

**Re-energizing the Relationship:  
Why program level changes may provide the best platform for Indigenous participation in  
Canada’s response to the Paris Climate Agreement**

In December 2015, 195 countries met in Paris for the 21<sup>st</sup> Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21), the largest conference ever convened on international climate policy. In the twelve months since COP21, Canada has joined eighty other countries in ratifying the resulting “Paris Agreement,” which commits its signatories to develop domestic strategies for emission reductions such that the average global temperature will not rise to two degrees Celsius above pre-industrial levels.<sup>1</sup> As a signatory country, Canada has committed to reduce its domestic emissions to 30% below 2005 levels by 2030.

The lead-up to the Paris Agreement coincided with the federal electoral victory of Justin Trudeau and the Liberal Party of Canada in October 2015. Running on an extensive platform that advocated “Real Change,” across several aspects of federal policy-making, the Liberals highlighted the importance of Canada’s involvement in COP21 and included promises both to attend the conference and to meet provincial Premiers and Indigenous leaders in their first ninety days in office to develop a Pan-Canadian framework to combat climate change.<sup>2</sup> The Trudeau government’s handling of environmental policy in the aftermath of the Paris Agreement has been a central indicator both of its unique style of federalism and its commitment to a renewed relationship with Indigenous peoples. In the past year, the government has convened two First Ministers’ Meetings (FMM) on climate policy, inviting representatives from the Assembly of First Nations (AFN), Métis National Council (MNC), and Inuit Tapiriit Kanatami (ITK) to participate in both sessions. The most recent FMM held on December 9 2016 resulted in the Pan-

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<sup>1</sup> United Nations Framework Convention on Climate Change. *Adoption of the Paris Agreement*. Paris: United Nations. (2015).

<sup>2</sup> Liberal Party of Canada. “A New Plan for a Strong Middle Class.” *Liberal Party of Canada*. Accessed October 9, 2016. <https://www.liberal.ca/realchange/>

Canadian Framework on Clean Growth and Climate Change, an intergovernmental agreement that includes provincial commitments to participate in a national carbon pricing scheme and commits both levels of government to robust, meaningful engagement with Indigenous peoples. If this commitment is to overcome the institutional challenges inherent in developing a sustained role for Indigenous political organizations in federal policy-making, the Trudeau government would be wise to consider initial action at the federal program level.

This paper argues that the program level provides the best foundation for immediate Indigenous participation in climate policy across four main sections. First, it will lay out the federal government's central dilemma in reconciling the need for a flexible intergovernmental response to the Paris Agreement with a continued commitment to establishing a nation-to-nation relationship between Indigenous peoples and the Canadian government. Second, a brief review of the modern history of environmental federalism and Indigenous relations with the federal government will provide context for contemporary decision-making. Third, a comparative analysis of how institutional factors in New Zealand and Australia have shaped Indigenous participation in climate policy will support the claim that Canada is better situated to adopt the Australian model of incremental program delivery. Finally, a case study of Indigenous and Northern Affairs Canada's ecoEnergy program will provide one example of a new participatory model of program delivery.

## **1. Central Dilemma**

The federal government's response to the Paris Agreement began in March 2016, when Prime Minister Trudeau met in Vancouver with provincial Premiers and leaders from the AFN, MNC, and ITK to establish four intergovernmental working groups on climate consultation. While this multilateral approach to policy-making initially reflected the model of collaborative

federalism the Trudeau government espoused in their campaign literature, federal tactics quickly changed. By October 2016, Justin Trudeau stood in the House of Commons to announce a federal minimum carbon price, while Minister of Environment and Climate Change, Catherine McKenna, met with her provincial counterparts in Montreal. Provinces would be required to choose between two modes of carbon pricing: a direct tax on carbon emitting outputs or a cap and trade system on emissions. Each province's respective policy would begin by 2018 at a minimum of \$10 per tonne, rising by \$10 annually to \$50 per tonne in 2022, or be subject to the federal price floor, with all revenues returned to provincial coffers.<sup>3</sup> The unilateral nature of this decision was apparent as environment ministers from Saskatchewan, Nova Scotia, and Newfoundland and Labrador walked out of the Montreal session minutes after the announcement. Since then, the federal government has retreated from this stance by highlighting its commitment to provincial flexibility in response to the national carbon pricing scheme.

Meanwhile, Indigenous leaders have recently begun to voice their dissatisfaction with what they see as an unequal role in the policy discussion thus far. In late November, Justin Trudeau announced that national Indigenous leaders would once again be welcome at the First Ministers' Meeting called to formalize the carbon pricing scheme within a Pan-Canadian Framework. When it became clear that these meetings would be kept separate from the main Premiers' conference on December 9, AFN National Chief Perry Bellegarde called on Prime Minister Trudeau to convene a separate First Ministers' Meeting focused on amending the constitution to recognize Indigenous peoples as a distinct order of government.<sup>4</sup> While Trudeau

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<sup>3</sup> Shannon Proudfoot. "Ottawa drops the hammer on carbon pricing. Now what?" *Maclean's*, October 16, 2016. <http://www.macleans.ca/politics/ottawa-drops-the-hammer-on-carbon-pricing-now-what/>

