The commission declined to consider the petition on the basis that it did not contain sufficient information to make a determination.

In 2008, the Federal Court of Canada in *Friends of the Earth v Canada (Governor in Council)* refused to review the executive's actions regarding its Kyoto commitments, citing accountability arrangements existing in the Kyoto Protocol Implementation Act, a law passed to keep the government on track with its climate change commitments. Then, in 2012, the Federal Court in *Turp v Canada (Attorney General)* stated that the executive's authority to enter into (and withdraw from) treaties stemmed from the royal prerogative, an ancient source of arbitrary power held by the British monarchy. As such, it concluded that the Kyoto Protocol Implementation Act could not restrict this power and that the courts could not intervene in such cases unless a Charter right was involved.

Although constitutional principles indicate that any prerogative power not specifically preserved by statute was extinguished by the Charter's rule of law provision in 1982 (when Canada gained full legislative independence from the United Kingdom), this issue remains contentious, as demonstrated by both the *Friends* and *Turp* cases. However, such uncertainty doesn't obviate the need to seek a judicial remedy. Indeed, it was conceded in *Fogal v Canada*, another Federal Court case, that the legal issue of the present scope of prerogative powers is "not moot."

Given the severity of the hazard posed by global warming, and the imminent threat posed by Canada's failure to commit to reducing GHG emissions to 25-40% below 1990 levels by 2020, it is critical that the courts be called upon to force Canada to set and achieve IPCC-compliant GHG reduction targets. In any future judicial review case, the executive would be hard-pressed to argue that meeting IPCC targets would slow down the economy: scientific consensus indicates the economy will collapse with environmental degradation and that a transition to a more sustainable society will indeed revive it.

Like the Netherlands, Canada has a legal duty—arising from the Charter, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man—to safeguard the lives and well-being of all people within its territory. Under the UNFCCC, Canada has specific duties to "achieve…stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Canada's GHG emissions reduction policies and performance contravene all of these duties.

The Paris talks

There are high hopes that states attending the 2015 United Nations Climate Change Conference in Paris from November 30 to December 11 will for the first time agree on a legally binding agreement to set and achieve GHG emissions reductions necessary to preserve life as we know it. Any future agreement, especially a legally binding one, is only as strong as its weakest link. Canada's announced commitment may once again undermine global attempts to agree on effective solutions to combat climate change.

A successful legal challenge of Canada's GHG emissions policies and performance may be the only means of protecting our environment and the health of generations to come.

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A longer, footnoted version of this article will be at www.lrwc.org by 1 November 2015.

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