

Implications of Canada's potential withdrawal from the Kyoto Protocol before the end of the First Commitment Period

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Introduction:

1. This briefing paper analyses the process and legality of Canada's alleged pending withdrawal from the Kyoto Protocol ("**KP**" or the "**Protocol**") prior to the end of the first commitment period on 31 December 2012. After summarising the process which Canada would have to follow to withdraw from the KP, this briefing paper examines the limited recourse available to international bodies and the parties to the KP to preserve Canada's status as a party, the legal implications of Canada's withdrawal, as well as the possibility of assessing Canada's compliance with its emission reduction targets on a *pro-rata* basis. This paper has not addressed the issue of Canada's international responsibility in relation to their withdrawal from the KP.

Right of Withdrawal under the Kyoto Protocol:

2. Canada is a party to both the KP and the Vienna Convention on the Law of Treaties ("**VCLT**"). Article 54 of the VCLT provides that a party to a treaty may withdraw from a treaty in conformity with the provisions of that treaty. Pursuant to Article 27 of the KP, a party may withdraw from the Protocol by giving written notification to the UN Depository. Any such withdrawal will take effect one year from the date of receipt by the Depository of the withdrawal notification or such later date as specified in the notification (the "**Cooling Period**"). Consequently, as a party to the KP, Canada may withdraw from the Protocol at any time, such withdrawal taking effect no less than one year after the date of receipt by the Depository of the notification of withdrawal.
3. Should Canada effect its rights under Article 27 and withdraw from the KP, it is unlikely that either of the Conference of the Parties ("**COP**") to the United Nations Framework Convention on Climate Change ("**UNFCCC**") or the Conference of the Parties serving as the Meeting of the Parties ("**CMP**"), as multilateral bodies, nor any of the individual parties to the KP, would have any legal recourse against Canada. There also does not appear to be any legal basis on which the COP, CMP, UN Depository or any individual party to the KP may delay or prohibit Canada's withdrawal from the KP if Canada were to decide to withdraw from the KP pursuant to Article 27.

Legal Implications of Canada's Withdrawal:

4. The first legal implication of Canada's potential withdrawal from the KP prior to the end of the first commitment period is that it would render any enforcement or penalty provisions under the KP inapplicable to Canada. During the one year Cooling Period Canada would still be bound to strive towards its emissions reduction target for the first commitment period. However, notifying

the UN Depository prior to 31 December 2011 of its intention to withdraw from the KP would mean that the enforcement branch of the KP's compliance committee would have no power under decision 27/CMP.1 to assess Canada's compliance with its annual assigned amount of greenhouse gas ("GHG") emissions. This stems from the fact that the enforcement branch can only assess the compliance of a party to the KP at the end of the first commitment period. If Canada is not a party to the KP at the end of the first commitment period, the enforcement branch would have no jurisdiction to assess Canada's compliance, save perhaps a declaration of non-compliance .

5. Secondly, having withdrawn from the KP, Canada would not be subject to any emission reduction targets in the second commitment period, assuming one is agreed in Durban.
6. Finally, a practical consequence of Canada's withdrawal from the KP prior to the end of the first commitment period is that Canada would avoid having to submit its final national inventory report, due by 15 April 2014, for annual GHG emissions data for the period ending on 31 December 2012. Since by that point Canada would no longer be a party to the KP, it would not need to purchase carbon credits during the "true-up period" in order to comply with its first commitment period target (whether pro-rated or not).

Possibility of assessing Canada's compliance with its emission reduction targets on a *pro-rata* basis

7. Should Canada choose to withdraw from the KP, there does not appear to be any basis under the Protocol or any related rules that would allow its emission reduction targets for the first commitment period to be assessed on a *pro-rata* basis. Article 3 of the KP, specifically paragraphs 1 and 7, states that the reduction targets are calculated on the commitment period as a whole. By virtue of withdrawing from the KP *during* the first commitment period, Canada would essentially exempt itself from having to meet its emission reduction commitments under the KP.
8. While the option of attempting to amend the KP to allow for pro-rated emission reduction calculations would be open to the parties, such a process could not ultimately prevent Canada's withdrawal from the KP, should it choose to do so as described above. An amendment to the KP may only be adopted at a CMP session, with notice of the proposed amendment provided to all parties to the KP at least six months prior to such session. While this notice period is shorter than the Cooling Period required by parties who have given notice of their intention to withdraw from the KP, by the time the relevant amendment entered into force, the withdrawing party would no longer be a party to the KP.
9. More fundamentally, however, pursuant to Article 20(4), amendments to the KP are only binding on those who accept them and it is inconceivable that Canada would choose to adopt and ratify an amendment which would allow for their first commitment period obligations to be pro-rated in such a way that it could make Canada internationally responsible for breach of the KP.