

CANADIAN *NET-ZERO EMISSIONS ACCOUNTABILITY ACT*: A BRIDGE OVER THE IMPLEMENTATION GAP?

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Canadian climate change law and policy has suffered from an implementation gap for decades. Since the 1980s, Canada has been setting and then failing to achieve greenhouse gas emissions reduction targets. In this context, the federal government recently enacted the Net Zero Emissions Accountability Act (NZEAA), a step that holds the potential to reverse a trend of unimplemented commitments. The purpose of the NZEAA is to bridge the gap through a transparency and accountability framework that guides and drives implementation of existing and forthcoming federal climate change law and policy. However, the specific features, weaknesses, and implications of the NZEAA remain not well understood. Overall, it remains an open question whether the NZEAA will actually provide a bridge across the gap. This article explores that question, presenting the basics of the new law, analyzing what it means in practical terms for Canadian climate change law and policy now and into the future, and then examining weaknesses, some of which may inhibit NZEAA from having its intended impacts. The article concludes by putting forward several overarching reflections and commenting on early signs that the plan is at least beginning to bridge the implementation gap, including through the first federal Emissions Reduction Plan under the NZEAA.

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Part 1: Introduction

In June 2021, as an unprecedented “heat dome” fueled wildfires across North America, the new federal *Canadian Net-Zero Emissions Accountability Act* received royal assent.¹ With this step, Canada became one of several nations around the world that have enacted climate change accountability legislation. Overall, the new *Act* represents a significant milestone in Canadian climate law and policy. No previous federal government has so explicitly committed to a long-term emissions reduction pathway and milestones, let alone a plan with numerous accountability and transparency mechanisms. This is important because governments have been plagued by decades of setting, then missing, emission reduction targets.²

Unachieved climate change commitments in Canada represent a stark example of the “implementation gap” that plagues environmental law more broadly.³ That is, environmental laws that appear strong on paper often do not achieve stated outcomes in practice.⁴ For example, despite significant expansion of domestic and international environmental law around the world, global biodiversity continues to be in decline.⁵ Similarly, despite laws aimed at managing marine fisheries and fish habitat, fish stocks around the world are in decline.⁶ In the climate change realm specifically, this type of gap has been referred to as the “emissions gap”, meaning the

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¹ *Net Zero Emissions Accountability Act*, SC 2021, c 22 [NZEAA].

² Office of the Auditor General of Canada (OAG), *Perspectives on Climate Change Action in Canada—A Collaborative Report from Auditors General—March 2018* (Ottawa: Office of the Auditor General of Canada, 2018), online: <https://www.oag-bvg.gc.ca/internet/English/parl_otp_201803_e_42883.html> [<https://perma.cc/VUR9-R8U7>].

³ Gregory Rose, “Gaps in the Implementation of Environmental Law at the National, Regional and Global Level” (2011) University of Wollongong, Faculty of Law, Humanities and the Arts – Papers, online: *University of Wollongong* <<https://ro.uow.edu.au/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2684&context=lhapapers>>. See also Daniel Farber, “The Implementation Gap in Environmental Law” (2016) 16:3 J Korean L.

⁴ *Ibid.*

⁵ United Nations Environment Programme (UNEP), *Global Environment Outlook – GEO-6: Healthy Planet, Healthy People* (04 March 2019), online: <www.unenvironment.org/resources/global-environment-outlook-6> [<https://perma.cc/5LZY-8V26>].

⁶ Todd Woody, “The sea is running out of fish, despite nations’ pledges to stop it,” *National Geographic* (8 October 2019), online: <www.nationalgeographic.com/science/article/sea-running-out-of-fish-despite-nations-pledges-to-stop> [<https://perma.cc/J33D-B4A3>]; Food and Agriculture Organization of the United Nations, “Sustainable Development Goals” (last visited 25 January 2023), online: <www.fao.org/sustainable-development-goals/indicators/1441/en/> [<https://perma.cc/YS98-49RP>]; National Oceanic and Atmospheric Administration Fisheries, “Sustainable Fisheries: Status of Stocks 2020” (last modified 17 November 2022), online: <www.fisheries.noaa.gov/national/sustainable-fisheries/status-stocks-2020> [<https://perma.cc/Y73E-8KWD>].

gap between party commitments and the 1.5°C objective,⁷ or the “credibility gap”, meaning the gap between party commitments and party action.⁸ Stated broadly, and notwithstanding some success stories, the suite of laws and policies aimed at actually achieving countries’ emission reduction commitments have not been working to date.

That failure is true nowhere more than in Canada, where the government has missed *every* national target and where emissions have grown more than any other G7 country since 1990.⁹ However, the NZEAA represents a new approach that has potential to reverse the trend. The purpose of the NZEAA is to bridge the implementation gap by guiding and driving implementation of existing and forthcoming federal climate change law and policy. In this context, however, the specific features, weaknesses, and implications of the NZEAA are not well understood, particularly in relation to other federal and provincial efforts to reduce greenhouse gases (GHGs). This understanding is important in the Canadian context for purposes of bridging the gap and achieving actual emission reductions, and it is also important beyond Canada as nations look for legislative approaches that may help bridge their own implementation gaps.

This article examines the new federal net-zero accountability law and analyzes what it means in legal and practical terms for Canadian climate change law and policy now and into the future, particularly with respect to fulfilling domestic and international GHG emission reduction targets. A key question animating this analysis is simple: to what extent is the NZEAA likely to bridge the implementation gap? To engage in this analysis and to respond to this question, this article proceeds in the following way. Part II succinctly sets out relevant background with respect to climate change law and policy, including a short summary of Canada’s past and existing commitments in respect of climate change and the associated implementation gap in this context. Part III provides the legal and political background leading to NZEAA, and then presents the main features of the law. Part IV then examines several key issues that may inhibit NZEAA from having its intended impacts over the long term. Part V begins by discussing the role of the NZEAA in improving coherence across Canadian climate law and policy, and the early signs that the plan is beginning to bridge the implementation gap, including through the first federal Emissions Reduction Plan (ERP) under the NZEAA.¹⁰ The article concludes with several comments on what to expect on the path ahead.

⁷ UNEP & UNEP Copenhagen Climate Centre, *Emissions Gap Report 2021* (26 October 2021), online: <www.unep.org/resources/emissions-gap-report-2021> [<https://perma.cc/QPZ8-V4Y8>].

⁸ Climate Action Tracker, “Glasgow’s 2030 Credibility Gap: Net Zero’s Lip Service to Climate Action” (9 November 2021), online: <climateactiontracker.org/publications/glasgows-2030-credibility-gap-net-zero-lip-service-to-climate-action/> [<https://perma.cc/J6R4-XN5F>].

