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Living Tree or Invasive Species? Critical Questions for the Constitutionality of Federal Carbon Pricing

In upcoming appeals, the Supreme Court of Canada must coherently address whether “greenhouse gases” represent a national concern that falls under exclusive federal jurisdiction and confront whether activity-level GHG regulation, such as federal output-based carbon pricing for large emitters, intrudes on provincial powers.

Grant Bishop

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A handwritten signature in black ink that reads 'Daniel Schwanen'.

Daniel Schwanen
Vice President, Research

THE STUDY IN BRIEF

In the upcoming hearings by the Supreme Court on constitutional challenges to the federal government's carbon pricing backstop under the *Greenhouse Gas Pollution Pricing Act* (GGPPA), the court must coherently define the “national concern” for the federal government to have jurisdiction to regulate greenhouse gases (GHGs) under its peace, order and good government (POGG) power.

The “minimum national standards” approach to defining the national concern by the majorities of the Ontario and Saskatchewan courts of appeal lacks any precedent in previous POGG jurisprudence. In all previous case law, a national concern conferred exclusive federal jurisdiction. In contrast, the Ontario and Saskatchewan decisions appear to be policy-driven contortions of constitutional law to enable both federal and provincial governments to concurrently price carbon. A “minimum national standards” approach for federal jurisdiction under POGG would mean both “death by a thousand cuts” for federalism, as one jurist has put it, and could undermine the exclusive federal jurisdiction for other national concerns like aeronautics, radio communications and nuclear power. Because carbon pricing is good policy does not mean courts should contort Canada's constitutional architecture. Given the transboundary effects of GHGs and the collective action problem facing consistent provincial regulation, the Supreme Court must confront whether greenhouse gases should fall under exclusive federal jurisdiction as a national concern.

Courts have also so far failed to grapple with the industry-specific picking of winners through the federal output-based pricing system (OBPS) for large emitters, which differentiates carbon costs per tonne between different industries and production processes. If not restricted from imposing industry-by-industry GHG standards, the federal government would have a back door to invade provincial jurisdiction for intra-provincial industries and natural resources. Even if greenhouse gases are a national concern, activity-level regulation like the OBPS should arguably be outside of federal jurisdiction. To address “leakage,” the federal government could instead use measures under its international trade power or work cooperatively with provinces.

The Supreme Court must now tackle vital constitutional questions that the Ontario and Saskatchewan courts neglected. In particular, the Supreme Court must: address the obvious problems with a “minimum national standards” approach to defining national concerns under POGG; coherently confront whether or not “greenhouse gases” are the national concern for which the federal government would have exclusive jurisdiction; and consider whether output-based pricing of GHGs with product- and process-specific benchmarks intrudes into provincial jurisdiction.

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Ahead of the Canada Day weekend, the Ontario Court of Appeal released its decision on the constitutionality of the federal government’s carbon-pricing “backstop,” as it is commonly called, under the *Greenhouse Gas Pollution Pricing Act* (GGPPA),¹ with a four-member majority upholding the legislation (Justice Huscroft dissenting).²

Ontario’s government has appealed this decision to the Supreme Court,³ joining Saskatchewan’s government in its appeal of an April decision by a three-member majority of the Saskatchewan Court of Appeal (Justices Ottenbreit and Caldwell dissenting).⁴ Quebec’s government is also intervening at the Supreme Court, opposing Ottawa’s jurisdiction to regulate greenhouse gases. Alberta has also put a reference question to its court of appeal.⁵

The federal assertion of jurisdiction to regulate greenhouse gases (GHGs) breaks new ground for the federal-provincial division of powers. In particular, the federal government’s argument that GHGs constitute a “national concern” under the peace, order and good government power (POGG) raises complex constitutional issues. As well, while many had previously argued that the federal government’s general taxation power could provide

jurisdiction to price GHG emissions, the Ontario and Saskatchewan majorities appeared to reject this view, finding that the dominant purpose of carbon pricing under the GGPPA was to influence behaviour rather than raise revenues (see Box 1).

Nonetheless, the courts’ findings on the national concern under POGG are potentially the most far-reaching. In order to uphold the federal backstop, the majorities of both the Ontario and Saskatchewan courts of appeal defined the “national concern” in a manner that lacks precedent and failed to grapple with essential questions. Specifically, both the Ontario and Saskatchewan majorities define the national concern in terms of “minimum national standards.” This approach to defining a national concern lacks precedent in previous POGG case law (see Box 2).

Moreover, this approach risks an unbounded imposition of federal minimum national

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1 *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.

2 *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*ONCA re GGPPA*].

3 See: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38781>.

4 *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*SKCA re GGPPA*]. Appeal to Supreme Court of Canada pending – see: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38663>.