<sup>4</sup> The Canadian Press. "First Nations want to ensure their role in climate talks by including their rights in the Constitution," *The Toronto Star* (Toronto, ON) December 9, 2016. <https://www.thestar.com/news/canada/2016/12/09/first-nations-want-to-ensure-their-role-in-climate-talks-by-including-their-rights-in-the-constitution.html>

rejected this request, the subsequent release of the Pan-Canadian Framework on Clean Growth and Climate Change made repeated references to robust and meaningful engagement with Indigenous peoples aimed at recognizing and respecting their rights. Asked about these commitments at a subsequent press conference, the Prime Minister replied that reconciliation efforts with Indigenous people will follow two tracks moving forward characterized by the federal government “taking broader, long-term steps to rebuild the relationship, while also addressing urgent short term needs.”<sup>5</sup>

The central dilemma now facing the Trudeau government focuses on how to bolster Indigenous political participation within the confines of a Pan-Canadian climate deal that has been designed to allow significant policy deference to the provinces. Trudeau’s campaign promises of a return to collaborative federalism and his earlier characterization of the government’s commitment to Indigenous peoples as the single most important relationship “to him and to Canada” now appear to be in conflict.<sup>6</sup> Given the sustained national attention that intergovernmental disputes on the new Pan-Canadian framework will likely continue to draw, the Trudeau government may be best positioned to focus on addressing the short term needs the Prime Minister highlighted in his two-track approach to Indigenous issues. While this should not satisfy the long term objectives of the AFN and similar organizations for constitutionally protected participation in policy-making, it can still lead to positive outcomes for Indigenous communities and provide a foundation for his government’s desired long term steps toward rebuilding the nation-to-nation relationship.

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<sup>5</sup> Kirsty Kirkup. “Trudeau details ‘two tracks’ toward resetting indigenous relationship,” *Maclean’s* (Toronto, ON) December 15, 2016. <http://www.macleans.ca/politics/ottawa/trudeau-details-two-tracks-towards-resetting-indigenous-relationship/>

<sup>6</sup> “Minister of Environment and Climate Change mandate letter.” *Justin Trudeau, Prime Minister of Canada*. Accessed October 7, 2016. <http://pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter>

## 2. Environmental Policy & Canadian Federalism

Although relatively little of the expansive literature on Canadian federalism has focused on environmental policy, several authors have characterized the file as an area of federal deference and decentralization.<sup>7</sup> The *Constitution Act, 1867* does not explicitly mention jurisdictional authority over the environment, however, initial consideration of environmental policy was traditionally left to the provinces, emanating from their authority over Crown lands, natural resources, and property and civil rights.<sup>8</sup> Federal involvement began in the late 1960s under Pierre Trudeau, when the federal government created the Department of the Environment and in 1970 established national environmental standards under the *Canada Water Act* and the *Fisheries Act*. While the direct justification for the federal government's constitutional authority in this area has been less clear than for the provinces, subsequent Supreme Court decisions have accepted federal interventions in environmental policy tied to its powers under section 91, including trade and commerce, criminal law, fisheries, and the peace, order, and good government clause.<sup>9</sup>

In practice, federal environmental policies have generally sought to standardize national guidelines, leaving enforcement mechanisms up to provinces where matters of resource development are at stake. Kathryn Harrison describes Canadian environmental policy as a typical situation of diffuse benefits and concentrated costs, a combination generally associated with

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<sup>7</sup> See Kathryn Harrison. "Passing the Environmental Buck," in *New Trends in Canadian Federalism* 2<sup>nd</sup> ed., edited by François Rocher and Miriam Smith. Toronto: Broadview Press Ltd, 2003.; Alexis Bélanger. "Canadian Federalism in the Context of Combating Climate Change." *Constitutional Forum* 20, no. 1 (2011): 21-31.

<sup>8</sup> Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 92 reprinted in RSC 1985, App II, No. 5

<sup>9</sup> Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 91 reprinted in RSC 1985, App II, No. 5

political inaction.<sup>10</sup> Periods of increased political salience are cyclical, tending to coincide with elevated public concern, which continues until declining economic conditions crowd out political will.<sup>11</sup> In recent years, these cycles have been triggered by Canada's commitments under the various extension treaties of the United Nations Framework Conventions on Climate Change (UNFCCC) including both the Kyoto Protocol and the Paris Agreement.

The Harper government's decade in power exposed the economic risks associated with federal inaction on environmental policy. First elected in 2006, the Harper Conservatives advocated a "Made in Canada" response to international climate obligations, shifting away from Kyoto – Canada would formally abandon the protocol in 2012 – and advocating instead for the "Turning the Corner" Plan, which promised an emissions reduction of 20% below 2006 levels by 2020, roughly half of Canada's Kyoto commitment.<sup>12</sup> By 2009, facing a recession triggered by the global financial crisis, the Harper government abandoned Turning the Corner and linked all future actions on carbon regulation to those taken by the United States. This was followed in 2012 by a commitment to "Responsible Resource Development," which promised emissions reduction standards for the oil and gas industry together with legislative changes aimed at relaxing regulations around the pipeline approval process.<sup>13</sup> These commitments were also abandoned after a significant drop in global oil prices in the latter half of 2014.

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<sup>10</sup> Harrison, *Passing the Environmental Buck*, 314.

