

November 23, 2020

## **Bill C-12, *Canadian Net-Zero Emissions Accountability Act*: A Preliminary Review**

**By:** David V. Wright

**Matter Commented On:** [Bill C-12](#), *Canadian Net-Zero Emissions Accountability Act*, 2nd Sess, 43rd Parl, 2020 (first reading 19 November 2020)

Just a few days ago, the federal government tabled [Bill C-12](#), *Canadian Net-Zero Emissions Accountability Act*. This post provides a brief overview and preliminary reflections on the proposed law. Overall, the bill represents a significant milestone in Canadian climate policy, a realm that has been plagued by decades of [setting-then-missing emission reduction targets](#). No previous federal government has so explicitly committed to a long-term emissions reduction pathway and milestones, let alone one with numerous accountability and transparency mechanisms. However, for reasons I discuss below, despite being characterized by the government as “binding”, the proposed law features a number of weaknesses and limitations. Further, while tabling this bill is a commendable step (especially if it becomes law), and is the result of many years of hard work and input from environmental organizations, it leaves difficult, long-standing conversations unaddressed.

### **Background**

Canada is one of an increasing number of jurisdictions that have committed to net-zero greenhouse gas (GHG) emissions by 2050, including New Zealand, the United Kingdom, the EU, and Japan (see discussion and list [here](#)). The United States is soon to join this club, given [President-elect Biden’s plan](#) to follow suit. A number of these jurisdictions have taken the further step of legislating this target (see a review of several examples [here](#)). If Bill C-12 becomes law, this will also include Canada. These law and policy steps flow from the recognition that to limit global warming to 1.5°C requires that net human-caused emissions need to reach net-zero by 2050, as underscored and [substantiated by the Intergovernmental Panel on Climate Change](#). The government’s move to legislate this target and put in place a climate accountability statute follows through on [part of the Liberal platform](#) in the fall 2019 federal election. It is also the latest development in a relatively long history on this federal front, one that includes unsuccessful attempts by the NDP in 2006, 2009 and 2011 (description [here](#)), and the [private member’s bill](#) that became the *Kyoto Protocol Implementation Act*, [SC 2007, c 30 \(KPIA\)](#), which was repealed by the Harper Government in 2012. The proposed law is also a significant component of a series of law and policy measures put forward since the Trudeau government’s

first election in 2015, including the [Pan-Canadian Framework](#), the [Greenhouse Gas Pollution Pricing Act](#), [SC 2018, c 12, s 186](#), [reform of the federal major project assessment regime](#) to include climate change requirements (as now detailed in the [Strategic Assessment on Climate Change](#)), signing onto the [Paris Agreement](#), [development of a clean fuel standard](#), and ongoing [direct regulation of GHG emissions](#). At the end of this post I comment on how the proposed climate accountability law takes an important step toward much needed coherence across all these federal measures.

## Overview of Key Features and Requirements

Bill C-12 enshrines in legislation the government's [previously stated commitment](#) to net-zero emissions by 2050. At the core of the proposed regime is the “milestones” requirement that the Minister “set a national greenhouse gas emissions target” every five years beginning in 2030 until 2050 (s 7(1)). In setting those targets, the Minister would have to take into account “the best scientific information available as well as Canada’s international commitments with respect to climate change” (s 8). These targets must also be supported by an emissions reduction plan (s 9), and those plans must contain year-specific targets, a description of key emission reduction measures, descriptions of relevant sectoral strategies, and descriptions of emission reduction strategies for federal operations (s 10(1)). These plans *may* (notably not *must*) include information about measures taken by provinces, as well as Indigenous communities and governments, municipal governments, and the private sector (s 10(3)). In setting the targets and establishing the plans, the Minister would have to provide for input from provincial governments, Indigenous communities and governments, a new advisory body (see below), and “interested persons” (s 13) (as an aside, this seems to be one of the more poorly drafted provisions in the bill, so expect the precise words to change, perhaps including a more inclusive public participation approach not limited to the currently listed groups).

Accountability and transparency mechanisms are then built around this milestone-targets-plans approach. The Minister would, under s 14(1), be required to prepare a “progress report” regarding each milestone year at least two years before the start of that year (i.e. the 2030 milestone year report would be due at the start of 2028). The progress report would have to contain an update on progress toward the target, an update on the specific information required in the plan (as per s 10(1) above), and “any other information... including information on any additional measures that could be taken to increase the probability of achieving the plans greenhouse gas emissions target” (s 14(2)).