5 Alberta Order in Council (20 June 2019). Available online: http://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2019/2019_112.pdf.

standards onto matters otherwise under provincial jurisdiction. The implications from the Ontario and Saskatchewan majorities' reasoning go beyond controlling GHGs. The "minimum national standards" approach could erode other federal jurisdiction under POGG – such as for radio-communications, aeronautics and nuclear energy. For example, if federal jurisdiction was limited to *minimum* national standards for radio-communications or aeronautics, why could provinces then not regulate the location for airports or cellphone towers?

The Ontario and Saskatchewan majorities' approach to defining the national concern appears motivated by a policy preference to allow both federal and provincial governments to price carbon. But this contradicts the holding by the majority of the Supreme Court in *Crown Zellerbach*⁶ (concerning the question of federal jurisdiction for marine pollution by dumping) that, if a matter is a national concern under POGG, the federal Parliament gains exclusive jurisdiction. Indeed, the approach to defining a national concern only to the extent of "the risk of non-cooperation" – and thereby allowing concurrent federal-provincial jurisdiction – was expressly rejected by the Supreme Court in *Crown Zellerbach*.

The uncontested evidence in all these cases is that cumulative atmospheric concentration of specific chemical substances emitted by human activities impacts the earth's climate. It is accepted that such greenhouse gases have extra-territorial, international effects, regardless of their source. Therefore, the upcoming appeal must directly address whether "greenhouse gases" represent a national concern. In particular, the Supreme Court must decide whether GHGs, like inflation in the *Anti-Inflation Reference*,⁷ are too "pervasive" to

constitute a single, distinct and indivisible subject matter. However, if the Supreme Court finds greenhouse gases represent a national concern, the federal government would have exclusive jurisdiction over that subject matter, displacing provincial jurisdiction.

Finally, neither the Ontario nor Saskatchewan decisions confront the industry-by-industry – and, in the case of power generation, process-by-process – differentiation of per-tonne carbon costs through the federal backstop's output-based pricing system (OBPS) for large emitters. To uphold the OBPS, the federal government must have jurisdiction not only for "minimum national standards" but "minimum national standards *by industry*". In these appeals, the Supreme Court must address whether a national concern for regulating GHGs allows the federal government to prescribe different standards for different activities. In order to constrain any federal jurisdiction for regulating greenhouse gases, the Supreme Court could decide that activity-level carbon pricing intrudes on provincial powers and the OBPS is therefore *ultra vires*.

This *Commentary* proceeds by elaborating key questions that the Supreme Court should consider in its upcoming decision concerning the GGPPA:

- Could the "minimum national standards" approach destabilize the division of powers under Canada's constitution?
- Do "greenhouse gases" constitute a national concern under POGG?
- Can the federal government impose industry-specific carbon prices or standards?
- How can federal jurisdiction for regulating greenhouse gases be contained?

The Supreme Court must ensure that it maintains a coherent approach to the constitutional division-of-powers – rather than preserve a preferred policy.

6 *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at paras. 33–35 [*Crown Zellerbach*].

7 *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 458 [*Anti-Inflation Reference*]. This decision responded to a federal government reference to the Supreme Court to determine the constitutionality of its 1975 wage-and-price control legislation.

Box 1: Why Not a “carbon tax”?

Certain commentators have expressed surprise that the federal government has argued that GHGs are a national concern under POGG rather than relying on the federal taxation power as the constitutional foundation to design its emissions pricing scheme (e.g., Newman, 2019).

The federal taxation power under Section 91(3) of the *Constitution Act*, 1867 (specifically, “The raising of Money by any Mode or System of Taxation”) provides broad jurisdiction for the federal government to raise revenues by levying any mode of taxation. Various scholars have asserted that this power would support a tax on GHG emissions (e.g., Hogg 2009 at p.518-19; Bankes and Lucas 2004 at p.390; Hsu and Elliot 2009 at p. 489; Schwartz 2017 at p.2; and Olszynski 2019). While agreeing that the federal taxation power could support a carbon tax designed as a revenue-raising measure, Chalifour (2008) suggests that a carbon tax whose dominant purpose is to reduce GHG emissions (rather than raise revenues) would more likely be characterized as a regulatory charge.^a

Importantly, in its 1999 *Westbank* decision, the Supreme Court set out criteria for determining whether a particular levy represents “in pith and substance” a tax or a regulatory charge, indicating that a tax must “raise revenue for general purposes.”^b In contrast, regulatory charges “have a regulatory purpose, such as the regulation of certain behaviour.”^c As well, in an earlier decision concerning natural gas levies under the 1980 National Energy Program, the Supreme Court stated that, “If the primary purpose is the raising of revenue for general federal purposes then the legislation falls under s. 91(3).”^d Justice Rothstein’s reasons for a unanimous Supreme Court in *620 Connaught* also appear to endorse the view that fees “designed to proscribe, prohibit or lend preference to a behaviour” constitute regulatory charges rather than taxation.^e If a federal levy is a regulatory charge rather than a tax, a separate head of power must provide the necessary jurisdiction, or the measure will be constitutionally invalid.