<sup>11</sup> For example, the creation of the *Canadian Environmental Assessment Act* and US-Canada Air Quality Agreement in 1991-92 came after a crisis period in the mid 1980s that included disasters at Bhopal and Chernobyl and the discovery of a hole in the ozone layer. *Ibid.*, 323.

<sup>12</sup> George Hoberg, "Unsustainable Development: Energy and Environment in the Harper Decade," In *The Harper Factor: Assessing a Prime Minister's Political Legacy*, edited by Jennifer Ditchburn and Graham Fox (Montreal & Kingston: McGill-Queen's Press, 2016), 255.

<sup>13</sup> *Ibid.*, 262.

Throughout this period, Prime Minister Harper's commitment to Open Federalism – a neoclassical approach in which Harper eschewed First Ministers' Meetings and reduced the role of the federal government relative to the provinces – hurt natural resource development and forced Premiers to work independently on carbon regulation. Over the course of Stephen Harper's nine years in office, provinces made several calls for federal coordination related to environmental and energy policy. Alberta advocated for a national energy strategy, while provinces such as Ontario, Quebec, and British Columbia called for various actions on climate change and energy regulation. When none were forthcoming, provinces took the initiative, coordinating a Canadian Energy Strategy through the Council of the Federation in July 2015. Some also took unilateral action on provincial climate policies such as British Columbia's carbon tax or Ontario and Quebec's involvement in an international cap and trade program through the Western Climate Initiative.<sup>14</sup> The resulting failure to complete any major pipeline projects, the patchwork strategy on carbon regulation, and the deterioration of Canada's international reputation on climate policy have all contributed to the present Trudeau government's adoption of a collaborative model of environmental policy-making.

## **2.2 Indigenous Participation in Canadian Public Policy**

The convergence of climate change federalism and Indigenous political participation marks a nascent development in their respective historical contexts. While the complex and disparate histories of Indigenous governance originated prior to European contact, a simplified understanding of contemporary political interactions with the Canadian government can be traced to two interrelated events in the early 1970s. The first was the organized opposition of the National Indian Brotherhood – the precursor to the Assembly of First Nations – and other

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<sup>14</sup> *Ibid.*

regional Indigenous groups to Prime Minister Pierre Trudeau's 1969 White Paper. Indigenous political organizations felt that the policy proposal, which sought to abolish Indian status, privatize reserve lands, and consolidate service delivery under provincial jurisdiction amounted to a renewed attempt at assimilation that ignored Canada's historical treaty obligations to Indigenous peoples.<sup>15</sup>

The political momentum that repudiated this policy was further empowered by a decisive change in Canadian constitutional jurisprudence delivered in *Calder v British Columbia* in 1973. In *Calder*, the Supreme Court of Canada acknowledged the existence of Aboriginal title, a change that prompted the Trudeau government's creation of a modern treaty process known as the comprehensive land claims policy that same year.<sup>16</sup> These efforts toward increased judicial and legislative participation culminated in the inclusion of national Indigenous organizations in discussions on constitutional patriation that helped enshrine recognition of "existing Aboriginal and Treaty rights" for First Nations, Métis, and Inuit peoples under section 35 of the *Constitution Act*, 1982.<sup>17</sup>

Since the creation of section 35, Indigenous efforts to advance policy change have been far more successful before the Courts than through the legislative process. While the 1980s and 1990s saw consecutive federal governments attempt to include Indigenous groups in major national debates such as those surrounding the Charlottetown Accord or the comprehensive study undertaken by the Royal Commission on Aboriginal Peoples, there have been relatively few

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<sup>15</sup> Canada. Indian and Northern Affairs. *Statement of the Government of Canada on Indian Policy*. Ottawa: Department of Indian and Northern Affairs, 1969. Available online: <http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-white-paper-1969.html>

<sup>16</sup> Dwight Newman. "Consultation and Economic Reconciliation," in *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights*, edited by Patrick Macklem and Douglas Sanderson, 207-223. Toronto: University of Toronto Press, 2016.

<sup>17</sup> The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

reforms to structures of governance or improvements in economic and social outcomes. By contrast, three decades of constitutional litigation and negotiation have resulted in new frameworks surrounding title rights and the duty to consult, cultural protections and rights to harvest, and the bilateral transfer of jurisdiction to specific nations through self-government agreements.<sup>18</sup> The judicial branch's emergence as the driver of Indigenous peoples access to rights and political benefits may have contributed to a decline in the effectiveness of federal policy-making for Indigenous communities in recent years.

This effect was compounded by the Harper government's strained relationship with Indigenous peoples. Prime Minister Harper began his time in office by rejecting the Kelowna Accord, the result of eighteen months of consultations with Indigenous political organizations culminating in a First Ministers' Meeting that would have provided \$5 billion to improve the education, employment prospects, and living conditions of Indigenous peoples between 2005-2010.<sup>19</sup> In its place, the Harper government pursued a patchwork of policies aimed at governance reforms, property rights on reserves, and ending the backlog in the land claims process. His greatest effort at partnership with Indigenous communities came in 2014 from the government's work with the Assembly of First Nations National Chief Shawn Atleo on the *First Nations Control of First Nations Education Act*. Though the bill promised \$1.9 billion for reserve communities over seven years, it was widely criticized by regional chiefs as the product of inadequate consultation with aims to reduce the powers of First Nations governments. The Assembly of First Nations' ultimate rejection of the bill led to its removal from the order paper

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<sup>18</sup> For specific examples see such cases as *R v Sparrow*, *Delgamuukw v British Columbia*, *Tsilhqot'in v British Columbia* and the Nisga'a Self Government Agreement. Patrick Macklem and Douglas Sanderson, eds. *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*. University of Toronto Press, 2016.