⁹ Barry Saxifrag, “Canada pledges to strengthen 2030 climate targets. How ambitious should we be?” (4 February 2021), online: *National Observer* <www.nationalobserver.com/2021/02/04/analysis/canada-pledges-strengthen-2030-climate-targets> [<https://perma.cc/3PJH-3RKZ>].

¹⁰ Environment and Climate Change Canada (ECCC), *2030 Emissions Reduction Plan: Canada’s Next Steps for Clean Air and a Strong Economy*, Catalogue No En4-460/2022E-PDF (Gatineau: ECCC, 2022),

Part 2: Overview of Canadian Climate Change Commitments and NZEAA Background

2.1. Overview of Canadian Climate Change Commitments

Canada began making international commitments to GHG emissions reductions as far back as 1988.¹¹ These commitments included emission reduction targets under the *Kyoto Protocol*,¹² then the *Copenhagen Accord*,¹³ and now the Paris Agreement.¹⁴ Canada has been very active at making commitments, but also very consistent in *not* achieving them.¹⁵

Despite that history, Canada continues to set ambitious emission reduction targets. Under the Paris Agreement, Canada initially committed to reducing GHGs by 30% below 2005 levels by 2030.¹⁶ In 2021, leading up to COP26, Canada revised that

online (pdf): <www.canada.ca/content/dam/eccc/documents/pdf/climate-change/erp/Canada-2030-Emissions-Reduction-Plan-eng.pdf> [ECCC, *2030 Emissions Reduction Plan*].

¹¹ See Canadian Press, “A brief history of Canada’s climate plans” (29 March 2022), online: *Toronto Star* <www.thestar.com/politics/2022/03/29/a-brief-history-of-canadas-climate-plans.html> [https://perma.cc/Z2XV-7PLP] (Explaining that in 1988 the Mulroney government set a goal to cut greenhouse gas emissions to 20% below 1988 levels by 2005); see also Vanessa Hrvatin, “A brief history of Canada’s climate change agreements” (30 May 2016), online: *Canadian Geographic* <canadiangeographic.ca/articles/a-brief-history-of-canadas-climate-change-agreements/> [https://perma.cc/N4AF-8LN4]; see generally, OAG, “A Timeline of Canadian Climate Change Commitments” (25 January 2023), online: <www.oag-bvg.gc.ca/internet/English/sds_fs_e_41101.html> [https://perma.cc/3JEU-DSZL].

¹² *A Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 148 (entered into force 16 February 2005).

¹³ *Amendment to the list in Annex I to the United Nations Framework Convention on Climate Change*, 26 October 2010, 2707 UNTS 30822 (entered into force 26 October 2010) [*Copenhagen Accord*].

¹⁴ *The Paris Agreement*, 12 December 2015, 3156 UNTS (entered into force 4 November 2016) [Paris Agreement].

¹⁵ See OAG, *supra* note 2 at exhibit 11 (Illustrating Canada’s actual and projected greenhouse gas emissions and emission reduction targets); see also Bruce Lourie, “The Trouble with Climate Targets” (21 October 2022), online: *National Observer* <www.nationalobserver.com/2022/10/21/opinion/trouble-climate-targets> [https://perma.cc/77F5-NMBN].

¹⁶ ECCC, “Canada’s Enhanced Nationally Determined Contribution” (last modified 23 April 2021), online: <www.canada.ca/en/environment-climate-change/news/2021/04/canadas-enhanced-nationally-determined-contribution.html>; see also OAG/CESD, *ibid* at exhibit 5.2 (Presenting Canada’s climate action and participation in major international climate agreements).

commitment to be more ambitious, now 40-45% by 2030.¹⁷ Additionally, Canada formally pledged to reach net zero emissions by 2050.¹⁸

After more than 30 years of making and missing emission reduction targets, an important question to ask is whether this time will be different for Canada. Canada's latest ERP gives many reasons for hope, laying out a reasonably clear pathway to the 2030 targets and beyond.¹⁹ However, Canada has had ambitious comprehensive GHG emission reduction plans in the past. It may come as a surprise to many, for example, that Prime Minister Stephen Harper's 2008 comprehensive economy-wide climate change plan, titled "Turning the Corner," planned for emission reductions that are more ambitious than those of today.²⁰ That plan, however, was never implemented. The Harper government instead became a majority government and then proceeded to withdraw from the Kyoto Protocol and repeal the *Kyoto Protocol Implementation Act*.²¹

As such, it is fair to say that a new, ambitious set of plans and targets far from guarantee that *this time* Canada will achieve its targets. In fact, the level of ambition outlined in the plan creates a risk the implementation gap could become wider than ever. However, there is a significant difference in the present context: the NZEAA. The balance of this article focuses on this new piece of Canada's broader climate change law and policy system, examining the extent to which it is likely to be a bridge over the implementation gap.

2.2. NZEAA Background

Canada is one of an increasing number of jurisdictions that have committed to net-zero GHG emissions, including China, the United Kingdom, the EU, the United States,

¹⁷ Prime Minister of Canada, News Release, "Prime Minister Trudeau Announces Increased Climate Ambition" (22 April 2021), online: *Government of Canada* <pm.gc.ca/en/news/news-releases/2021/04/22/prime-minister-trudeau-announces-increased-climate-ambition>.

¹⁸ See David Wright, "Reflection on COP26 and the Glasgow Climate Pact" (2022) 125 *Resources* 1, online (pdf): *Canadian Institute of Resources Law* <<https://ciril.ca/sites/default/files/Resources/Resources125.pdf>> [<https://perma.cc/98RB-4W7F>].

¹⁹ ECCC, *2030 Emissions Reduction Plan*, *supra* note 10; see also David V. Wright, "Canada's 2030 Federal Emissions Reduction Plan: A Smorgasbord of Ambition, Action, Shortcomings, and Plans to Plan" (2022) 10:2 *Energy Regulation Quarterly* 6, online (pdf): <energyregulationquarterly.ca/wp-content/uploads/2022/07/erq-volume-10-issue-2-2022.pdf> [<https://perma.cc/TQ7Y-A7TA>].

²⁰ Government of Canada, *Turning the Corner: Taking Action to Fight Climate Change* (March 2008), online (pdf): <publications.gc.ca/collections/collection_2009/ce/En88-2-2008E.pdf>.