In the Saskatchewan challenge to the GGPPA, the majority of the Saskatchewan Court of Appeal endorsed the view that because raising revenues for general purposes is an incidental, rather than primary, purpose of carbon pricing under the GGPPA, the legislation is not a tax in the constitutional sense.^f The Ontario majority only briefly addressed questions around the taxation power; however, the majority held that the pith and substance of the GGPPA does not fall under the taxation power but, rather, under the national concern branch of POGG.^g

In both challenges, the courts were required to consider whether the GGPPA was a tax because of the requirement for parliamentary control over taxation under Section 53 of the Constitution.

Specifically, if the GGPPA had been found to impose a tax, it could be invalid because of the ministerial discretion around its application (i.e., the provinces and industrial sectors to which charges would apply). Additionally, had the GGPPA been found to levy a tax, property owned by provincial governments (e.g., provincially owned power generation facilities) would not have been subject to the tax under the so-called “Crown immunity” conferred by Section 125 of the Constitution.^h These consequences were avoided because

a See: Chalifour, 2008 at p.149.

b *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at para. 34 [*Westbank*].

c *Westbank* at para.44.

d *Re Exported Natural Gas Tax*, [1982] 1 SCR 1004 at 1070.

e *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 at para. 20 [*620 Connaught*].

f *SKCA re GGPPA* at paras. 87-89, 96.

g *ONCA re GGPPA* at paras. 147-49.

h Section 125 stipulates that, “No Lands or Property belonging to Canada or any Province shall be liable to Taxation”. Such Crown immunity from taxation was the basis for the Supreme Court’s holding in *Westbank* that invalidated fees (which were found to be taxes rather than regulatory charges) imposed by an Indian Band on provincially-owned hydroelectric infrastructure.

Box 1: Continued

both the Ontario and Saskatchewan majorities held that both parts of the GGPPA – the fuel levy under Part 1 and the OBPS under Part 2 – were regulatory charges rather than taxes.

The question of whether the GGPPA imposes a tax or regulatory charge will presumably also be considered by the Supreme Court in the upcoming appeals. The Ontario and Saskatchewan decisions appear to entrench a precedent that, even if raising revenues, a charge for the primary purpose of incenting specific behaviour will not be supportable by the federal general taxation power. While such a limit to the federal taxation power is arguably indicated in earlier cases like *Westbank* and *620 Connaught*, the Supreme Court should also confirm whether a dominant purpose of raising revenue is a requirement for legislation to be valid under Section 91(3) of the Constitution. This could have implications for the constitutionality of other levies aimed at modifying behaviour.

COULD A “MINIMUM NATIONAL STANDARDS” APPROACH DESTABILIZE THE DIVISION OF POWERS?

For defining the “national concern” under POGG, the majority of the Ontario Court of Appeal rejected the definition of “the cumulative dimensions of GHG emissions” that was advanced by counsel for Canada. The majority considered this definition “too vague and confusing” and noted that “GHGs are inherently cumulative”.⁸ Instead, after considering the “pith and substance” of the federal legislation, the majority imposed its own definition for the “national concern” as “establishing minimum national standards to reduce greenhouse gas emissions.”⁹

Notably, the Ontario majority’s definition for the national concern under POGG was based on its characterization of the “pith and substance” of the legislation itself. In describing the “new matter,”

the majority merely reiterates its characterization of “minimum national standards to reduce GHG emissions” for the pith and substance of the GGPPA.¹⁰ Therefore, the Ontario majority’s approach to defining the national concern confuses the characterization of the legislation with characterization of the national concern. This conflates two separate branches of constitutional analysis applicable to POGG powers – first, defining the national concern to determine whether it accords with the test outlined in *Crown Zellerbach* to establish new federal jurisdiction and, second, analyzing whether the “pith and substance” of the challenged legislation falls within that new federal jurisdiction.

Interestingly, the Ontario majority only briefly noted that certain constructions of a national concern would give the federal government exclusive jurisdiction for regulating GHGs, displacing provincial jurisdiction.¹¹ Similarly, the

8 *ONCA re GGPPA* at para. 74.

9 *ONCA re GGPPA* at para. 77.

10 *ONCA re GGPPA* at para. 104.

11 *ONCA re GGPPA* at para. 74.