<sup>19</sup> Cynthia Welsey-Esquimaux. "Stephen Harper and Indigenous Peoples." In *The Harper Factor: Assessing a Prime Minister's Political Legacy*, edited by Jennifer Ditchburn and Graham Fox (Montreal & Kingston: McGill-Queen's Press, 2016), 222.

and Atleo's resignation. It would also mark the end of the Harper government's attempts at collaboration with Indigenous governments on major policy initiatives.

The institutional challenges highlighted by the recent history of Indigenous relations with the Canadian government must prove instructive for Prime Minister Trudeau if he is to successfully orchestrate his desired return to a nation-to-nation relationship. Given that many Indigenous communities now view constitutional litigation as a first response to unwanted government action, the federal government must emphasize its commitment to proper understanding and consideration of section 35 Aboriginal rights. Closely related to this is the importance of flexible policy-making that can adapt to regional discrepancies among chiefs who may differ from the wishes of national organizations like the Assembly of First Nations. While national consensus may be impossible, preliminary considerations of regional policy requirements will help to avoid intra-organizational conflict. Finally, if policymakers within the Trudeau government are to use national climate policy as part of the foundation for a new relationship with Indigenous peoples they should utilize the file's legacy of provincial decentralization as a strategic advantage to better understand regional discrepancies in community requirements and capacities.

### **3. Alternative Policy Considerations from New Zealand and Australia**

The institutional similarities between Canada, Australia, and New Zealand offer a natural case study for policymakers wishing to adopt a comparative lens for political analysis. Their shared legacy of English colonial rule has provided them such foundational institutions as the Westminster parliamentary tradition, liberal political philosophy, and constitutional architectures flowing from the English common law. Alongside these traditions, however, runs a common history of complex relations with the original inhabitants of their respective territories. While

New Zealand and Australia have both sought to incorporate consultation into national climate strategies over the past decade, political calculus and institutional differences have resulted in very different outcomes.

### **3.1 New Zealand – A Policy Born from Partnership**

In 2008, New Zealand’s Labour government passed the *Climate Change Response (Emissions Trading) Amendment Act*, which created a market-based emissions trading scheme (ETS) in which one tonne of greenhouse gas emissions was equivalent to one New Zealand Unit (NZU), an offset that could be bought and sold depending on a consumer’s total emissions output. At the time of passage, many New Zealanders focused on sectoral exemptions from the ETS. Controversially, the agricultural sector, an industry that contributes roughly 50% of New Zealand’s GHG emissions, was not included in the scheme.<sup>20</sup> Less controversial, was the role that the Māori – an Indigenous people making up 10% of New Zealand’s population - held in the policy’s development.

New Zealand’s Ministry of the Environment began consulting Māori political organizations about climate change in 2001 in the run up to their ratification of the Kyoto Protocol in 2002. This trend continued through the mid 2000s with the government funding a Climate Change Māori Reference Group and a Climate Change *Iwi* Leadership Group (later renamed the *Iwi* Leaders Group or ILG) for regional consultations in 2007.<sup>21</sup> Together, these organizations presented a joint submission to the Select Committee on the 2008 Amendment Act, which drew

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<sup>20</sup> While the Labour government promised to phase the agriculture sector in by 2012, this promise was cancelled when the National party formed government in 2011. An ETS review begun in late 2015 promised to reexamine whether agriculture should now be included. Kate Gudsell, “Is it time to include farming in NZs ETS?” *Radio New Zealand* (Wellington, NZ), Oct 27 2015.

<sup>21</sup> *Iwi* are Māori tribes or nations. Naomi Johnstone, “Negotiating climate change: Māori, the Crown, and New Zealand’s Emission Trading Scheme,” in *Climate Change and Indigenous Peoples: The Search for Legal Remedies*, edited by Randall S. Abate and Elizabeth A. Kronk. Northampton: Edward Elgar Publishing, 2013

attention to concerns within the Māori economy, a subset of national output clustered within the agricultural, forestry, and fisheries sectors, with an asset base of some \$16.5 billion in 2006.<sup>22</sup> The result has been program exemptions for Māori-controlled territories, a subsidized allotment of NZUs for Māori-owned businesses operating in the primary sector, bilateral agreements on freshwater management and seabed protection, and Māori representation in international climate consultations.