The Minister would also have to prepare an “assessment report” in relation to milestone years no later than 30 days after Canada submits its GHG emissions inventory (see this year’s inventory [here](#)) in accordance with obligations under the [United Nations Framework Convention on Climate Change](#) (UNFCCC). This, quite logically, creates a direct link between the new domestic

accountability regime and Canada's reporting requirements under the international climate change regime. The assessment report would have to contain a summary of Canada's GHG inventory for the relevant year, a statement as to whether the target for that year was achieved, and an assessment of how aspects of the plan required under section 10(1) contributed to achieving targets, information "relating to adjustments that could be made to subsequent emission reduction plans" to increase the probability of meeting subsequent targets, and other additional information the Minister considers appropriate (s 15(2)).

The closest the bill comes to creating some kind of compliance mechanism is in section 16, "Failure to achieve target." Under this provision, if the Minister concludes that Canada has missed a target, the Minister must include in the ensuing assessment report "reasons why Canada failed to meet the target" (s 16(a)), a description of actions the "Government of Canada" is taking or will take to address the shortcoming (s 16(b)), and any other information the Minister considers appropriate (s 16(c)). Notably, clause (b) is limited to action by the Government of Canada, presumably because the drafters recognize the federal government's inability to compel provinces to take action to address a missed target, a constraint I discuss further below. In any event and to be clear, there is no real or significant legal penalty for missing a target under this proposed law. (Am I the only one picturing Bart Simpson writing lines on the chalkboard?)

The bill also contains several important institutional components. It would establish a new advisory body "to provide the Minister with advice with respect to achieving net-zero emissions by 2050, including advice respecting measures and sectoral strategies that the Government of Canada could implement to achieve a greenhouse gas emissions target, and any matter referred to it by the Minister, and to conduct engagement activities related to achieving net-zero emissions" (s 20(1)). This body would be comprised of a maximum of fifteen people appointed on renewable terms of up to three years (s 21(2)). The body would be required to submit a report to the Minister annually (s 22(1)), and the Minister would be required to publicly respond to advice provided by the body (s 22(2)).

Perhaps a surprise feature of the bill is an explicit role for the Minister of Finance. That Minister would have to prepare an annual report with respect to "measures that the federal public administration has taken to manage its financial risks and opportunities related to climate change" (s 23).

Finally, Bill C-12 would revive an oversight responsibility of the [federal Commissioner of the Environment and Sustainable Development](#) (CESD), akin to the [role that existed under the repealed KPIA, and similar to the role envisioned in Bill C-215 tabled by the Bloc Québécois earlier this year](#). The CESD, which is housed in the Office of the Auditor General, would be required to "examine and report on the Government of Canada's implementation of the measures aimed at mitigating climate change, including those undertaken to achieve its most recent

greenhouse gas emissions target as identified in the relevant assessment report” (s 24(1), and the CESD report could include recommendations on improving the effectiveness of implementation measures committed to under an emissions reduction plan (s 24(2). To give effect to this CESD role, Bill C-12 includes a consequential amendment to s 23(2) of the *Auditor General Act*, [RSA 1985, c A-17](#) (s 28).

If nothing else, expect this law to be good for the pulp and paper sector because of all the plans, assessments and reports it requires.

## **Preliminary Reflections**

### ***The Tie That Doesn't Bind?***

Despite the government characterizing this proposed law as “[binding](#)”, that concept is distracting in this context. If passed, this act would certainly enshrine the 2050 net-zero target in legislation and create all the above-described target-setting, plan-making, and report-writing obligations. The current government would be obliged to comply with all this. However, the principle of parliamentary sovereignty, as reflected in section 42(1) of the federal [Interpretation Act](#), [RSC 1985, c I-21](#), dictates that parliaments of tomorrow have the power to repeal and amend any act of a previous parliament. Put another way, the government of today cannot bind the government of tomorrow when it comes to climate change plans and targets, even if they are legislated. This is a basic feature of Canada’s democratic system as inherited from the United Kingdom. One need only look to the Harper government’s repeal of the *Canadian Environmental Assessment Act*, [SC 1992, c 37](#) and replacement with the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19, s 52](#), and then the Trudeau government’s repeal of that act and replacement with the *Impact Assessment Act*, [SC 2019, c 28, s 1](#) (*IAA*) to see this power at work in the environmental law realm. Having said this, Bill C-12 could be seen as an attempt to politically or morally bind a future government to setting and achieving GHG emission reduction targets. Subject to shifts in public opinion, the regime that Bill C-12 would put in place would make missing targets a highly visible and uncomfortable event, and repealing of the act would also be a high-profile and potentially unpopular move.