Box 2: Overview of Previous Case Law on “national concerns” under POGG

While Section 92 of the Constitution enumerates matters within the exclusive jurisdiction of provincial legislatures, Section 91 assigns federal Parliament the power “to make Laws for the Peace, Order, and good Government of Canada.” The accepted view is that this federal POGG power involves three branches: (1) gap; (2) emergency; and (3) national concern. The gap branch is understood to fill gaps in the Constitution’s division of powers. For example, while the Constitution specifically assigns provincial jurisdiction for “the incorporation of companies with provincial objects”, there is no enumerated federal power of incorporation for the companies with non-provincial (i.e., federal) objects.

Under the emergency branch, the federal government may pass legislation that overrides provincial jurisdiction during a temporary emergency. This branch was applied to uphold federal legislation during wartime or its aftermath that encroached on provincial property and civil rights jurisdiction. The emergency branch requires “abnormal or exceptional circumstances” and the legislation must be reasonably viewed as “necessary” to address the emergency.^a In the *Anti-Inflation Reference*, a majority of the Supreme Court held that federal legislation for imposition of temporary wage-and-price controls outside of federally regulated sectors could be justified as “crisis legislation” in the context of high inflation and high unemployment experienced during the mid-1970s.^b

Notably, in the Ontario and Saskatchewan references, certain parties argued a “national emergency” as the constitutional basis to support the GGPPA. However, both the Saskatchewan and Ontario decisions rejected this ground on the bases that Parliament did not pass the GGPPA as emergency legislation and the statute lacks the temporary character (i.e., “life of limited duration”) required to be supportable by the POGG emergency branch.^c

In contrast with these other branches, the national concern branch establishes exclusive federal jurisdiction over subjects that, although originally subject to provincial jurisdiction, have since become matters of national concern. In *Crown Zellerbach*, Justice Le Dain, writing for the majority of the Supreme Court, provided the accepted definition for this branch:

- 1 The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
- 2 The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
- 3 For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

a *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 406-7 and 420 [*Anti-Inflation Reference*].

b *Anti-Inflation Reference* at 375.

c *ONCA re GGPPA* at paras. 217-19, citing *Anti-Inflation Reference* at 427, 437 and 461; and *SKCA re GGPPA* at para. 202.

Box 2: Continued

- 4 In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra provincial interests of a provincial failure to deal effectively with the control or regulation of the intra provincial aspects of the matter.^d

The final aspect of this definition is understood to relate to so-called “provincial inability” and can help identify a national concern on the basis that “provincial failure to deal effectively with the intra provincial aspects of the matter could have an adverse effect on extra provincial interests.”^e

Various scholars have observed that courts appear to apply “provincial inability” to circumstances where activities in one province impose negative externalities (i.e., impacts on others without private cost to the producer) on other provinces (Choudhry 2019 at p.18; and Chalifour 2016 at p.366-67). For example, in his dissent in *Crown Zellerbach*, Justice La Forest acknowledged that federal government could control interprovincial pollution as a national concern under POGG, characterizing the majority’s holding in the earlier *Interprovincial Co-operatives* case as upholding exclusive federal jurisdiction for regulating inter-provincial water pollution as a national concern.^f

However, in *Crown Zellerbach*, Justice Le Dain stressed that, “in order for a matter to qualify as one of national concern falling within the federal peace, order and good government power it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned.”^g In the *Anti-Inflation Reference*, Justice Beetz reasoned that:

The “containment and reduction of inflation” does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds.^h

It is also firmly established that once a subject matter is recognized as a national concern under POGG, it is subject to exclusive federal jurisdiction.ⁱ For example, radio-communications is understood as a national

d *Crown Zellerbach* at para. 33.

e *Crown Zellerbach* at para. 35.

f *Crown Zellerbach* at para. 59 [Justice LaForest dissenting], citing *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 SCR 477 [*Interprovincial Co-operatives*]. Justice LaForest dissented in *Crown Zellerbach* at para. 56 on the issue of whether the marine dumping had deleterious effects beyond provincial limits. Notably, writing for the majority in *Crown Zellerbach* at para. 36, Justice Le Dain disagreed with Justice LaForest’s interpretation that a majority of the court in *Interprovincial Co-operatives* had endorsed inter-provincial river pollution as within exclusive federal jurisdiction under POGG. Justice Le Dain observed that Justice Ritchie, in his concurring opinion in *Interprovincial Co-operatives* at 525-526, had concurred in the result but had expressly declined to endorse exclusive federal jurisdiction for inter-provincial rivers.

g *Crown Zellerbach* at para. 39.

h *Anti-Inflation Reference* at para. 458. As noted above, the Supreme Court majority upheld wage-and-price controls under the emergency branch of POGG.

i Although “radio communications” was not directly referred to as a “national concern” in the original Privy Council decision (*In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 (UK JCPC)), the explanation of previous POGG cases by Justice Beetz in the *Anti-Inflation Reference* at 456-457 categorized federal jurisdiction for “radio communications” as based on a national concern.