New Zealand's case differs from the Australian experience due in large part to the Treaty of Waitangi, a governance agreement signed in 1840 between the British Crown and Māori *rangatira* (chiefs).<sup>23</sup> The existence of both English and Māori versions of this document – and their conflicting interpretations of sovereignty – has led to similar treaty conflicts to those present in both Australia and Canada, but the creation of a permanent Waitangi Tribunal in 1975 has helped to resolve interpretive disputes and identify breaches of its original intent. Together with New Zealand's common law judiciary, the Tribunal has afforded the Treaty of Waitangi quasi-constitutional status through litigation over the past four decades.<sup>24</sup>

The Treaty of Waitangi's institutional status provides the Māori with bargaining power in such policy matters as the climate negotiations. In recognition of the respect New Zealand's government now holds for the Treaty, Māori political organizations such as the ILG were successful in lobbying the government to define its Treaty duties under section 3A of the original

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<sup>22</sup> John Ballingal and Chris Schilling. *New Zealand's 2020 emissions target negotiations: Impact on the Māori economy*. Wellington: NZIER. (2009).

<sup>23</sup> New Zealand. Ministry of Justice. *The Treaty of Waitangi/Te Tiriti O Waitangi*. Wellington, NZ. <http://www.waitangitribunal.govt.nz/treaty-of-waitangi/>

<sup>24</sup> Gareth Morgan and Susan Guthrie. *Are We There Yet? The Future of the Treaty of Waitangi*. Wellington: Phantom House Publishing, 2014.

*Climate Change Response Act* in 2002.<sup>25</sup> This action has helped shape political path dependence over the ensuing decade of climate negotiations.

Equally important to Māori participation are the institutional structures of the Parliament and electoral system. Since 1867, New Zealand's Parliament has maintained designated Māori electorates, which currently account for seven of the legislature's 121 seats. These protected districts, in which only Māori may vote, are bolstered by New Zealand's decision to adopt a mixed member proportional representation electoral system in 1996.<sup>26</sup> The change normalized minority governments and prompted the creation of *Te Paati Māori* (the Māori Party) which has won between two and five seats in every election since its formation in 2005. This mechanism for formal political participation has allowed the Māori to hold a key role in coalition governance, with even the centre-right National party inviting the Māori party to enter into a confidence and supply agreement after the former won a minority mandate in the 2014 election. Together, these constitutional and political institutions have allowed the Māori to develop a sustained role in the political discussion around climate policy in New Zealand.

### **3.2 Australia – “Axing the Tax”**

Australia's contemporary response to climate change began in 2007 when Kevin Rudd's Labor party defeated John Howard's longstanding Liberal-National coalition government in an election in which climate policy became a central issue. Within months, the Rudd government had ratified the Kyoto Protocol, created a Department of Climate Change, and commissioned

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<sup>25</sup> *Climate Change Response Act*, Statutes of New Zealand 2002.  
<http://www.legislation.govt.nz/act/public/2002/0040/latest/DLM2636665.html>

<sup>26</sup> Māori voters must declare their intention to vote either in the Māori electorates or on the regular electoral rolls. This is reassessed through the national census every five years.

Professor Ross Garnaut to deliver a national report on Australian climate policy.<sup>27</sup> Rudd drew heavily from the Garnaut Review in his government's initial climate policy, the Carbon Pollution Reduction Scheme (CPRS). The CPRS proposed an emissions trading system, similar to that of New Zealand's, which was aimed at reducing Australia's emissions by 5% below 2000 levels by 2020.<sup>28</sup> The combination of a weak target with major exemptions for export intensive trade exposed industries (EITE) such as coal mining lost the government significant support amongst Senators from the Australian Greens and led to the bill's failure in the Senate on two occasions. Rudd ultimately retracted the CPRS and was replaced as Labor leader by Julia Gillard in a leadership change in June 2010.

Gillard's effort to avoid a similar fate led her to fight the 2010 federal election on the promise of delivering a more balanced emissions trading scheme by 2012. Under her leadership, the Labor Party managed a slim victory in which a confidence and supply agreement with the Australian Greens provided the two additional seats she needed to form government. Now beholden to the Greens, Gillard announced the *Clean Energy Act* (CEA) and accompanying Carbon Pricing Mechanism – a carbon levy of AUD \$23 per tonne that would be replaced by a cap and trade scheme by 1 July 2015.

Present within the *Clean Energy Act* was an allocation of \$22.4 million for an Indigenous Carbon Farming Fund (ICF) and \$1 billion for a Biodiversity Fund.<sup>29</sup> These programs indicated a broader effort on the part of the Labor government to incorporate Indigenous Australians into

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<sup>27</sup> The Garnaut Review marked the first significant opportunity Indigenous Australians had to discuss the impacts they faced from catastrophic climate events. Emily Gerrard. "Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples." *The University of New South Wales Law Journal* 31, no. 1 (2008): 941-952.

<sup>28</sup> Council on Foreign Relations. *Carbon Pollution Reduction Scheme, Green Paper*. <http://www.cfr.org/climate-change/carbon-pollution-reduction-scheme-green-paper/p16864>

<sup>29</sup> \$4.4M is dedicated to research and development of low cost carbon farming techniques to maximize Indigenous participation, with the remaining \$17.1M allocated for tools and training. Australia. Department of Environment and Energy. *Indigenous Carbon Farming Fund*. <https://www.environment.gov.au/climate-change/emissions-reduction-fund/cfi/indigenous-australians/icffrd>

their climate policies. Together, they encouraged partnerships that cultivate traditional ecological knowledge to assist in carbon sequestration and wildfire management. By 2016, there were 24 major Indigenous carbon sequestration initiatives in place across Australia, concentrated heavily within the title lands of the Northern Territory and West Australia.<sup>30</sup>

To the average Australian voter, however, any minor successes realized by the ICF were overshadowed by the intensely negative political marketing campaign opposition leader Tony Abbott launched against the *Clean Energy Act*. Threatening that the pricing mechanism would shift the burden of climate change from industry to the consumer, Abbott claimed the levy would “wipe [entire towns] off the map” and raise the price of a leg of lamb to over \$100.<sup>31</sup> This messaging proved effective, as Julia Gillard’s public opinion numbers began to plummet. A second change in Labor leadership in 2013 saw Gillard and Rudd swap places once again, but it was not enough to prevent the Liberal-National coalition from winning a decisive majority in the 2013 federal election.