### ***The Provinces That Are Never Bound?***

Perhaps unsurprisingly, Bill C-12 does not include any explicit requirements for provinces, nor does it bind provinces in any way. Rather, it only includes the above-mentioned nods to the provincial spheres whereby a federal emissions reduction plan under section 10 *may* include information on initiatives taken by provinces, and the Minister must provide provincial governments with an opportunity to make submissions during the process of setting or amending emissions targets and emission reduction plans (s 13). For better or worse, in Canada’s federalist system this is about as far as a federal climate accountability statute can go. The federal

government simply does not possess plenary power with respect to GHG emission reductions. While the federal government does have ample jurisdiction to legislate with respect to greenhouse gas emissions (see this [excellent analysis](#) by Dr. Nathalie Chalifour), as seen in the federal carbon pricing regime, as well as in [regulations](#) under the *Canadian Environmental Protection Act, 1999*, [SC 1999, c 23](#) (e.g. coal-fired generation of electricity regulations, renewable fuels regulation), it has a limited constitutional basis to bind provinces to specific climate change plans and measures. Having said this, the forthcoming opinion of the Supreme Court of Canada regarding the [GGPPA reference cases](#) and federal and provincial jurisdiction over GHGs is likely to be released in time for new jurisdictional clarity to inform revisions to the bill. In any event, the stated (relatively modest) purpose of Bill C-12 is to require the setting of targets and “to promote transparency and accountability in relation to achieving those targets”, not to create a top-down rigid decarbonization pathway.

### ***No Budget, Nor Pathway***

What may be disappointing to some, but likely not surprising to many, is the lack of detail in Bill C-12 with respect to *how* the emission reduction targets will be achieved. There is, for example, no mention of carbon budgets or decarbonization pathways. While there are some explicit provisions with respect to what emission reduction plans must include (s 10, summarized above), the approach is rather barebones, and it stands in stark contrast to the very detailed and prescriptive carbon-budgeting approach in the [UK’s legislated pathway to 2050](#). Further to my above point, however, the UK enjoys the luxury of being a unitary state that does not have to contend with the jurisdictional and political complexities of federalism.

In many ways, Bill C-12 is an output from a relatively easy conversation that Ottawa has had with itself: What can we say that we will do? What can we say about how we are going to do it? Who can we get to help us do it? What will we do to ourselves if we don’t do it? However, the long-standing, exceedingly more difficult conversation that needs to happen for Canada to enjoy a legally and politically stable pathway way to achieve targets is between the federal and provincial governments (and there are extremely important conversations that need to happen with Indigenous communities and governments as well, and with territorial governments and municipalities). It seems that by tabling Bill C-12 in its current form the federal government is recognizing that a top-down, paternalistic approach to dictating carbon budgets and decarbonization pathways would be unwise, and likely legally untenable. Rather, similar to developments in the international climate regime leading up to the Paris Agreement, federal and provincial governments need to finally have difficult discussions about who is going to do what between now and 2050. This has been an elephant in the federal-provincial-territorial room for literally decades now. While Bill C-12 creates laudable transparency and accountability mechanisms, it is no substitute for the substantive discussions about actual emission reductions by specific jurisdictions. One model, as identified by [Professor Nigel Bankes on Twitter](#), is the

European Union Burden Sharing Agreement, which redistributes the overarching EU reduction target among the member states (see a summary [here](#)).

### ***Non-Justiciable?***

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). It was also relevant that *KPIA* was brought in as a private member's bill and did not have support of the Harper government at the time. So an area beyond the scope of this short post but in need of further examination as Bill C-12 progresses beyond first reading is the extent to which parliament (and those influencing revisions to the bill) actually wants the issue of meeting and missing targets and putting in place associated plans to be justiciable, or whether the preference is to have accountability fall primarily to parliamentary processes. Revisions to the bill could take it in either direction (for now, for consideration of a similar justiciability point but in a different sphere, see this [post](#) by my colleague Professor Nigel Bankes regarding provisions in Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, [1st Sess, 42nd Parl, 2015](#)). In short, to the extent that Bill C-12 takes a similar approach as *KPIA*, the prospect of a court making a similar ruling on non-justiciability is foreseeable.