²¹ *Kyoto Protocol Implementation Act*, SC 2007, c 30 [*KPIA*]; see Silvia Maciunas & Géraud de Lassus Saint-Geniès, "The Evolution of Canada's International and Domestic Climate Policy: From Divergence to Consistency?" (April 2018), online (pdf): *Centre for International Governance Innovation* <www.cigionline.org/static/documents/documents/Reflections%20Series%20Paper%20no.21%20Maciunas.as.pdf> [<https://perma.cc/8BAH-AESQ>].

and Japan.²² A number of these jurisdictions have taken the further step of legislating this target.²³ This list now includes Canada. These net-zero commitments and associated laws 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.²⁴

The federal 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.²⁵ It is also the latest development in a relatively long history on the federal front, one that includes unsuccessful attempts by the New Democratic Party in 2006, 2009 and 2011,²⁶ and the private member's bill²⁷ that became the *KPIA*, which was repealed in 2012. The new law is also a significant component of a series of climate change-oriented law and policy measures put forward since the Trudeau government's first election in 2015, including: the Pan-Canadian Framework,²⁸ the *Greenhouse Gas Pollution Pricing Act*,²⁹ reform of the federal major project assessment regime to include climate change requirements³⁰ (as now detailed in the

²² Kelly Levin et al, "What Does 'Net-Zero Emissions' Mean? 8 Common Questions, Answered" (last modified January 2022), online: *World Resources Institute* <www.wri.org/insights/net-zero-ghg-emissions-questions-answered> [<https://perma.cc/87SJ-CMLF>]. See generally, Chris Hilson, "Hitting the Target? Analysing Use of Targets in Climate Law" (2020) 32 *J Environ L* 2, 195–220.

²³ "Marking the Way: How Legislating Climate Milestones Clarifies Pathways to Long-Term Goals" (last visited 25 January 2023), online: *Canadian Climate Institute* <<https://climatechoices.ca/reports/marking-the-way/>> [<https://perma.cc/3ZE6-S9BB>].

²⁴ Intergovernmental Panel on Climate Change, "Special Report: Global Warming of 1.5°C, *Summary for Policy Makers*" (6 October 2018), online: <www.ipcc.ch/sr15/chapter/spm/> [<https://perma.cc/FBU7-UU7A>].

²⁵ Liberal Party of Canada, "Liberals move forward to legislate net-zero emissions by 2050" (24 September 2019), online: *Liberals* <liberal.ca/liberals-move-forward-to-legislate-net-zero-emissions-by-2050/> [<https://perma.cc/G29V-Q6AZ>].

²⁶ New Democratic Party of Canada, "New Democrats reintroduce climate change accountability act" (15 June 2011), online: <www.ndp.ca/news/new-democrats-reintroduce-climate-change-accountability-act> [<https://perma.cc/8CWC-VJLQ>].

²⁷ "Opposition MPs pass Kyoto bill despite Tory resistance" (14 February 2007), online: *CBC News* <www.cbc.ca/news/canada/opposition-mps-pass-kyoto-bill-despite-tory-resistance-1.644855> [<https://perma.cc/VAR8-77P7>].

²⁸ Government of Canada, *Pan-Canadian Framework on Clean Growth and Climate Change*, Catalogue No. En4-294/2016E-PDF (Gatineau: ECCC, 2016), online (pdf): <publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf>.

²⁹ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [GGPPA].

³⁰ Government of Canada, "Environment and Regulatory Reviews" (last modified 28 August 2019), online: <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews.html>.

Strategic Assessment on Climate Change)³¹, signing onto the Paris Agreement,³² development of a clean fuel standard,³³ more than \$100 billion in federal spending since 2016,³⁴ and direct regulation of GHG emissions.³⁵ The latter includes, for example, regulation of passenger automobiles and light trucks, renewable fuels, and coal-fired generation of electricity.³⁶ As noted further below, Canada’s new climate accountability law takes an important step toward building much needed coherence across all these federal measures.

Part 3: Key Features and Requirements of the NZEAA

3.1. Statutory Requirements

The NZEAA enshrines in legislation the government’s previously stated commitment³⁷ to net-zero emissions by 2050.³⁸ 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 2050,³⁹ and each target must

³¹ Government of Canada, *Strategic Assessment of Climate Change – Revised October 2020*, Catalogue No En14-417/2021E-PDF (Gatineau: ECCC, 2020), online (pdf): <www.canada.ca/en/services/environment/conservation/assessments/strategic-assessments/climate-change.html>.

³² Government of Canada, “The Paris Agreement” (last modified 06 January 2016), online: <www.canada.ca/en/environment-climate-change/services/climate-change/paris-agreement.html>.

³³ Government of Canada, “Clean Fuel Regulations” (last modified 07 July 2022), online: <www.canada.ca/en/environment-climate-change/services/managing-pollution/energy-production/fuel-regulations/clean-fuel-standard.html>.

³⁴ Government of Canada, “Canada’s Climate Actions for a Healthy Environment and a Healthy Economy” (last modified 07 July 2022), online: <www.canada.ca/en/services/environment/weather/climatechange/climate-plan/climate-plan-overview/actions-healthy-environment-economy.html>. It should be noted that additional federal spending and tax credits are expected now that the US has passed the Inflation Reduction Act. For commentary on the Canadian context, including why such spending is needed even in a context with carbon pricing, see Brendan Haley, “5 reasons why higher carbon prices require stronger green industrial policy” (06 January 2021), online: *Broadbent Institute* <www.broadbentinstitute.ca/5_reasons_why_higher_carbon_prices_require_stronger_green_industrial_policy> [https://perma.cc/P6SU-9QY9].

³⁵ Government of Canada, “Greenhouse gas emissions regulations” (last modified 20 August 2018), online: <www.canada.ca/en/environment-climate-change/services/climate-change/greenhouse-gas-emissions/regulations.html>.

³⁶ *Ibid.*

³⁷ Government of Canada, Governor General, *Moving Forward Together: Speech from the Throne to Open the First Session of the 43rd Parliament of Canada*, 43-1 (last modified 05 December 2019), online: <www.canada.ca/en/privy-council/campaigns/speech-throne/moving-forward-together.html>.

³⁸ NZEAA, *supra* note 1, s 6.

³⁹ *Ibid.*, s 7(1).

be more ambitious than the previous.⁴⁰ In setting those targets, the Minister must take into account “the best scientific information available”, “Canada’s international commitments with respect to climate change”, “Indigenous knowledge”, and submissions from the net-zero advisory body.⁴¹

These targets must also be supported by a detailed ERP,⁴² and those plans must contain: year-specific targets,⁴³ a summary of Canada’s most recent GHG inventory,⁴⁴ relevant information from Canada’s submissions pursuant to its international commitments,⁴⁵ a description of key emission reduction measures,⁴⁶ descriptions of relevant sectoral strategies,⁴⁷ descriptions of emission reduction strategies for federal operations,⁴⁸ a projected timetable for implementation for the measures and strategies set out in the plan,⁴⁹ projections of emission reductions resulting from the measures and strategies set out in the plan,⁵⁰ and a summary of key cooperative measures or agreements with provinces and other governments in Canada.⁵¹ The plan must also explain how the emissions reduction target and associated measures and strategies will contribute to Canada meeting its 2050 net-zero target.⁵² These plans must include information about measures taken with provinces, as well as Indigenous communities and governments, municipal governments, and the private sector.⁵³ In setting the targets and establishing the plans, the Minister must also provide for input from provincial governments, Indigenous communities and governments, the net-zero advisory body (see below), and “interested persons.”⁵⁴

Accountability and transparency mechanisms are then built around this milestone-targets-plans approach. The Minister must prepare a detailed “progress

⁴⁰ *Ibid*, s 7(1.1).

