Intelligence MEMOS

From: Grant Bishop

To: The Honourable Jody Wilson-Raybould, Attorney General of Canada, and the Honourable Catherine McKenna, Minister of Environment

Date: October 17, 2018

Re: **FEDERAL CARBON-PRICING BACKSTOP IS NEW CONSTITUTIONAL TERRITORY**

Certain commentators have minimized the merits of constitutional challenges raised by provinces to the federal government's carbon pricing backstop. However, the federal backstop represents new and far-reaching constitutional territory. No Canadian court has affirmed a general federal jurisdiction to regulate greenhouse gases. This assertion of federal power – and its interface with provincial powers – requires prompt consideration by our courts. Ottawa alone can expedite clarity by referring the question of constitutionality directly to the Supreme Court.

Scholarly consensus about the constitutional foundation for the federal backstop is not uniform: Bryan Schwartz of University of Manitoba, who provided an opinion for Manitoba's government, believes the backstop would be valid under the federal taxation power, but doubts that it could be supported under the federal government's jurisdiction for criminal law or for peace, order and good government (POGG). Alistair Lucas and Janet Yearsley of University of Calgary also question whether any of these powers could support federal pricing.

Regardless, opinion among legal academics doesn't make law: judges decide constitutional questions. Once upon a time, many legal experts also agreed that the federal trade and commerce power would support a national securities regulator. The Supreme Court held otherwise.

There is good precedent to support the expansion of POGG to cover the regulation of GHGs as a "national concern". Similar to the Supreme Court's finding that marine pollution was a national concern in *Crown Zellerbach*, a provincial failure to regulate GHGs would have extra-provincial effects.

But key questions lie in the details of the backstop – and concern the limits of a federal jurisdiction to regulate GHGs. The Supreme Court's test for an expansion of POGG in *Crown Zellerbach* also requires that the federal jurisdiction be reconciled with provincial powers.

In particular, it is questionable whether the output-based allocations (OBAs) in the federal backstop (which assign credits to large GHG emitters based on an industry-by-industry estimate of average emissions intensity) are in pith and substance about regulating GHGs or represent industrial regulation within the provincial jurisdiction. By tweaking these output-based allocations for steel producers in July, the federal government's aim is arguably to support particular industries rather than mitigate GHGs. This is not an argument against OBAs: OBAs help mitigate the impact on the competitiveness of trade-exposed sectors while preserving incentives to reduce emissions.

But, as the Supreme Court underscored in the *National Securities Reference*, the optimal policy should not be confused with what is constitutional. Although counterintuitive, to find OBAs outside the federal jurisdiction could further cooperative federalism: This would counterbalance a potentially expansive federal power. It would compel provincial governments to choose between a less efficient federal backstop and cooperating on well-tailored provincial carbon pricing using OBAs. It would avoid handing Ottawa all the cards.

Moreover, if POGG does confer federal jurisdiction to regulate GHGs, it is also an open question how any of the current provincial carbon pricing schemes would be constitutional: A national concern under POGG means an exclusive federal jurisdiction – for example, aeronautics, radio-communications or nuclear power – and provinces cannot legislate within the core of a national concern. Even if provinces have concurrent powers for environmental regulation, it is difficult to see how a mirror provincial GHG pricing scheme would not intrude on the core of a federal national concern for regulating GHGs.

Previous federal governments sought direct answers from the Supreme Court on constitutionally contentious legislation – for example, the national securities regulator and controls on wages and prices. The Trudeau government has so far failed to seek this clarity.

Rather than being just costly lawsuits, the current challenges by Ontario and Saskatchewan highlight significant, unresolved constitutional questions. If the federal government wants to save litigation costs and expedite certainty, it can consolidate the separate challenges by a direct reference to the Supreme Court. That Ottawa has not indicates that it may be harbouring more doubt than it lets on.

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