Upon forming government, Tony Abbott completed his campaign against the carbon pricing mechanism by repealing the levy and halting Australia’s path toward an emissions trading system. In its place, the Liberal-Nationals enacted “direct action,” a voluntary carbon reduction system in which businesses could enter a reverse-auction, securing government grants by lowering their emissions. Interestingly, the Liberal-National coalition has left the Indigenous Carbon Farming Fund intact, despite scaling back significant portions of Labor’s broader Clean Energy Futures Plan. Australia is currently planning a major review of its climate policies in early 2017.

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<sup>30</sup> Catherine J Robinson et al. “Indigenous benefits and carbon offset schemes: an Australian Case Study,” *Environmental Science & Policy* 56 no. 1 (2016): 129-134.

<sup>31</sup> Lenore Taylor. “Carbon tax savings: Labor has a bone to pick with Coalition,” *The Guardian* (Manchester, UK) July 14, 2014. <https://www.theguardian.com/environment/2014/jul/14/carbon-tax-savings-labor-bone-pick>

While Australia operates under a federal system of government, recent scholarship has noted that the increasing centralization of power at the Commonwealth level has cemented the federal government's role as the country's policy driver.<sup>32</sup> With this in mind, I have focused consideration of Indigenous Australians' limited participation in climate policy development on national electoral politics.

Since the early 2000s, climate policy has developed into a political wedge issue in Australia. The Australian economy is heavily dependent on resource extraction, with a disproportionate dependence on brown and black coal. Coal supplied 84% of Australia's domestic electricity production in 2008 and generated \$41 billion in export revenues in 2010-11.<sup>33</sup> This economic reliance has resulted in a continued flow of subsidies to resource companies and an ongoing debate on the question of how to regulate extractive industries. The Liberal-National coalition has remained supportive of these industries and warned against the trade impacts of unilateral action without similar efforts by larger partners such as China and the United States, while Labor has sought to mitigate proposed carbon regulations through targeted industrial exemptions. While numerous leaders have attempted to clearly articulate these positions as synonymous with each party's brand, ideologically diverse caucuses have triggered four separate leadership challenges – two for Labor, and two for the Liberal-Nationals – in the last seven years, indicating that internal party dynamics may demanded priority over external consultation.

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<sup>32</sup> Robert French. "The Incredible Shrinking Federation: Voyage to a Singular State?" in *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives*, edited by Gabrielle Appleby, Nicholas Aroney and Thomas John. Cambridge: Cambridge University Press, 2012.

<sup>33</sup> Sharon Mascher and David Hodgkinson. "Australia: From 'No Regrets' to a Clean Energy Future?" in *Climate Change and the Law*, edited by E.J. Hollo et al. Dordrecht: Springer Publishing, 2013.

The second crucial factor has been the role of the Australian Senate within Parliament. The Australian Senate is elected as a body of regional representation and is generally much stronger than its Canadian counterpart. Senators do not feel bound to provide a rubber stamp to government legislation, as indicated by Kevin Rudd's repeated failure to pass the Carbon Pollution Reduction Scheme.<sup>34</sup> In this case, Rudd was caught between a Liberal-National opposition calling for industry exemptions and moderation, and an Australian Greens caucus in the Senate that rejected the CPRS for not having gone far enough. The Greens' impact continued in their influence on the controversial carbon pricing mechanism adopted by Julia Gillard when the former held the balance of power through a command and supply agreement after the 2011 election.

This constant attention to political strategy required both within and across parties in the Parliament of Australia provides some explanation for the ad hoc nature of Indigenous Australians' involvement in climate policy development. If a sitting government is unable to guarantee support for a contentious policy, they will be less likely to reach out to external actors. Coupled with Indigenous Australians' small share of the national population and their lack of an entrenched constitutional status, it is unsurprising that programs for Indigenous partnerships were designed for implementation after the broader policy discussion had concluded.<sup>35</sup>

### **3.3 Implications for Canada**

Recent political developments surrounding the Pan-Canadian Framework on Climate Change suggest the Canadian government may benefit more at this time from an Australian model of Indigenous climate programming than New Zealand's method of comprehensive

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<sup>34</sup> Keith Dowding and Aaron Martin. *Policy Agendas in Australia*, Canberra: Palgrave Macmillan, 2017.