Box 2: Continued

concern, and the Supreme Court has held that jurisdiction for the siting of radio-communications infrastructure is therefore under exclusive federal jurisdiction, rejecting any so-called “double aspect” under which provinces (or municipalities) could concurrently legislate.^j Similarly, because air travel is under federal jurisdiction as a national concern, the Supreme Court has held provincial laws could not restrict the location of airports and aerodromes.^k In the context of nuclear power, a majority of the Supreme Court found that the national concern displaced provincial legislation for labour relations.^l

j *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at para. 52 [*Rogers Communications*].

k *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at paras. 2 and 60 [*Canadian Owners and Pilots Association*].

l *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 351 and 379-380 [*Ontario Hydro*]. The Ontario Hydro decision involved three separate opinions: one written by Justice LaForest (Justices L’Heureux-Dubé and Gonthier concurring), another by Chief Justice Lamer and a dissent by Justice Iacobucci (Justices Sopinka and Cory concurring). However, a majority concurred that atomic power was a national concern that displaced provincial legislation over labour relations. Specifically, in *Ontario Hydro* at 379-80, Justice LaForest held that “the production, use and application of atomic energy constitute a matter of national concern” and noted that, “The whole purpose of federal regulation of nuclear electrical generating plants would be frustrated if Parliament could not govern the standards and conditions for employment of the individuals who operate the plant, both for their own safety, and for that of the general public.” Likewise, in *Ontario Hydro* at 351, Chief Justice Lamer agreed that the “power to regulate the labour relations of those employed on or in connection with facilities for the production of nuclear energy is integral to Parliament’s declaratory and p.o.g.g. jurisdictions.”

Saskatchewan Court of Appeal majority only tangentially mentions this potential result.¹² Yet, underlying both the Ontario and Saskatchewan majority decisions appears a perceived need to maintain concurrent federal and provincial jurisdiction for pricing GHGs.

The result is a contorted effort to overlay federal jurisdiction for “minimum national standards” while preserving provincial jurisdiction to price or otherwise regulate GHG emissions above some

minimum federally imposed standard. But this approach is inconsistent with the underpinnings of POGG, which are to recognize “new matters which did not exist at Confederation and to matters which, although *originally matters of a local or private nature* in a province, have since, in the absence of national emergency, *become matters of national concern* [emphasis added]”.¹³ The very point of the national concern branch of POGG is to transfer specific authority to the federal government

12 *SKCA re GGPPA* at para. 130.

13 *Crown Zellerbach* at para. 33.

that would otherwise reside with provincial governments.

Nonetheless, the Ontario and Saskatchewan majorities are trying to give the federal government a “national concern” but allow provinces to play too. As the Ontario majority emphasized, its “minimum national standards” definition for the national concern “is narrowly constrained to address the risk of provincial inaction regarding a problem that requires cooperative action.”¹⁴

However, in *Crown Zellerbach*, the Supreme Court specifically rejected the proposition that federal jurisdiction for a national concern would extend only to the “risk of non-cooperation” and could confer concurrent or overlapping jurisdiction.¹⁵ The so-called “provincial inability” test (see Box 2) does not mean that the national concern is limited to addressing only the “problem of cooperative action by two or more legislatures.” Rather, the Supreme Court emphasized in *Crown Zellerbach* that when a matter constitutes a national concern, the federal Parliament “has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects”. A finding of provincial inability indicates that a matter has “singleness and indivisibility required to bring it within the national concern doctrine” and “[i]t is because of the interrelatedness of the intra-provincial and extra-provincial aspects

of the matter that it requires a single or uniform legislative treatment.”¹⁶

Dividing control for GHGs into federal minimum national standards that operate alongside provincial measures is inconsistent with that express holding in *Crown Zellerbach* that a national concern means exclusive federal jurisdiction over the single, distinct and indivisible subject matter.

Put another way, in previously establishing national concerns under POGG – like aeronautics, radio-communications and atomic energy – courts might have defined the respective national concern in terms of “minimum national standards” rather than conferring exclusive federal jurisdiction. Such an approach would have left room for municipal ordinances to apply to cell-phone tower locations,¹⁷ provinces to limit the siting of aerodromes¹⁸ or for provincial labour laws to apply to nuclear power plants.¹⁹ Applying a “minimum national standards” approach would have undercut the exclusivity of federal jurisdiction for these national concerns.

Reciprocally, instead of reasoning that inflation was too pervasive to meaningfully define a national concern in the *Anti-Inflation Reference*, the Supreme Court might have recognized a national concern for “setting maximum national standards for wages and prices.” Similarly, in its 2011 holding in the *Securities Reference*,²⁰ the Supreme Court could have instead held that the interprovincial character

14 *ONCA re GGPPA* at para. 131.

15 *Crown Zellerbach* at paras. 34-35.

