

Why Canada should not withdraw from the Kyoto Protocol

By Nigel Bankes

Rumour\decision commented on:

Canada will withdraw from the Kyoto Protocol

Rumours abound that Canada will withdraw from the Kyoto Protocol later this month. While Canada's Minister of the Environment, Peter Kent, will not confirm these rumours ([Montreal Gazette](#), November 29, 2011) there is reason for thinking that withdrawal is being actively considered if not already decided on (see "[Canada to pull out of Kyoto Protocol next month](#)")?

This post discusses four questions. First, what is the law pertaining to withdrawal from an international environmental agreement (MEA)? Second, why is withdrawal being considered and what other options are available? Third, what might be some of the ramifications of a Canadian withdrawal? And fourth, what is the legal nature of the current commitment: whom does it bind?

1. What is the law pertaining to withdrawal from an international environmental agreement (MEA)?

Article 54 of the [Vienna Convention on the Law of Treaties](#) (VCLT) provides as follows:

Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties after consultation with the other contracting States.

Article 71 further provides that where treaty relations come to an end the termination of those relations:

- (a) releases the parties from any obligation further to perform the treaty;
- (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

Canada is a party to the VCLT.

Article 27 of the Kyoto Protocol provides as follows:

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 from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.
3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from this Protocol.

This is a very common provision in a multilateral environmental agreement (MEA).

While it is a very common provision, it is also very, very unusual for a state to withdraw from such an agreement. Canada has withdrawn from the International Whaling Convention for example and Islamic states have withdrawn from international human rights treaties (and attracted significant criticism for doing so); but, in general, a withdrawal from an MEA is almost unheard of.

In sum, the combination of Article 54 of the VCLT and Article 27 of the Kyoto Protocol makes it clear that Canada has the liberty to withdraw from the Protocol on the terms prescribed in that article. Article 71 of the VCLT, however, makes it clear that in doing so Canada can avoid *prospective* obligations under the Protocol but that it cannot avoid obligations that have *already accrued*.

If Canada gives notice before the end of December, will it be able to prevent the accrual of the principal obligation that it has as a contracting party under the Protocol? That obligation is the Article 3(1) duty to ensure that its greenhouse gas emissions do not exceed Canada's "annual assigned amount" (AAUs) calculated in accordance with our commitment (minus 6% of 1990 emissions) by the end of the first commitment period which runs from 2008 to 2012 (i.e. the assigned amount - which is an annual figure – multiplied by five for the five years of the first commitment period).

This is the crucial question. There is a strong argument to the effect that a Party's obligation under this provision cannot crystallize before the end of the first commitment period; and if by then Canada is no longer a party then it successfully evades state responsibility for the commitments that it undertook even though those commitments might have induced others to make similar commitments (whether deeper or shallower).

It bears noticing that Canada has already had one encounter with the Kyoto compliance regime on the grounds that it had not established a fully operation national registry system as required by the [Protocol](#).

2. Why is withdrawal being considered and what other options are available?

So why is Canada considering withdrawal from the Protocol? Canada is considering withdrawal because Canada is not even close to meeting its legal obligations under Kyoto Protocol. In fact, according to most reports, we are likely to be emitting well over 30% above our 1990 emission levels by the end of the first commitment period. What other option might be considered? There are at least two. First, Canada could get into compliance and, second, Canada could take its lumps and face the non-compliance system.

Canada could get into compliance

Canada cannot get into compliance at this stage in the game by reducing emissions or by enhancing sinks. It is far too late for that. But Canada could enter the carbon market to buy AAUs from countries that do not need them and certified emission reduction units (CERs) from Clean Development Mechanism projects (offset credits in developing countries based on approved projects that reduce emissions over a baseline or business as usual scenario). This option is not without objections – not only the obvious one of cost (although the state of the world’s economy has depressed carbon prices) but also the objection that Canada would be buying “hot air” in the form of unused AAUs from economies in transition which made, what turned about to be, very shallow commitments when ratifying the Protocol.

Canada could take its lumps and face the non-compliance system.

What would happen if Canada took its lumps and faced the non-compliance system? The result in due course would be a declaration that Canada had failed to meet its commitments under the Kyoto Protocol – assuming that Canada did not engage in massive trading as contemplated above.

But what would be the further consequences of that? The [Kyoto compliance regime](#) (at 92 et seq) suggests a number of possible consequences including denial of access to the so-called Kyoto flexibility mechanisms. But perhaps the most concrete implication is that if there is a second commitment period (i.e. post 2012) there will be a “Deduction from the Party’s assigned amount of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions.”

