

# Intelligence MEMOS



From: Grant Bishop  
To: The Honourable Catherine McKenna, Minister of Environment and Climate Change; and the Honourable David Lametti, Minister of Justice  
Date: May 6, 2019  
Re: **OTTAWA'S CARBON-PRICE BACKSTOP IS NOT OUT OF THE CONSTITUTIONAL WOODS**

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On Friday, a three-to-two majority of the Saskatchewan Court of Appeal upheld the constitutionality of the federal carbon pricing backstop. However, any self-congratulation in Ottawa is premature. The decision highlighted many weaknesses in the federal arguments. Pending a decision in a parallel challenge in Ontario, and with Saskatchewan to appeal this decision to the Supreme Court, the constitutional foundations of the federal backstop remain shaky.

The Saskatchewan court was split with two judges of the five-member panel issuing a lengthy dissent that found the federal backstop unconstitutional. Indeed, the majority's decision [emphatically rejected](#) Ottawa's sweeping assertion of jurisdiction for "the cumulative dimensions of greenhouse gases." The majority [fashioned a much narrower definition](#) of "the establishment of minimum national standards of price stringency for GHG emissions" as a "national concern" under the peace, order and good government (POGG) power.

Importantly, the court's majority noted major problems with confirming federal jurisdiction for regulating GHGs as a national concern under POGG. As highlighted in [an earlier Intelligence Memo](#), confirming such a national concern would mean exclusive federal jurisdiction. Similarly, the Saskatchewan court's majority [observed that](#) "if GHG emissions are recognized as a matter of exclusive federal jurisdiction, any provincial law would be unconstitutional if, in pith and substance, it was in relation to such emissions." This is a nuance that was also [argued](#) by counsel for Ontario's Attorney General in the hearing before the Ontario Court of Appeal last month.

The problem that Ottawa faces is carving space to legislate for carbon pricing without expelling provinces from also regulating GHGs. There is an unavoidable political context operating here: if Ottawa has exclusive jurisdiction for regulating GHGs, a new federal government might nix any carbon pricing and provinces would be barred from regulating GHGs themselves.

The Saskatchewan court's majority attempted to thread the needle by [defining the matter](#) as one of "minimum national standards of price stringency." This approach seems a contortion of the matter to fit the legal test and, as [the majority itself recognized](#), out-of-step with how national concerns under POGG (like aeronautics, nuclear power or broadcasting) have been defined.

Moreover, this approach to defining a national concern runs the risk of destabilizing past division-of-powers case law. If "minimum national standards" are now a basis for federal jurisdiction under POGG, it is unclear why this would not extend to other areas of provincial jurisdiction like securities regulation, healthcare or natural resource extraction. On this point, the dissenting judges have effectively written the appeal for Saskatchewan, [contending that the majority's](#) "approach to characterization would, in the long run, destabilize the federation and the division of powers through death by a thousand cuts."

The majority's characterization of the national concern could weaken support for the federal backstop in another way. The majority tailored it to fit its understanding of the "pith and substance" of the federal backstop – that is, imposing a minimum national carbon price. A national concern for minimum price stringency could be problematic for an output-based federal pricing scheme under which different industries will pay different costs per tonne of GHG emissions depending on their products and production processes.

For example, as elaborated in [a recent C.D. Howe Institute report](#), Ottawa's proposed fuel-specific benchmark for electricity will result in varying carbon costs per tonne for coal and natural gas power facilities. By varying costs for GHGs by industry, the federal output-based carbon pricing system could be argued to intrude on provincial jurisdiction for industrial regulation.

Indeed, during the hearing before the Ontario Court of Appeal in April, counsel for Ontario [highlighted this point](#) about the "picking of favourites" in federal differentiation of carbon costs under the output-based pricing system. Interesting, during that same hearing, [counsel for Canada conceded](#) that Parliament "passing a law targeting specific sectors" would be outside the asserted "national concern" for regulating GHGs. The federal government needs a Plan B if the Ontario court invalidates its output-based carbon pricing system as an intrusion on provincial jurisdiction for industrial regulation.

The challenges in Saskatchewan and Ontario have raised legitimate and nuanced constitutional issues. It remains puzzling that Ottawa did not refer the question of its jurisdiction for regulating GHGs directly to the Supreme Court years ago. By doing so, Ottawa could have clarified the constitutional complexities and provided a firm legal foundation for a national approach to reduce GHG emissions.

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