16 *Crown Zellerbach* at para. 35.

17 *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at para. 52 [*Rogers Communications*].

18 *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 2 and 60 [*Canadian Owners and Pilots Association*].

19 *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 351 and 379-380 [*Ontario Hydro*]. See discussion in footnote 1 of Box 2 about findings on the national concern issue in the separate opinions by Justice LaForest (Justices L’Heureux-Dubé and Gonthier concurring) and Chief Justice Lamer.

20 *Reference re Securities Act*, 2011 SCC 66 at paras. 115-117 [*Securities Reference*]. Note that while the *Securities Reference* concerned whether the federal trade and commerce power (rather than POGG) could support the proposed federal *Securities Act*, the test for federal jurisdiction under the trade and commerce power also considers whether a particular subject matter is a “national concern.”

of Canada’s capital market was a national concern justifying “minimum national standards for issuing securities”. Establishing a precedent for overlaying “minimum national standards” to construct a national concern would pave the way for federal intrusion into almost any provincial jurisdiction. As the dissenting judges of the Saskatchewan Court of Appeal noted, “such an approach to characterisation would, in the long run, destabilise the federation and the division of powers through death by a thousand cuts”.²¹

Therefore, the “minimum national standards” approach risks both diminishing the exclusive federal jurisdiction for national concerns and lowering the bar for defining a national concern.

DO “GREENHOUSE GASES” CONSTITUTE A “NATIONAL CONCERN”?

In the coming appeals, the Supreme Court must directly address whether greenhouse gases constitute a national concern. The federal government has so far sought to define the subject matter in a manner that allows concurrent federal and provincial jurisdiction for regulating GHGs. But, if courts accept that GHG emissions are a national concern, the federal government cannot have it both ways: it gets exclusive jurisdiction for the subject matter.

While the federal government and other parties have argued that the so-called “double aspect doctrine” should allow concurrent jurisdiction for regulating GHG emissions, it is unclear how this would be the case if “greenhouse gases” are defined as the national concern. The double aspect doctrine applies to subject matter that may be regulated under different heads of power; it does not permit concurrent jurisdiction over a subject matter for which exclusive jurisdiction is assigned to either the federal Parliament or provincial legislatures (see Box 3). If “greenhouse gases” are established as a national concern, any provincial legislation that “in pith and substance” seeks to regulate GHGs should then be *ultra vires* – just as any other provincial legislation that is aimed at a subject matter within exclusive federal jurisdiction.²²

Of course, there is a political backdrop to the courtroom. It might be that a future federal government rescinds carbon-pricing legislation, and an exclusive federal jurisdiction for regulating GHGs would mean that any provincial legislation regulating GHGs would then be invalid. Similarly, provincial governments could not permit air travel or mobile phones if Parliament passed legislation to ground all aircraft or prohibit cellular networks. But political speculation does not belong in courts. The character of the subject matter must be the focus of the constitutional analysis rather than a preferred policy outcome.

21 *SKCA re GGPPA* at para. 435.

22 This consequence appeared to be a late-breaking recognition for Canada: its factum in the Saskatchewan reference asserted that “GHG emissions are a matter of national concern” (Factum of the Attorney General of Canada in the matter of the Greenhouse Gas Pollution Pricing Act on a Reference by the Lieutenant Governor in Council (Docket CACV3239) at para. 65. Available online: <https://sasklawcourts.ca/images/documents/Appeal/CAcacv3239AGcan.pdf>). However, in contrast with its written argument, Canada made an extraordinary modification of its definition during oral argument, substituting “the *cumulative dimensions* of GHG emissions” as the asserted national concern. The Saskatchewan majority observed that this revision appeared to be an attempt to avoid precluding provinces from regulating GHGs, but noted that the “cumulative dimensions” concept was not well-developed and reasoned that it was a distinction without a difference since there “is no practical or operational break point between individual GHG emissions and *cumulative* GHG emissions” (*SKCA re GGPPA* at paras. 133–6).

Box 3: Can a National Concern for GHGs Have a “Double Aspect”?

The federal government, along with various other parties, has argued that GHG regulation falls within a “double aspect” such that both Parliament and the provincial legislatures may validly pass laws on this subject matter. The aim to allow concurrent jurisdiction for GHGs appears to motivate the “minimum national standards” approach to defining the national concern adopted (albeit in differing forms) by the Ontario and Saskatchewan majorities. As discussed above, this “minimum national standards” approach is problematic for the stability of the division of powers and contradicts previous POGG jurisprudence.

However, if the Supreme Court concludes that GHGs are the “national concern” (a result that GHGs’ trans-boundary character and collective action problem for provincial regulation would seem to support), the double aspect doctrine would not apply. The double aspect doctrine does not confer concurrent provincial jurisdiction for a subject matter that is under an exclusive federal power – or vice versa.