⁴¹ *Ibid*, s 8.

⁴² *Ibid*, s 9.

⁴³ *Ibid*, s 10(1)(a).

⁴⁴ *Ibid*, s 10(1)(a.1).

⁴⁵ *Ibid* (Though not explicit, this is presumably referring to submissions required from Canada under the UNFCCC and the Paris Agreement.).

⁴⁶ *Ibid*, s 10(1)(b).

⁴⁷ *Ibid*, s 10(1)(c).

⁴⁸ *Ibid*, s 10(1)(d).

⁴⁹ *Ibid*, s 10(1)(e).

⁵⁰ *Ibid*, s 10(1)(f).

⁵¹ *Ibid*, s 10(1)(g).

⁵² *Ibid*, s 10(2).

⁵³ *Ibid*, s 10(3).

⁵⁴ *Ibid*, s 13.

report” regarding each milestone year at least two years before the start of that year.⁵⁵ This means, for example, that the 2030 milestone year report would be due at the start of 2028. However, through a late addition during the legislative process aimed at pushing for more accountability and transparency in the near-term,⁵⁶ a provision was added to require that the Minister prepare an initial progress report for the first milestone year by the end of 2023, another by the end of 2025, and another by 2027.⁵⁷ Each progress report must contain certain details, including: an update on progress toward the target,⁵⁸ the most recent published greenhouse gas emissions projections for the next milestone year,⁵⁹ a summary of Canada’s most recent GHG inventory,⁶⁰ a summary of relevant information from Canada’s submissions pursuant to its international commitments,⁶¹ an update on the implementation of federal measures and strategies described in emission reduction plans,⁶² updated projections of annual greenhouse gas emission reductions,⁶³ updates on the implementation of the key cooperative measures or agreements with provinces or other governments,⁶⁴ and projections indicate that the plan’s greenhouse gas emissions target will not be met, details of any additional measures that could be taken to increase the probability of achieving that target.⁶⁵ Additionally, any report relating to the 2030 target must also include an update on the progress made towards achieving the interim greenhouse gas emissions objective for 2026.⁶⁶

The Minister must also prepare an “assessment report” in relation to milestone years no later than 30 days after Canada submits its GHG emissions inventory in accordance with obligations under the *United Nations Framework Convention on Climate Change* (UNFCCC⁶⁷).⁶⁸ This creates a direct link between the

⁵⁵ *Ibid*, s 14(1).

⁵⁶ See Alan Andrews, “Bill C-12 passes and becomes law” (last modified 16 June 2022), online: *Ecojustice* <<https://ecojustice.ca/bill-c-12-passes-and-becomes-law/>> [<https://perma.cc/ER3C-APPS>] (discussing late changes to the bill, including “more frequent reports before 2030).

⁵⁷ NZEAA, *supra* note 1, s 14(1.1).

⁵⁸ *Ibid*, s 14(2)(a).

⁵⁹ *Ibid*, s 14(2)(a.1).

⁶⁰ *Ibid*, s 14(2)(a.2).

⁶¹ *Ibid*.

⁶² *Ibid*, s 14(2)(b).

⁶³ *Ibid*.

⁶⁴ *Ibid*, s 14(2)(b.1).

⁶⁵ *Ibid*, s 14(2)(b.2).

⁶⁶ *Ibid*, s 14(3).

⁶⁷ *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

⁶⁸ NZEAA, *supra* note 1, s 15(1).

new domestic accountability regime and Canada's reporting requirements under the international climate change regime.⁶⁹ Contents of the assessment report are very similar to those of the plans and progress reports, including, for example: a summary of Canada's GHG inventory for the relevant year,⁷⁰ a statement as to whether the target for that year was achieved,⁷¹ an assessment of how aspects of the plan required under section 10(1) contributed to achieving targets,⁷² an assessment of how key cooperative measures with provinces or other governments contributed to emission reductions,⁷³ "any information relating to adjustments that could be made to subsequent emissions reduction plans in order to increase the probability of meeting subsequent national greenhouse gas emissions targets,"⁷⁴ and other additional information the Minister considers appropriate.⁷⁵

The NZEAA does not contain provisions that explicitly force the government to actually *achieve* the milestone emission reductions targets. As such, the Act lacks a firm and formal compliance mechanism. The furthest the NZEAA goes in this regard is in section 16, entitled, "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,"⁷⁶ "a description of actions the Government of Canada is taking or will take to address the failure to achieve the target,"⁷⁷ and "any other information the Minister considers appropriate."⁷⁸ Notably, subsection (b) is limited to action by the Government of Canada, presumably because the drafters recognized the federal government's inability to compel provinces to take action to address a missed target, a constraint discussed further below. In any event, and as also discussed in more detail further below, there is no substantive or significant legal penalty for missing a target under the NZEAA.

⁶⁹ See e.g., ECCC, *Canada's Fourth Biennial Report on Climate Change*, Catalogue No En4-73/2020E-PDF (Gatineau: ECCC, 2019), online (pdf): <unfccc.int/sites/default/files/resource/br4_final_en.pdf>; see also Government of Canada, "Canada's official greenhouse gas inventory" (last modified 21 November 2022), online: <www.canada.ca/en/environment-climate-change/services/climate-change/greenhouse-gas-emissions/inventory.html.>. Note that s 25 of the NZEAA strengthens this link by requiring that methodology used to report on Canada's greenhouse gas emissions for each milestone year and for 2050 must be consistent with the methodology used by Canada in its official national greenhouse gas emission inventory report for the UNFCCC.

⁷⁰ NZEAA, *supra* note 1, s 15(2)(a).

⁷¹ *Ibid*, s 15(2)(b).

⁷² *Ibid*, s 15(2)(c).

⁷³ *Ibid*, s 15(2)(c.1).

⁷⁴ *Ibid*, s 15(2)(d).

⁷⁵ *Ibid*, s 15(2)(e).

⁷⁶ *Ibid*, s 16(a).

⁷⁷ *Ibid*, s 16(b).

⁷⁸ *Ibid*, s 16(c).