### ***Law and Policy Coherence Emerging?***

As I've said in previous blogs ([here](#), [here](#) and [here](#)), the federal government is in need of more coherence across its climate change laws, policies and measures. From my perspective, Bill C-12 is a step in the right direction on this front. Notwithstanding above comments about thin detail, the bill creates a framework for the federal government to work with other governments in the federation to at long last explicitly map out the route from today to 2050. It is an important piece of the broader climate action framework, but not a sufficient piece that will magically set and keep everything on track. Rather, the hardest work is yet to come. While it was no surprise that Bill C-12 includes only the 'where', not the 'what' and 'how', the latter must now be addressed in a formal, long-term way.

At a more detailed level, there are several promising features in the bill that set up linkages to support better law and policy coherence. First, the bill creates a direct link between international climate change reporting requirements and the domestic regime (see above point about assessment reports and national inventories). That is, under the international system, Canada is already obliged to submit and report on GHG inventories (see [this example](#)) and progress toward international climate change commitments (see [this example](#)), so Bill C-12 would in many ways just make this more clearly an obligation under domestic law as well. Second, as flagged by my colleague [Professor Sharon Mascher on Twitter](#), the bill potentially creates a link between the milestone targets and the recently finalized (but evergreen) [Strategic Assessment on Climate Change](#) (SACC) under the new federal Impact Assessment regime. The SACC directs project proponents to submit a “credible plan” for how the project will achieve net-zero emissions by 2050, and that plan “should describe emissions reductions at specified intervals up to 2050.” So, it is foreseeable that proponents will work to present a picture that is consistent with the milestone targets (and perhaps the SACC will be updated again to explicitly direct proponents to do so, as suggested by Professor Mascher). Further, the milestone targets required under Bill C-12 would presumably become “commitments in respect of climate change” which would have to be taken into account in the assessment and decision-making phases under the new federal assessment regime (sections 22 and 63 of the *IAA*, respectively). Third, and at the risk of trying to tie too many threads together in a generous manner, Bill C-12 in some ways resembles a centrepiece (soft as it may be) that helps Canadians see how all federal climate initiatives relate to each other. At present, it is difficult to get a clear picture of everything Canada is doing on the climate front. One could look at the Pan-Canadian Framework or at submissions to the UNFCCC to get a sense of things, but Bill C-12 would require a routinely updated and comprehensive view of what is going on and how it’s going. Granted, it may be hard to get a full sense of provincial measures, but the stage would be set to cooperate on this, and the CESD may be in a position to again cooperate with provincial auditors general and take stock (as done impressively [here](#)).

Finally, this emerging coherence is coming at the right time. Canada’s economy remains intimately tied to the United States, but for the past four years Canada has had to essentially go it alone on climate change policy (except for a number of cross-border sub-national arrangements). With the Biden election win, what Canada has been up to at the federal level since 2015 makes much more sense. The shared long-term objective of net-zero emissions by 2050 is the first of what are likely to be a number of Canada-US (re)alignment steps on climate policy in coming months and years. Having a clear, coherent picture of where Canada is going (and how?) will likely make it easier for the federal government and the Biden Administration to identify areas for sensible alignment and differences.

## Conclusions

Bill C-12 represents a significant step in federal climate change law. The bill includes a number of features and accountability mechanisms that could significantly contribute to keeping Canada on track to achieve long-term emission reduction targets. However, as described above, the proposed regime also has weaknesses, not the least of which are a very soft compliance mechanism, potentially limited recourse to the courts, and constraints on influencing action by provinces. What is really needed is a detailed emissions reduction roadmap that has buy-in from all provinces for the long-term. Hard as it is to hear, this means the most difficult conversations are yet to come. But with the United States soon pulling in the same climate policy direction and global commodity markets tempering emissions growth expectations from fossil fuel rich provinces like Alberta, and with widening recognition of western economic diversification imperatives, there is reason to believe the long Sisyphean phase of Canadian climate policy and politics is over. There is potential to roll forward, aided by milestones but hampered by political hazards.

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This post may be cited as: David V. Wright, “Bill C-12, *Canadian Net-Zero Emissions Accountability Act*: A Preliminary Review” (November 23, 2020), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2020/11/Blog\\_DVW\\_Bill\\_C12.pdf](http://ablawg.ca/wp-content/uploads/2020/11/Blog_DVW_Bill_C12.pdf)

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