In the *Securities Reference*, the Supreme Court explained that:

Canadian constitutional law has long recognized that the same subject or “matter” may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another. The federal law pursues an objective that in pith and substance falls within Parliament’s jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction (*Canadian Western Bank*, at para. 30). This concept, known as the double aspect doctrine, allows for the *concurrent application* of both federal and provincial legislation, but it does not create *concurrent jurisdiction* over a matter (in the way, for example, s. 95 of the *Constitution Act, 1867* does for agriculture and immigration).^a

Notably, the Supreme Court also emphasized in the *Securities Reference* that:

[N]otwithstanding the Court’s promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The “dominant tide” of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.^b

Moreover, in the subsequent *Canadian Owners and Pilots Association* decision, the Supreme Court majority specifically rejected that application of the double aspect doctrine where provincial legislation impairs the “core” of a federal power (in that case, the national concern for aeronautics). In such a case, the doctrine of interjurisdictional immunity forecloses any “double aspect.”^c Similarly, if the dominant purpose (i.e., the “pith and substance”) of provincial legislation is to regulate any exclusive federal jurisdiction (whether an enumerated head of power under section 91 or a subject matter found to be a national concern under POGG), it should be invalid.

The recent unanimous decision by a five-member panel of the B.C. Court of Appeal in *Re EMA* (concerning provincial legislation for “hazardous substance” permits targeted at shipments of bitumen via the Trans-Mountain Pipeline) discussed the interface between “pith and substance” and the “double aspect” doctrine at length.^d The court found the provincial legislation invalid as intended to prohibit carriage of heavy

a *Securities Reference* at para. 66.

b *Securities Reference* at para. 62.

c *Canadian Owners and Pilots Association* at para. 58.

d *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at paras. 4-10 [*Re EMA*].

Box 3: Continued

oil through an interprovincial undertaking (an exclusive federal jurisdiction) and, in rejecting a double aspect, further explained:

[T]he first task in determining the constitutional validity of legislation is to determine its “true character” or “dominant characteristic”. That determination is not to be conflated with deciding whether the law “impairs” a “vital part” of the federal jurisdiction over interprovincial undertakings. If the law relates in substance to a federal head of power, that is “the end of the matter.”^e

Similarly, in its reasons in *SKCA re GGPPA*, the Saskatchewan majority explained why defining GHGs as the national concern would eliminate any “double aspect” under which provincial governments might regulate GHGs:

At present, when GHG emissions are not recognized as being a matter coming within exclusive federal jurisdiction, there is plenty of scope for the double aspect doctrine to operate. A province can regulate GHG emissions by enacting laws in relation to property and civil rights, for example, and Parliament can regulate GHG emissions by, for instance, passing laws in relation to taxation.^f But, 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.

In other words, the problem is not only that recognizing federal jurisdiction over something as broad as GHG emissions would give Parliament wide authority in positive terms. It is that, in negative terms, provincial legislatures would be significantly denied the authority to deal with GHG emissions. Provinces could address such emissions only to the extent laws enacted in relation to provincial matters such as property and civil rights had an *incidental* impact on them.^g

Interestingly, none of the reasons from the Ontario Court of Appeal panel directly commented on the applicability of the double aspect doctrine.^h

Nonetheless, the Saskatchewan and Ontario courts appear alert to the consequences of defining the national concern as “greenhouse gases” – specifically, that this definition would confer exclusive federal jurisdiction for GHG and, thereby, invalidate provincial legislation aimed at regulating GHGs.ⁱ

e *Re EMA* at para. 92.

f As discussed in Box 1, case law on federal taxation power indicates the purpose of a “tax” must be “to raise revenue for general purposes”. Since the purpose of regulating GHGs is to modify behaviour, rather than raising revenues, it is difficult to see how the federal taxation power could underpin federal GHG regulation. Indeed, the Saskatchewan majority’s use of taxation as an example head of power under which Parliament could regulate GHGs is inconsistent with its own reasoning that the GGPPA represents a tax rather than a regulatory charge because its purpose is not to raise revenue (see *SKCA re GGPPA* at paras. 87-88).

g *SKCA re GGPPA* at paras. 130-131.

h In *ONCA re GGPPA* at paras. 130-135, the Ontario majority elaborates why its “minimum national standards” approach would not displace provincial legislation to regulate GHGs, but does not specifically discuss the “double aspect” doctrine.

i As discussed below in footnote 30, certain chemical substances that contribute to the so-called “greenhouse effect” may be co-emitted with substances that cause local environmental effects. While provincial regulation for activities that is aimed at addressing local pollution could incidentally influence GHG emissions, the purpose of such regulation should be distinguishable from legislation specifically targeted at regulating GHGs.

