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: February 22, 2019

Re: **Ottawa needs a Plan B if courts find only it can regulate GHGs**

The Saskatchewan Court of Appeal heard oral arguments last week on the constitutionality of the federal government's carbon pricing "backstop," which it intends to apply to provinces that Ottawa decides lack sufficiently stringent carbon pricing. The governments of Saskatchewan, Ontario and New Brunswick contend that Ottawa lacks jurisdiction for this legislation under the constitution's division of powers.

At last week's hearing, questions from the panel of judges underscored inconsistencies in Ottawa's position that both the federal and provincial governments can regulate greenhouse gas emissions. The federal government should develop contingency plans if courts find that regulating GHG emissions is an exclusive federal jurisdiction.

Ottawa has argued that GHG emissions are a "national concern" under the peace, order and good government ("POGG") power under section 91 of the constitution. University of Calgary's Martin Olszynski summarizes the arguments for why GHG emissions may fulfill the four-prong test for a "national concern" outlined by the Supreme Court's 1988 decision in *Crown Zellerbach* (concerning federal jurisdiction for controlling marine pollution). However, *Crown Zellerbach* (and other POGG caselaw) also indicates that a finding of "national concern" means "Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects."

Therefore, a "national concern" finding may mean the jurisdiction to regulate GHGs is exclusively federal (as elaborated in an earlier Intelligence Memo). In that case, provincial legislation that is aimed "in pith and substance" at reducing GHG emissions should be invalid under our constitutional division-of-powers, and the federal government could not selectively "backstop" carbon pricing in non-compliant provinces. That is, only the federal government could legislate to regulate GHG emissions nationwide.

During last week's oral arguments, questions from Chief Justice Robert Richards indicated that the court is wrestling with (A) how it could define a "national concern" for GHG emissions without displacing provinces' jurisdiction for present legislation that regulates GHGs; and (B) what "edges" a federal power to regulate GHGs would have.

Notably, in her oral submissions, counsel for the Attorney General of Canada modified Canada's description of the "national concern" to "cumulative dimensions of GHG emissions" from "GHG emissions" in Canada's earlier written submission. She explained that this was to differentiate the "national concern" from aspects of GHG emissions that would remain subject to provincial legislation. Chief Justice Richards expressed his difficulties with this distinction, asking "how is there ever a local or intra-provincial dimension" to cumulative GHG emissions? He also pressed council for a definition of the "edges" of the asserted national concern. He was clearly concerned about the potentially sweeping power that might, for example, support a federal "Better Windows in Homes Act".

Counsel for Canada asserted the "double aspect" doctrine would allow for concurrent jurisdiction. Nonetheless, Richards indicated his confusion how the "national concern" would not displace provincial legislation aimed at regulating GHGs, posing that "if the pith and substance of what [provinces] are doing goes to the cumulative dimensions of greenhouse gas emissions, then it's unconstitutional."

However, during the final reply by counsel for Saskatchewan, Richards also signalled that he saw merit in a possible analogy with the provincial regulation of intra-provincial water pollutants and federal jurisdiction for regulating inter-provincial waters – a suggestion advanced by Canada's EcoFiscal Commission.

Nonetheless, it remains unclear just how provincial regulation of GHGs would not intrude on the core of an exclusive "national concern" for GHG emissions. In past decisions, the Supreme Court has rejected a "double aspect" and held provincial legislation invades the core of the "national concern" when considering municipal prohibitions on siting cell phone antennae, provincial zoning that restricts aerodromes, or provincial labour legislation in nuclear power plants.

There are two key takeaways from this hearing: (1) the jurisdiction to regulate GHGs is not as clear-cut as many had asserted; and (2) the federal government did not fully think through the constitutional complexities before passing the backstop legislation.

Regulating GHGs represents the most significant assertion of federal jurisdiction in a generation. The federal government could have directly referred these constitutional questions to the Supreme Court before passing the backstop legislation. This would have pre-emptively addressed the legal uncertainty that last week's hearing brought to the surface. However the Saskatchewan court finds, its decision and the upcoming reference in Ontario will only be preludes to a final word from the Supreme Court of Canada.

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