3.2. Institutional and Oversight Dimensions

The NZEAA also contains several important institutional components. It establishes 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”.⁷⁹ This body, now called the Net-Zero Advisory Body (NZAB) is to be comprised of a maximum of fifteen people appointed on renewable terms of up to three years,⁸⁰ and the Act sets out specific competencies that the Minister must consider when making appointments to the body.⁸¹ The NZAB is required to submit a report to the Minister annually,⁸² taking certain factors into account,⁸³ and the Minister is required to publicly respond to advice provided by the body.⁸⁴ Initial advice from the NZAB and associated response by the Minister were published in March 2022.⁸⁵

The NZEAA also assigns significant oversight responsibility to the federal Commissioner of the Environment and Sustainable Development (CESD).⁸⁶ This revives an oversight role of the CESD role that existed under the repealed *KPIA*,⁸⁷ and is similar to the role envisioned in Bill C-215 tabled by the Bloc Québécois in 2021.⁸⁸

⁷⁹ *Ibid*, s 20(1); see Net-Zero Advisory Body (NZAB), “Advice of Canada’s 2030 Emissions Reduction Plan” (2021), online (pdf): <nzab2050.ca/22685/widgets/95630/documents/77441> [https://perma.cc/2DAF-YFSV]; see also NZAB, “Net-Zero Pathways: Initial Observations” (June 2021), online (pdf): <nzab2050.ca/22685/widgets/95630/documents/59943> [https://perma.cc/7FEJ-9H5W]; see also Government of Canada, “November 1, 2021 letter from ministers Guilbeault and Wilkinson to the Net-Zero Advisory Body” (1 November 2021), online: <www.canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050/advisory-body/2021-letter.html>.

⁸⁰ NZEAA, *supra* note 1, s 21(2).

⁸¹ *Ibid*, a 21(1.1).

⁸² *Ibid*, s 22(1).

⁸³ *Ibid*, s 22(1.1).

⁸⁴ *Ibid*, s 22(2).

⁸⁵ See, NZAB, “Publications,” (last visited 25 January 2023), online: <nzab2050.ca/publications> [https://perma.cc/JV38-GQ79]; see ECCC, Statement, “Minister Guilbeault welcomes advice from the Net-Zero Advisory Body to help Canada achieve its 2030 climate target” (21 March 2022), online: <www.canada.ca/en/environment-climate-change/news/2022/03/minister-guilbeault-welcomes-advice-from-the-net-zero-advisory-body-to-help-canada-achieve-its-2030-climate-target.html>.

⁸⁶ OAG, “Who We Are” (last visited 25 January 2023), online: <www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html#Commissioner> [https://perma.cc/F2UD-ZFLN] at “The Commissioner of the Environment and Sustainable Development”.

⁸⁷ *Kyoto Protocol Implementation Act*, SC 2007, c 30, s 10.1.

⁸⁸ “Bill C-215, An Act respecting Canada’s fulfillment of its greenhouse gas emissions reduction obligations”, 1st reading, *House of Commons Debates*, 43-1 (24 February 2020).

The CESD, which is housed in the Office of the Auditor General,⁸⁹ is 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 GHG emissions target as identified in the relevant assessment report.”⁹⁰ The CESD report may include recommendations on improving the effectiveness of implementation measures committed to under an ERP.⁹¹ To give effect to this CESD role, NZEAA included a consequential amendment to subsection 23(2) of the *Auditor General Act*.⁹² The office of the CESD will no doubt build on its many years of oversight of implementation of federal climate change law, policy, and programs.⁹³

An additional institutional feature of NZEAA is the provision for an explicit role for the Minister of Finance. That Minister must, in cooperation with the Minister of the Environment, 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.”⁹⁴

Finally, the NZEAA includes a mandatory review of the provisions and operation of the Act five years after it comes into force (i.e. 2026). This review is to be conducted by a committee of the Senate, of the House of Commons, or of both Houses of Parliament for that purpose.⁹⁵

Part 4: Weaknesses in Bridging the Gap

The requirements and features discussed above represent significant changes to the federal climate change law landscape. These changes may reasonably be expected to begin bridging the implementation gap. However, as discussed in this part, barriers remain and they are of a magnitude that could preclude fully bridging the gap.

⁸⁹ OAG, “Who We Are,” *supra* note 86.

⁹⁰ NZEAA, *supra* note 1, s 24(1).

⁹¹ *Ibid*, s 24(2).

⁹² *Auditor General Act*, RSA 1985, c A-17.

⁹³ OAG & CESD, *supra* note 2.

⁹⁴ NZEAA, *supra* note 1, s 23.

⁹⁵ *Ibid*, s 27.1.

4.1. Not “Binding”

Despite the government characterizing the NZEAA law as “binding,”⁹⁶ that concept is distracting in this context. The Act certainly enshrines the 2050 net-zero target in legislation and creates all the above-described target-setting, plan-making, and report-writing obligations. The federal government is now obliged to comply with all of this. However, the principle of parliamentary sovereignty, as reflected in section 42(1) of the federal *Interpretation Act*,⁹⁷ 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*,⁹⁸ and replacement with the *Canadian Environmental Assessment Act, 2012*,⁹⁹ and then the Trudeau government’s repeal of that Act and replacement with the *Impact Assessment Act*,¹⁰⁰ to see this power at work in the environmental law realm. Having said this, NZEAA can 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 the Act puts in place makes missing targets a highly visible and politically uncomfortable event. Repealing the NZEAA would also be a high-profile and potentially unpopular move.

4.2. Federal-Provincial Jurisdictional Constraints

The NZEAA 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 ERP must include information on initiatives taken in cooperation with provinces,¹⁰¹ and the Minister must provide provincial governments with an opportunity to make submissions during the process of setting or amending emissions targets and ERPs.¹⁰² This is not surprising. For better or worse, in the Canadian federation 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

⁹⁶ ECCC, News Release, “Government of Canada charts course for clean growth by introducing bill to legislate net-zero emissions by 2050” (19 November 2020), online <www.canada.ca/en/environment-climate-change/news/2020/11/government-of-canada-charts-course-for-clean-growth-by-introducing-bill-to-legislate-net-zero-emissions-by-2050.html>.

⁹⁷ *Interpretation Act*, RSC 1985, c I-21.

⁹⁸ *Canadian Environmental Assessment Act*, SC 1992, c 37.

⁹⁹ *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19.

¹⁰⁰ *Impact Assessment Act*, SC 2019, c 28 [IAA].

¹⁰¹ NZEAA, *supra* note 1, s 10.

