Intelligence MEMOS

From: Grant Bishop

To: Supreme Court of Canada

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Re: **Supreme Court should recognize Ottawa's exclusive GHG jurisdiction but find the carbon price backstop unconstitutional**

Against the backdrop of intensifying climate change, the Supreme Court last week began hearing arguments on the constitutionality of the *Greenhouse Gas Pollution Pricing Act* – the federal carbon-pricing backstop.

Its ultimate decision will invariably be historic in how it shapes the way our country regulates carbon emissions in the decades to come. In Ontario and Saskatchewan, majority appeal court decisions upheld the backstop, finding that Ottawa had jurisdiction for the legislation under the "national concern" branch of the federal peace, order and good government power; in Alberta, the court found that it would unconstitutionally intrude on provincial powers.

But the questions of today are not only about today. The pivotal problem now faced by Canada's highest court will be finding a durable and lasting fit for nationwide measures to reduce greenhouse gases (GHGs) that also work under our constitution.

The court's solution should be to recognize exclusive federal jurisdiction for regulating greenhouse gases – but also deem the backstop unconstitutional. Such a "split the baby" result would establish clear authority over GHGs, but prevent Ottawa's backdoor intrusion into provincial regulation of specific industries.

On the core issue, greenhouse gases are a quintessential national concern. They are inherently trans-boundary, accumulating in the atmosphere far beyond any earthbound jurisdictional borders. Although global climate change will inflict community-level consequences, GHGs lack direct local effects; any consequences come from cumulative atmospheric concentration.

Therefore, reducing GHGs represents a classic "collective action problem." Any jurisdiction could free-ride on others' reductions, but failure by a single province to deal effectively with GHGs will have extraprovincial effects. This "provincial inability" to effectively regulate GHGs requires a uniform, national scheme.

Nonetheless, as I highlighted in a 2019 C.D. Howe Institute **paper**, there are problems with the decisions in Ontario and Saskatchewan. Specifically, both defined the national concern in the makeshift terms of "minimum national standards," with the apparent aim of avoiding displacement of the provincial legislation already on the books.

This is a dangerous road because it risks undermining exclusive federal jurisdiction for other national concerns. If this approach works for GHGs, for instance, why not similarly define federal jurisdiction for national concerns such as aeronautics, radio communications or nuclear power in terms of "minimum national standards"?

This approach is also inconsistent with **previous Supreme Court case law** that emphasized that a single and indivisible subject cannot be carved up to create shared federal and provincial jurisdiction. The court has also previously rejected a "double aspect" that would allow concurrent jurisdiction in relation to other national concerns when it found, for example, municipal regulation of cell tower construction to be unconstitutional.

Moreover, if GHGs truly meet the "provincial inability" test, provincial regulation should be ineffective. It should therefore be irrelevant that exclusive federal jurisdiction displaces provincial jurisdiction for GHGs.

Provincial governments are right to fear that a decision in favour of the federal backstop could be a Trojan horse, granting Ottawa the licence to regulate any activity that emits GHGs and eviscerating provincial powers for industrial regulation.

Such an intrusion is exemplified by the federal output-based pricing system (OBPS) for large emitters under the backstop, which involves different "emission intensity" benchmarks for different products and, in the case of electricity, by fuel. The consequence is that different industries and facilities will pay a different cost per tonne of GHGs.

Additionally, the OBPS **favours** coal-fired power generation by prescribing a higher benchmark for producing electricity with coal than natural gas. A higher benchmark means a lower cost per tonne. The Supreme Court should hold that such intentional distortion to the dispatch order for power plants contravenes the exclusive provincial jurisdiction for managing power generation under section 92A of the constitution.

Industry-level carbon pricing by Ottawa should be as offensive to the constitution as, say, inserting specific provisions for dentists or electricity trading in the federal *Competition Act*. The Supreme Court has stressed that the federal trade and commerce power must concern **"trade as a whole rather than with a particular industry."** It would be inconsistent for federal jurisdiction over GHGs to provide a backdoor for activity-by-activity regulation.

Based on questions from the bench during last week's hearing, certain justices appear very concerned about the intrusion into provincial jurisdiction represented by the OBPS (for example, see **intervention by Justice Rowe at 2:34 of Day 1**).

The Supreme Court must look beyond the immediate legislation. As was written almost a century ago, our constitution is a "living tree," adaptable to new contexts and challenges. In this century, confronting the challenge of climate change will define Canada. To face this challenge, our constitution must continue to bloom.

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