Intelligence MEMOS

From: Grant Bishop

To: Climate Policy Observers

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Re: Ottawa Needs to Get Back to Carbon Pricing Basics

Last month, a Supreme Court majority held that the core of the federal *Impact Assessment Act* (IAA) is unconstitutional – a "Trojan horse" of federal overreach into provincial jurisdiction. Amid much criticism, this legislation was enacted in 2019 under Bill C-69 to overhaul how the environmental and social effects of major projects were assessed and approved.

The Supreme Court's opinion on the IAA is immediately important for new major projects in Canada, but it also signals the constitutional vulnerability of Ottawa's pending legislation for clean electricity standards, an industry-specific cap on greenhouse gases from oil and gas, and quotas for sales of electric vehicles.

To avoid miring Canadian climate policy in protracted uncertainty, the federal government should expedite clarity on its jurisdiction for these proposed regulations by referring the questions around constitutionality directly to the Supreme Court. Most importantly, Ottawa should return its focus on making carbon pricing work transparently, consistently and predictably across the country. (I addressed the unprincipled inconsistency of Ottawa's decision to exempt heating oil from the fuel levy elsewhere.)

The federal side says amendments to the IAA will be simply "surgical," but core components of the legislation require revamp. The court majority rebuked the factors for "sustainable development" and "meeting climate change commitments" that Ottawa had crammed into the public interest decision under Bill C-69. These would confer a "practically untrammelled power" for Ottawa to regulate otherwise provincially regulated projects.

Notably, the Supreme Court majority also chastised Ottawa for attempting to "do an end run" around the limits of federal jurisdiction for GHGs. The majority stressed that its earlier decision upholding the federal carbon pricing backstop did confer wide-ranging jurisdiction for the federal government to regulate every activity that emits GHGs: "legislation with respect to roadways, building codes, public transit and home heating, for example" remains outside federal jurisdiction.

Importantly, in the earlier carbon pricing case, the dissenting justices were especially alert to the risks that GHG regulation could veer too deeply into industrial policy. Although punting that question to a future case, the majority nonetheless indicated that using GHG regulation for "industrial favouritism" would be constitutionally problematic.

Looking ahead, this latest decision should warn Ottawa of the shaky constitutional ground for its proposed regulations to require net-zero electricity generation and to impose an industry-specific cap on GHGs from oil and gas. (I recently highlighted constitutional questions around these proposed regulations.) The court has foreclosed broad federal jurisdiction for regulating each and every GHG-emitting activity.

Alternatively, upholding the proposed federal regulations as valid "criminal" law would untenably stretch that federal power – which is understood as the constitutional basis for their enabling statute, the *Canadian Environmental Protection Act*. The Supreme Court would need to contort its established jurisprudence that "criminal" law requires a prohibition accompanied by a penalty in response to a threat to a public interest. Some scholars contend the court could still uphold these proposed regulations as constitutionally valid. However, such broadening of "criminal" law would arguably confer federal jurisdiction for practically any scheme of detailed, sector-specific regulation.

Provinces like Alberta are unabashedly eager to challenge these regulations. But provincial governments can only refer constitutional questions to their own province's court of appeal while the federal government can refer questions directly to the Supreme Court, which it should do to avoid wasting precious years and prolong investor uncertainty.

Most importantly, this decision should prompt Ottawa to re-focus Canadian climate policy on carbon pricing. During Ottawa's earlier fight for jurisdiction to price carbon, widespread consensus among Canadian economists rightly backed carbon pricing as the best way to reduce GHGs. But after winning, Ottawa became distracted with creating new regulations rather than concentrating on making carbon pricing work well across Canada.

Meanwhile, Ottawa has abdicated any effective backstop for Canada's present provincial carbon pricing patchwork. Alberta's industrial carbon pricing scheme faces a looming oversupply of credits and offsets. Industry's lack of confidence in future carbon prices is paralyzing investment decisions for carbon capture and storage projects.

Ottawa's climate policy risks spiraling into an economic and constitutional mess. The court's decision should be read as a stop sign for federal jurisdiction. With industry exasperated by policy uncertainty in Canada and diverting investment elsewhere, Ottawa should expend less effort on expanding federal powers and instead bolster its capabilities for competently administering carbon pricing nationally.

Grant Bishop is the Calgary-based founder of KnightFork, which builds data-driven tools for carbon pricing and the energy transition. As Associate Director of Research for the C.D. Howe Institute from 2018-2021 his work included an extensive report on the implications of Bill C-69 with Senior Fellow Grant Sprague.

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