But what if there is no second commitment period? Or what if there is second commitment period but commitments are voluntary as they were in the first round?

In the “no second commitment period” scenario the “sanction” becomes meaningless. However, if Canada remains a party to the Protocol it will still be subject to the compliance process and will therefore be subject to naming and shaming even if the more concrete sanction has lost its teeth (if it ever had any). Funnily enough, it appears as if it is the prospect of naming and shaming that is pushing the federal government to consider withdrawing from Kyoto. It prefers to be named and shamed for withdrawing rather than named and shamed for failing to meet its obligations.

What about the scenario in which there is a second commitment period? In that case, the smart money suggests that Canada would simply low-ball and come up with a soft, readily achievable commitment which takes account of the 1.3 penalty which must be worked off during the second commitment period. This is no doubt cynical - but is it a *worse* outcome for the international legal community (and any sense of international rule of law) - than the withdrawal scenario? We can now turn to consider the implications of a Canadian Kyoto withdrawal.

3. What might be some of the ramifications of a Canadian withdrawal?

In order to consider the implications of a Canadian withdrawal we need to think about the implications of this not just for the climate change regime but for international environmental law generally and for other MEAs. What messages does Canada send if it were to withdraw? I think that Canada sends three main messages.

The first message is that Canada cannot be trusted to stand by its bargain, especially if the bargain involves deep commitments (i.e. a commitment to do something that we are not already obliged to do by domestic law) rather than shallow commitments (commitments already enshrined in domestic law). Canada will find it difficult to induce other parties to make concessions in return for a proposed concession from Canada. There is no reason to think that other states will ring fence Kyoto as a special bargain and not expect Canada to be equally evasive in other areas of international relations. Why should they? The only thing that was special about Kyoto is that it involved a deep commitment with an economic impact. Other agreements such as trade agreements may demand similarly deep commitments. In sum Canada's message is that when the going gets tough, the tough may get going (SAS motto), but Canada will opt to free ride.

Second, it may make it more difficult for Canada to take the lead on agreements that matter to Canadians. Take, for example, a case like the [Stockholm Convention on Persistent Organic Pollutants](#). That was an agreement that Canada took a leading role in developing because Canada believed that persistent organic pollutants generated or applied in equatorial areas were being carried by long range atmospheric transport and then deposited in the colder higher latitudes causing human health concerns in arctic countries. By and large, the commitments of developed countries under the POPs Convention were shallow (in many cases the POPs in question were already banned in developed countries), but deeper commitments were demanded from developing countries (a classical case of exporting environmental values) in return for the promise of financial and technical commitments. Why should developing countries believe that Canada will deliver on its commitments? Why should developing countries agree to help Canada achieve its objectives if Canada is reluctant to live up to its Kyoto obligations and seeks to evade and avoid those obligations in the most cynical manner possible – i.e. right at the time of crystallization?

And third, and related, if Canada withdraws from Kyoto will it not make it politically easier for other states simply to withdraw from other Conventions that are no longer convenient to them? As indicated above, withdrawal clauses such as this are very common. Here for example is the withdrawal clause of the POPs Convention:

Article 28(1)

At any time after three years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the depositary.

Canada needs to consider its options very carefully. Remaining a party to the Protocol carries the risk of being shamed for failing to meet a commitment. Withdrawing from the Protocol carries its own shaming risk but it also carries a much more serious risk for the entire international community which is the damage that Canada's withdrawal will do to the multilateral treaty making process. And we all need that process to work in order to deal with the global problems that require collective solutions. Better to be shamed for our laggard behaviour alone than to be shamed for that, *and* the calculated damage that we will inflict on this important law making institution.

4. What is the legal nature of the current commitment: whom does it bind?

And finally, there is a theme in some of pronouncements of the current government that somehow Canada is not responsible for meeting the commitments listed against Canada's name in the Annex to the Protocol because those commitments were the commitments of the previous Liberal administration and not those of the current Harper Administration - and therefore not commitments of the Government of Canada. As a matter law this claim is arrant nonsense. When the executive ratifies an international treaty it does so on behalf of the Government of Canada whatever the form of any subsequent administration. International legal obligations attach to the state and not to a particular administration. Canada is bound by the Kyoto Protocol and has been since the day it entered into force - and as result Canada has an obligation to perform it in good faith (Article 26 of the VCLT).