<sup>35</sup> There are roughly 670,000 Indigenous Australians, representing 3% of the national population. Australia. Australian Bureau of Statistics. *Estimates of Aboriginal and Torres Strait Islander Australians*. <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>

partnership. Australia provides a near perfect parallel to Canada as a nation dependent on non-renewable resources, with similar demographic profiles and levels of formal political organization for its Indigenous peoples. While Prime Minister Trudeau's continued emphasis on the importance of a renewed nation-to-nation relationship suggests his desire to move toward a permanent role for Indigenous political organizations, the national attention surrounding Canadian climate policy suggests that his government must be strategic in how they incorporate Indigenous participation in the early stages of the process.

The critical difference between Canada and the Antipodean cases is the powerful position of Canadian provincial governments relative to their federal counterpart. Though a federal system, Australia's highly centralized model does not allow for adequate comparison to Canadian federalism, particularly on a policy file historically characterized by deference to provincial constitutional authority. Any increase to Indigenous participation in Canadian climate policy must be tailored to interact with this institutional constraint.

#### **4. A Renewed Programming Relationship – Expanding the ecoENERGY Program**

Similar to the Australian case, the first steps toward new partnerships with Indigenous peoples may come through immediate revisions to federal program delivery. While the newly released Pan-Canadian Framework on Clean Growth and Climate Change includes 80 separate references to the need for Indigenous consultation and involvement on climate policy, this commitment does not appear to be borne out in the framework's annex outlining new federal investment. One of the few funding commitments explicitly directed toward Indigenous communities is a two-year, \$10.7 million program funding transitions away from diesel reliance through renewable energy projects in off-grid Indigenous and northern communities. This commitment appears to be a renewal of Indigenous and Northern Affairs Canada's (INAC)

ecoENERGY for Aboriginal and Northern Communities Program (hereafter ecoENERGY), which operated from 2007-2016.

The ecoENERGY program, which formally ended on March 31 2016, supported Indigenous communities' attempts to reduce GHG emissions by transitioning to renewable energies such as residual heat recovery, biomass, geothermal, wind, solar, and mini-hydro. Its annual budget of roughly \$5 million/year was split between two funding streams: Stream A supports feasibility studies for projects up to \$250,000 that result in reductions of greater than 4000 tonnes of GHG over their life cycle. Stream B supports the design and construction of energy projects of up to \$100,000 per project.<sup>36</sup> While the program prioritized off-grid communities, funding had been available to any community that could demonstrate a commitment to renewable energy transitions. The final program evaluation conducted by INAC's Audit and Evaluation Sector in June 2015 recommended reconfiguring the program to focus exclusively on the needs of off-grid communities.

Indigenous communities represent roughly 60% of Canada's off-grid communities, a status that acts as a significant barrier to economic and social policy development.<sup>37</sup> The majority of these communities are reliant on diesel generation, generating large fuel freight costs.<sup>38</sup> Once fuel arrives on reserve, there is no guarantee that the existing generators will meet energy needs. The INAC evaluation acknowledges that energy demand frequently exceeds output, leading to rolling blackouts or brownouts, and a freeze on essential developments such as housing starts,

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<sup>36</sup> Canada. Aboriginal and Northern Affairs Canada. Audit and Evaluation Sector. *Evaluation of the ecoENERGY for Aboriginal and Northern Communities Program*. [Gatineau], 2015. [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/ev\\_eanc\\_1465225601381\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/ev_eanc_1465225601381_eng.pdf)

<sup>37</sup> The latest program evaluation by Indigenous and Northern Affairs Canada stated that Indigenous communities account for 167 of the 292 off-grid and diesel dependent communities in Canada. *Ibid.*

<sup>38</sup> INAC's Ontario regional office estimates that diesel transport costs for its 25 off-grid communities have totaled \$46.8 million since 2005-6 and that diesel costs are expected to rise by 40% over the next decade. *Ibid.*

and business expansion on reserve. Pikangikum First Nation – an off-grid Ojibwa community of 3000 people located 500 kilometres northwest of Thunder Bay – routinely experiences power outages lasting between a few minutes and several days. Investigations into repeated crises including a cluster of youth suicides from 2006-2008 and a house fire that killed six adults and three children in March 2016 have both cited development barriers due to lack of reliable electricity as contributing factors.<sup>39</sup> While the Pikangikum case represents a tragic combination of worst possible outcomes, hundreds of reserves across Canada continue to struggle with similar difficulties related to energy poverty.

By acting on the recommendations of the INAC program evaluation, the Trudeau government could implement a redesigned ecoENERGY program as an archetype for Indigenous participation in climate policy while staying within the institutional constraints imposed by contemporary federalism. At the program level, this would require a shift in targeting to bring immediate relief to those communities with the greatest need. Under the old ecoENERGY framework, project approvals were dependent on band councils submitting applications by March of each year. INAC's evaluation identified a tendency for a vendor-driven funding model, which encourages third parties to help develop ad hoc projects that fit within the stringent categories set out by Streams A and B above. New recommendations suggest that INAC should develop partnerships with those communities identified as demonstrating the greatest need and work alongside contractors to develop training and mentorship for community members. INAC recognizes that this will necessarily involve removal of restrictive funding streams and maximum

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<sup>39</sup> Eric Bombicino. "How energy poverty devastates Pikangikum First Nation," *TVO Current Affairs*, (Toronto, ON) April 2, 2016. <http://tvo.org/article/current-affairs/shared-values/how-energy-poverty-devastates-pikangikum-first-nation>

project allotments, giving administrators and community leaders more flexibility in project design.<sup>40</sup>