¹⁰² NZEAA, *supra* note 1, s 13.

jurisdiction to legislate with respect to GHG emissions,¹⁰³ as confirmed for example in the context of the federal carbon pricing regime under the federal peace, order and good government power,¹⁰⁴ as well as in relation to GHG regulations¹⁰⁵ under the *Canadian Environmental Protection Act, 1999*¹⁰⁶ (e.g. coal-fired generation of electricity regulations, renewable fuels regulation) under the criminal law power,¹⁰⁷ it has a circumscribed constitutional basis to bind provinces to specific climate change plans and measures. Having said this, the upholding of the federal carbon pricing regime by the Supreme Court of Canada in 2021 does provide helpful jurisdictional clarity, confirming that the federal government does have the constitutional basis to enact minimal national carbon pricing standards.¹⁰⁸ In any event, the stated purpose of the NZEAA is to require the setting of targets and “to promote transparency, accountability and immediate and ambitious action in relation to achieving those targets,”¹⁰⁹ not to create a top-down rigid decarbonization pathway.

4.3. Absence of Carbon Budgets and Clear Pathways

What may be disappointing to some, but likely not surprising to many, is the lack of detail in the NZEAA with respect to how the emission reduction targets will be achieved. There is, for example, no mention of carbon budgets or decarbonization pathways.¹¹⁰ While there are some explicit provisions with respect to what ERPs must include (section 10, summarized above), some of which were bulked up late in the legislative process, the approach is rather thin. It stands in stark contrast to the very detailed and prescriptive carbon-budgeting approach in, for example, the United Kingdom’s legislated pathway to 2050.¹¹¹ However, the UK enjoys the benefits of

¹⁰³ See Nathalie Chalifour, “Canadian Climate Federalism: Parliament’s Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax” (2016) 36:2 NJCL 331, DOI: <dx.doi.org/10.2139/ssrn.2775370>. See also Peter W Hogg, “Constitutional Authority Over Greenhouse Gas Emissions” (2009) 46 Alta Law Rev 507.

¹⁰⁴ GGPPA, *supra* note 29.

¹⁰⁵ Government of Canada, “Greenhouse gas emission regulations,” *supra* note 35.

¹⁰⁶ *Canadian Environmental Protection Act, 1999*, SC 1999, c 23.

¹⁰⁷ *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160.

¹⁰⁸ *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

¹⁰⁹ NZEAA, *supra* note 1, s 4.

¹¹⁰ For discussion of carbon budgeting in the Canadian context, see Andrew Gage, “A Carbon Budget for Canada: A collaborative framework for federal and provincial climate leadership,” (December 2015), online: *West Coast Environmental Law* <wcel.org/publication/carbon-budget-canada-collaborative-framework-federal-and-provincial-climate-leadership> [https://perma.cc/627R-YSA3]; see also Meinhard Doelle, “Integrating Climate Change into Environmental Impact Assessments: Key Design Elements” (26 October 2018), DOI: <dx.doi.org/10.2139/ssrn.3273499> [https://perma.cc/SB24-K4YX].

¹¹¹ *Climate Change Act 2008* (UK), 2008. For discussion and some comparison see Anne Casselman, “How the UK is Winning the Race Against Climate Change” (18 August 2022), online: *The Walrus* <thewalrus.ca/uk-climate-change/> [https://perma.cc/GZN5-SZJD].

being a unitary state that does not have to contend with the jurisdictional and political complexities of federalism.

In many ways, the NZEAA 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. There are also extremely important conversations that need to happen with Indigenous communities and governments as well, and with territorial governments and municipalities. It seems implicit in the NZEAA that the federal government recognizes that it would be politically unwise to implement a top-down, paternalistic approach to dictating carbon budgets and decarbonization pathways, and is likely constitutionally 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 decades. While the NZEAA creates laudable transparency and accountability mechanisms, it is no substitute for the substantive discussions about actual emission reductions by specific jurisdictions based on some type of carbon budgeting methodology. One model that could be considered as NZEAA implementation proceeds is the European Union "Burden Sharing Agreement", which redistributes the overarching EU reduction target among the member states in a binding manner.¹¹² The NZEAA does not preclude such an approach and could be seen as creating additional clarity and space for such an agreement to be developed, but the Act does not require it. As such, this remains a barrier to building a complete bridge across the implementation gap.

4.4. *Justiciability*

Those who view the NZEAA as a potential source of legal hooks to be used in a lawsuit against a future non-compliant federal government will be disappointed. Despite calls for explicit provisions providing for judicial oversight,¹¹³ NZEAA contains no legislative provision for a party to sue the federal government for non-compliance, let

¹¹² See Commission of the European Communities, "Green Paper on greenhouse gas emissions trading within the European Union" (3 March 2000), online (pdf): <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0087&from=EN> for a summary of that approach.

¹¹³ See House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 43-2, No 39 (09 June 2021) at 19:02 (Elizabeth May) ("I'm proposing clause 27.1, which was supported by, I think, West Coast Environmental Law and by a number of other organizations. It provides some guidance that this legislation anticipates judicial review of ministerial obligations, and says that where someone could seek judicial review within the Federal Court and relief, it's available under subsections 18(1) and 18.1(3) of the Federal Courts Act."). See also West Coast Environmental Law et al, "A Climate Accountability Law for a Safe and Brighter Future" (May 2021) at 9, online (pdf): *House of Commons* <www.ourcommons.ca/Content/Committee/432/ENVI/Brief/BR11354962/br-external/Jointly4-e.pdf> [https://perma.cc/AMK8-84NZ].

alone suing for not achieving emission reduction commitments. The federal Minister was clear on this point during the legislative process, stating that the NZEAA regime is premised on oversight by Parliament, not the courts.¹¹⁴

This lack of explicit provision for recourse to the courts creates legal uncertainty because it is unclear what NZEAA obligations a court would find to be justiciable. Justiciability is a barrier that cuts across climate change litigation,¹¹⁵ and this present context is no different. It is highly likely that a court will interpret at least some provisions of NZEAA in a manner similar to the Federal Court in *Friends of the Earth v Canada (Governor in Council)*.¹¹⁶ A key holding in *Friends of the Earth* was 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, then 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."¹¹⁷ 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.

The approach taken by the NZEAA is similar to *KPIA*, including the legislative intent as articulated by the Minister;¹¹⁸ however, it is clear that the new statute takes on board lessons from *Friends of the Earth*. The court's analysis in *Friends of the Earth* relied, at least in part, on several aspects of *KPIA* that are *not* at play in the NZEAA context. For example, *KPIA* was a private member's bill; NZEAA is not. Also, *KPIA*'s requirements for a government plan were less detailed than those set out in NZEAA. Related, the requirements that were set out in *KPIA* were

¹¹⁴ House of Commons, Standing Committee on Environmental and Sustainable Development, *Evidence*, 43-2, No 32 (17 May 2021) at 15:15 (Jonathan Wilkinson) ("Whenever there is a law that is put into place there is the potential for people or organizations to see whether or not it can be litigated. I'm not going to opine on whether or not this is something that could be litigated through the courts... At the end of the day, this is intended to be a forcing function. It's intended to make governments take action and that is the whole structure and focus, to ensure that we can never, in this country, have again a government like Stephen Harper's, which signed up to a target and never had a plan.").