The associated funding and consultation requirements arising from a newly targeted ecoENERGY program can be achieved through the federal-provincial and federal-Indigenous meetings the Prime Minister has already approved. Despite the federal government's constitutional responsibility to provide services for reserve communities, many of the eventual partnership agreements providing energy to off-grid communities will have to come through provincial energy utilities. An external review conducted in support of INAC's ecoENERGY evaluation recognized the existence of multiple programs within Ontario, Québec, British Columbia, and the Northwest Territories already aimed at reducing diesel reliance on reserves.<sup>41</sup>

Given this existing policy infrastructure, the Trudeau government should develop national off-grid electrification standards, similar to those of the national price floor for carbon emissions, while maintaining the option for program flexibility across provinces. By meeting with regional chiefs and government officials from each province, federal policy-makers could develop targeted plans to end Indigenous energy poverty through renewable transitions on the same timeline as the 2030 Paris climate commitments. The funding for this model would clearly eclipse the annual \$5.35 million commitment in the 2016 federal budget, but the Trudeau government could make use of those revenues generated through the national carbon pricing plan, set to increase to \$50 per tonne of emissions by 2022. The Pan-Canadian Framework currently commits the Canadian government to return all revenues to the provinces, however, it also mentions the need for "revenue recycling" targeted at "vulnerable populations and

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<sup>40</sup> Canada, *Evaluation of ecoENERGY*, 41.

<sup>41</sup> Kim Scott. *Literature Review Supporting the Evaluation of the ecoENERGY for Aboriginal and Northern Communities Program in Canada*. Kishk Anaquot Health Research. (unpublished, provided to the author, 2016).

Indigenous communities.”<sup>42</sup> Though politically difficult, appropriate program design may be able to accommodate this initiative without abandoning Trudeau’s earlier promise to the provinces. For example, Ottawa could develop program cost estimates for each province and mandate that a portion of revenues generated by carbon pricing be dedicated to provincial involvement in the new ecoENERGY program, which would supplement increases to INAC funding. As projects are completed, those provinces that complied with the mandate would receive a portion of INAC’s cost reductions from the transition away from diesel in the form of increased transfer payments. Ideally, this model would create incentives for provinces to reduce administrative barriers between Indigenous communities and provincial utilities, while maintaining a degree of provincial autonomy in the targeting of programs.

For Indigenous political organizations, the result will be a first step toward greater program-level involvement and lead to tangible results that account for a diversity of capacities and demands amongst the hundreds of Indigenous communities across the country. The failure of the *First Nations Control of First Nations Education Act* demonstrates that new federal programming related to Indigenous issues must garner approval beyond the office of the AFN National Chief. The regionally specified focus of a new ecoENERGY program would allow for sustained partnership with national organizations such as the AFN and ITK, while necessarily including chiefs at the regional and local community levels. The flexibility of a decentralized, province-by-province plan would also ensure that individual projects are not locked in to national requirements. While this program still falls well short of most Indigenous leaders’ conception of the nation-to-nation relationship Prime Minister Trudeau has promised, it does provide immediate improvements to economic and social welfare on reserves that is in keeping

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<sup>42</sup> Canada. Environment and Climate Change Canada. *Pan-Canadian Framework on Clean Growth and Climate Change*. <https://www.canada.ca/content/dam/themes/environment/documents/weather1/20161215-1-en.pdf>

with the Prime Minister's recent announcement of a "two track" approach to resetting his government's relationship with Indigenous peoples.<sup>43</sup>

## **Conclusion**

One year removed from Canada's initial commitment at COP21, there is reason to commend the federal government's domestic response. In his first year in office, Prime Minister Trudeau has delivered on his electoral promise to secure a landmark national framework agreement on carbon pricing and strategies for emissions reduction that have achieved near-universal acceptance amongst provincial and territorial leaders.<sup>44</sup> On the promise of a renewed nation-to-nation relationship with Indigenous peoples, however, progress has been more measured. While the Trudeau government may have set out with the best of intentions in its decision to incorporate Indigenous political organizations into discussions surrounding national climate policy, it is clear that federal officials did not appreciate the complexity of this process. As Indigenous leaders have since clarified, realization of a nation-to-nation relationship will require reaching a place of equal partnership between Indigenous and federal decision-makers that may not be possible while new ground is still being broken in Canadian environmental policy. As this paper has demonstrated, however, this should not be cause to abandon efforts directed toward Indigenous participation in Canada's response to the Paris Agreement. The Canadian government should take the first steps toward Indigenous involvement in climate policy at the program level, informed by knowledge of the institutional constraints of these complex areas and the lessons of similar policy responses in New Zealand and Australia. While initiatives like INAC's ecoENERGY program comprise only a small portion of the federal

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<sup>43</sup> Kirkup, "Trudeau details 'two tracks'."

<sup>44</sup> At this time, Saskatchewan has refused to sign onto the Pan-Canadian framework and Manitoba has tied their agreement to developments at the First Ministers' Meeting on health care funding in mid-December 2016.

government's work toward a new relationship with Indigenous peoples, they represent a promising foundation from which to move forward.

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