¹¹⁵ See Camille Cameron & Riley Weyman, "Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices" (2022) 34:3 J Env'tl L 195, DOI: <doi.org/10.1093/jel/eqab026> [https://perma.cc/6JT9-9KV4].

¹¹⁶ *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183, affirmed by the Federal Court of Appeal. [*Friends of the Earth*]. See Jodie Hierlmeier, "Court Rules that Kyoto Implementation Act is a Matter for Parliament" (2008), online (pdf): *Environmental Law Centre*, <elc.ab.ca/Content_Files/Files/NewsBriefs/CourtrulesthatKyotoImplementationAct.pdf> [https://perma.cc/L6F7-WTXT].

¹¹⁷ *Ibid* at para 33.

¹¹⁸ *Supra* note 1144.

problematic from the court’s perspective, especially the notion of a “just transition.”¹¹⁹ That concept is not included in NZEAA. Instead, the NZEAA takes a more careful approach by including clear, mandatory language that provide courts legal criteria to apply to a fact scenario. Unfortunately, the NZEAA missed an opportunity by omitting a provision that would require the government to “take all measures necessary” to achieve GHG emission reduction targets. Canadian case law supports that language as being justiciable;¹²⁰ indeed, it has recently been deployed in the context of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*.¹²¹

All of this means that it is foreseeable, even likely, that a court will find parts of the NZEAA to be justiciable, such as requirements pertaining to publishing of plans and reporting on progress. However, notwithstanding the deeper scrutiny and more searching review of administrative decision-making required under *Canada (Minister of Citizenship and Immigration) v. Vavilov*¹²², it is uncertain how far a court would go in ruling on the adequacy of such reports and plans. Indeed, a similar climate change accountability statute in British Columbia¹²³ was recently found to be justiciable by the Supreme Court of British Columbia.¹²⁴ However, Basran J., applying the *Vavilov* framework, interpreted the requirements of that statute narrowly and declined to comment on the “wisdom or efficacy” of the climate change plan at issue.¹²⁵ Put plainly, the Court was willing to find requirements of the BC Act justiciable; however, on a reasonableness standard of review, was not willing to deeply scrutinize the government plans and reports at issue, let alone actual progress in achieving emission reductions.¹²⁶ Notwithstanding differences between the federal NZEAA and the BC

¹¹⁹ KPIA, *supra* note 21, s 5(1)(a)(iii.1). This phrase has since attracted much political attention, particularly in Alberta, see Meaghan Archer, “Notley slams feds, Alberta government’s reaction over ‘just transition’ bill” *Global News* (18 January 2023), online: <globalnews.ca/news/9419179/notley-reacts-just-transition/> [https://perma.cc/4XQ8-9YNB].

¹²⁰ See Nigel Bankes, “Implementing UNDRIP: An analysis of British Columbia’s Declaration on the Rights of Indigenous Peoples Act.” UBC L R, 53(4) 2021, 971–1015 (noting that courts have treated the language of “take all measures necessary” as justiciable).

¹²¹ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. See also *Ibid*.

¹²² *(Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. See Shaun Fluker, “Vavilov and the Judicial Review of Natural Resources, Energy and Environmental Decisions in Canada” (2020) Canadian Institute of Resources L No 123, online: <cir.ca/sites/default/files/Resources/Resources123.pdf> [https://perma.cc/6S9A-MWQV]. See also Nigel Bankes, “The Discipline of *Vavilov*? Judicial Review in the Absence of Reasons” (12 May 2020), online (blog): <ablawg.ca/2020/05/12/thediscipline-of-vavilov-judicial-reason-in-the-absence-of-reasons/> [https://perma.cc/CTC5-D4GD].

¹²³ *Climate Change Accountability Act*, SBC 2007, c 42 [The BC Act].

¹²⁴ *Sierra Club of British Columbia Foundation v British Columbia (Minister of Environment and Climate Change Strategy)*, 2023 BCSC 74.

¹²⁵ *Ibid* at para 47. See David Wright, “BC Climate Accountability Law is Justiciable (But Weak Climate Plan is Reasonable)” (27 January 2023), online (blog): <ablawg.ca/2023/01/27/bc-climate-accountability-law-is-justiciable-but-weak-climate-plan-is-reasonable/> [https://perma.cc/44DV-GA7X].

¹²⁶ *Ibid* at para 45. Note the standard of review was reasonableness (para 49).

Act, a similar approach is foreseeable in the federal realm, particularly given the *Friends of the Earth* precedent. And, to be clear, because there is no explicit statutory requirement in NZEAA for Canada to actually achieve targets, that core matter almost certainly remains non-justiciable in the NZEAA context.

Notwithstanding the lack of explicit role for judicial oversight under the NZEAA and the associated unsettled questions about justiciability within this new statutory regime, there could still be a nexus with the courts and climate change litigation. A remedy sought in many Canadian climate change lawsuits against governments is to force the government to put in place a comprehensive plan to achieve deep emissions cuts.¹²⁷ That is precisely what the NZEAA does. As such, it is reasonable to view the NZEAA as a model remedy that could satisfy a court order obtained by climate litigation parties in Canada. For example, in *La Rose*, the plaintiffs sought an order requiring Canada “to develop and implement an enforceable climate recovery plan that is consistent with Canada’s fair share of the global carbon budget plan to achieve GHG emissions reductions.”¹²⁸ Even if the NZEAA is repealed in the future, the statute would still be an off-the-shelf articulation of such a court remedy.

It is in this way, in addition to explicit requirements in the NZEAA, that the Act could also play a role in bridging the implementation gap by representing a new minimum standard for what government climate change policy needs to look like for Canada to actually achieve its emission reductions commitment. It is foreseeable that if a future government repeals the NZEAA and withdraws from the Paris Agreement, it is the requirements of the NZEAA and the features of ERPs that a court looks to when crafting an order with which a future recalcitrant government must comply.¹²⁹ Such direction from a court would also render moot the above-discussed concerns about Parliamentary sovereignty in this context because the government would ultimately still be required to put in place an enforceable climate plan.

¹²⁷ See e.g., *La Rose v Canada*, 2020 FC 1008 at paras 12 and 53 [*La Rose*]; where the Plaintiffs sought an order requiring Canada to implement an enforceable climate recovery plan that is consistent with Canada’s fair share of the global carbon budget plan to achieve GHG emissions reductions compatible with the maintenance of a stable climate system and the plaintiffs’ constitutional rights.

¹²⁸ *Ibid.*

¹²⁹ Notwithstanding issues of justiciability in the climate change litigation realm, which to date have been a major barrier for litigants.

Part 5: Concluding Reflections and Comments

5.1. Law and Policy Coherence Emerging?

For many years, Canada has been in need of more coherence across its climate change laws, policies and measures.¹³⁰ On this front, the NZEAA is a step in the right direction. At long last, and notwithstanding above comments about thin detail, the *Act* creates a framework for the federal government to work with other governments in the federation to map out the route from today to 2050. There are several promising features in the NZEAA that set up linkages to support better law and policy coherence.

First, the *Act* 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 inventories¹³¹ and on the country's progress toward international climate change commitments,¹³² so the *Act*, in many ways, confirms these obligations under domestic law as well.

Second, the *Act* creates a logical link between the milestone targets and the final (but evergreen) federal Strategic Assessment on Climate Change (SACC)¹³³ 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.”¹³⁴ So, it is foreseeable that proponents will work to present a picture that is consistent with the milestone targets. Further, the milestone targets required under the NZEAA 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.¹³⁵

Third, the *Act* in some ways resembles a centrepiece (soft as it may be) that helps Canadians see how all federal climate initiatives relate to each other. Until now, it has been 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 Canada's submissions to the UNFCCC to get a sense of things, but the NZEAA requires routine and

¹³⁰ See Camille Fertel et al, “Canadian energy and climate policies: A SWOT analysis in search of federal/provincial coherence” (2013) 63 *Energy Policy* 1139, DOI: <doi.org/10.1016/j.enpol.2013.09.057> [https://perma.cc/TT7F-XWZ6].

¹³¹ See Government of Canada, “Canada's official greenhouse gas inventory,” *supra* note 69.

¹³² See ECCC, *Canada's Fourth Biennial Report on Climate Change*, *supra* note 69.

¹³³ Government of Canada, *Strategic Assessment of Climate Change – Revised October 2020*, *supra* note 31.

¹³⁴ *Ibid* at 16.

¹³⁵ IAA, *supra* note 1000, ss 22, 63.

comprehensive updates about what is going on and how it is going. Granted, it may be hard to get a full sense of provincial measures, but the stage is set to cooperate on this, and the CESD may be in a position to again cooperate with provincial auditors general and take stock.¹³⁶ The first ERP released under the NZEAA, published in March 2022, represents an early sign that this coherence is building. That first plan charted a reasonably credible path to Canada's 2030 emission reduction target and beyond to net-zero.¹³⁷

Finally, for those who want to see Canada achieve its emission reduction targets as part of the international effort to limit warming to 1.5 degrees, this emerging coherence is coming at the right time. Canada's economy remains intimately tied to the United States, but during the 2016-2020 period Canada had to essentially go it alone on federal climate change policy. The Biden Administration is charting a course toward ambitious emission reductions, most notably through the recently passed *Inflation Reduction Act*.¹³⁸ For Canada, this means that the many climate change initiatives put in place at the federal level since 2015 make much more sense politically and economically, and those that do not can be adapted in light of the new context.¹³⁹ The shared long-term objective of net-zero emissions by 2050 is one of what are likely to be a number of Canada-US (re)alignment steps on climate policy in coming years. Having a clear, coherent picture of where Canada is going will likely make it easier for the federal government and the Biden Administration to identify areas for sensible alignment and differences.

5.2 Concluding Comments on the Path Ahead

The NZEAA represents a significant step in federal climate change law, one that legally requires building at least some of the spans in a bridge across the implementation gap between Canada's emission reduction commitments and actually achieving those targets. The *Act* 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, the proposed regime also has significant weaknesses, some unavoidable, that will act as barriers to fully bridging the gap. These include a very

¹³⁶ See OAG, *supra* note 2 (for a previous pan-jurisdictional project like this).

¹³⁷ David Wright (2022), *supra* note 19.

¹³⁸ *Inflation Reduction Act*, 2022, Pub L No 117-169, 136 Stat 1818.

¹³⁹ See Marisa Beck, "Responding to the Inflation Reduction Act: What are Canada's options?" (02 November 2022), online: *Canadian Climate Institute* <climateinstitute.ca/inflation-reduction-act-what-are-canadas-options/> [<https://perma.cc/5CK3-HPCQ>]; see also Ian Campbell, "Canadian response to US Inflation Reduction Act should seek to boost 'certainty' for investors, says advocacy group" (17 November 2022), online: *The Hill Times* <www.hilltimes.com/story/2022/11/17/canadian-response-to-u-s-inflation-reduction-act-should-boost-certainty-for-investors-says-advocacy-group/355848/> [<https://perma.cc/D9V5-ACRW>].

soft compliance mechanism, potentially limited recourse to the courts, and limited influence on provincial (in)action. Notwithstanding the latest ERP being a relatively strong plan that represents an improvement on previous federal plans, it is far from certain whether ensuing plans will be stronger or weaker from a climate action and target-achievement perspective. The true test of the Act will likely come after the next change in federal government, where that government will have several options: keep the *Act* and continue building the same bridge to the same destination, keep the Act and build a different bridge to a different destination (i.e. revise targets and choose different tools such as a cap and trade mechanism), or scrap the *Act* and wash out the whole bridge (i.e. repeal the *Act* and abandon the targets). From a legal perspective, that future government would have the prerogative to take any of these paths, notwithstanding any political costs.

All of this leads to several areas to watch as NZEAA implementation unfolds. One is simply the extent to which the present or future governments satisfy the requirements of the NZEAA through future ERPs and the implementation of the many measures set out therein (key near-term examples include a cap on oil and gas emissions, and a federal clean electricity standard). Another is what additional arrangements that the federal and provincial governments may put in place. For example, though it remains unlikely, a detailed and binding emissions reduction roadmap that has buy-in from all provinces for the long-term would strengthen the bridge over the gap to an unprecedented extent. Finally, it is foreseeable parties litigate perceived non-compliance with requirements of the NZEAA as a means to push for further climate action within the terms of the statute (e.g., where a future plan lacks detail or ambition), and it will be interesting to see how a court treats issues of justiciability. Outside of the *Act*, time will tell whether the NZEAA does someday inform a court order for climate action in the likeness of what has been seen in other jurisdictions.¹⁴⁰

Regardless of where NZEAA implementation goes from here, the *Act* currently represents a high-water mark in terms of explicit federal requirements to set emission reduction targets and develop detailed plans to achieve those reductions. There is perhaps a better chance than ever that the long Sisyphean phase of Canadian climate policy and politics is over. There is also, however, a chance that the implementation gap becomes wider than ever.

¹⁴⁰ See e.g., Urgenda, “Landmark Decision by Dutch Supreme Court” (last visited 25 January 2023), online: <www.urgenda.nl/en/themes/climate-case/> [<https://perma.cc/JL2B-8AZH>].