Parties to the constitutional challenge all accept that GHGs have extra-provincial effects and international implications. The federal government argues that any cooperative arrangement among provinces to reduce GHGs would be open to defection and that federal jurisdiction is necessary to address the extra-provincial effects of a provincial failure to regulate GHGs. Accepting this argument would support “provincial inability” with respect to effectively regulating GHGs.

Again, the national concern doctrine specifically contemplates that jurisdiction for a single, distinct and indivisible subject matter would be transferred to the federal government. In *Crown Zellerbach*, the Supreme Court emphasized that subjects that were “originally matters of a local or private nature in a province” could become matters of national concern.²³ Therefore, it is not relevant whether current provincial legislation might become invalid. The question is whether “greenhouse gases” have “a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.”²⁴

For example, the Constitution does not assign “aeronautics”, “radiocommunications”, “nuclear power” or “marine pollution” to either federal or provincial jurisdiction. When these were established as national concerns, the federal government gained exclusive authority over subjects to which provincial legislation might have otherwise applied previously. As exhibited in cases like *Rogers Communications*, *Canadian Owners and Pilots Association* and *Ontario Hydro*,²⁵ the national concern displaces provincial legislation. Likewise, the fact that provincial

legislation for regulating GHGs exists today does not mean that jurisdiction for “greenhouse gases” cannot be transferred to federal jurisdiction as a national concern. Again, when courts recognize a national concern under POGG, it means that a single, distinct and indivisible subject matter, over which provinces might have previously legislated, is transferred to federal jurisdiction.

However, a relevant concern for defining the national concern is whether the definition will have ascertainable and reasonable limits for its impact on provincial jurisdiction. The question is whether the national concern would intrude on the powers assigned to provinces under Section 92 of the Constitution. Importantly, the Constitution does not enumerate “greenhouse gases”, “pollution” or “environment” as either federal or provincial powers. For any definition of the national concern, the court must explain what and how provincial powers are incompatible with the transfer of the national concern to federal jurisdiction.

Therefore, the Supreme Court must consider whether “greenhouse gases” is a subject matter like “inflation” that is “so pervasive that it knows no bounds”. In the *Inflation Reference*, Justice Beetz reasoned that “containment and reduction of inflation” is “an aggregate of several subjects some of which form a substantial part of provincial jurisdiction” and its “recognition as a federal head of power would render most provincial powers nugatory.”²⁶

While Justice Beetz did not elaborate on his “pervasive” characterization, inflation is an economic concept rather than a physical phenomenon.

23 *Crown Zellerbach* at para. 33.

24 *Crown Zellerbach* at para. 33.

25 See comment on the holding in *Ontario Hydro* at footnote 38.

26 *Anti-Inflation Reference* at 458. While Justice Beetz’s dissented in the *Anti-Inflation Reference*, his difference from the majority was on whether wage-and-price controls were justified by the emergency branch of POGG, rather than as a national concern. The majority in the *Anti-Inflation Reference* agreed with his opinion on the national concern branch, and this view was confirmed in *Crown Zellerbach* at para. 32.

Specifically, inflation represents the change in a statistical aggregation of prices charged across a range of goods and services. Restraining inflation through federal limits on prices and wages interfered directly with the provincial jurisdiction over contracts for sale of products, which is at the core of the provincial property and civil rights power.

As Chief Justice Laskin (writing for the majority) noted in the *Anti-Inflation Reference*, “The control and regulation of local trade and of commodity pricing and of profit margins in the provincial sectors have consistently been held to lie, short of a national emergency, within exclusive provincial jurisdiction.” Therefore, Justice Laskin emphasized that the proposed wage-and-price controls would “ostensibly interfere with classes of matters which have invariably been held to come within exclusive provincial jurisdiction, more particularly property and civil rights and the law of contract. They do not interfere with provincial jurisdiction in an incidental or ancillary way, but in a frontal way and on a large scale.”²⁷

In contrast, in *Crown Zellerbach*, a majority of the Supreme Court found “the pollution of marine waters by the dumping of substances” to “have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned.” The majority emphasized that “marine pollution, because of the differences in the composition and action of marine waters and fresh waters, has its own characteristics and scientific considerations

that distinguish it from fresh water pollution.”²⁸ Nonetheless, as Justice LaForest noted in his dissent in *Crown Zellerbach*, a highly general subject matter like “environmental pollution” is “itself all-pervasive. It is a by-product of everything we do. In man’s relationship with his environment, waste is unavoidable.”²⁹

The sources of GHGs are certainly ubiquitous, with GHGs emitted by a nearly all-encompassing range of human activities (including breathing). However, it could be argued that the physical characteristics and atmospheric behaviour of GHGs in cumulative concentration could distinguish control over emissions of those specific substances from control of pollution with “merely local or private” effects.³⁰

Nonetheless, whether the national concern is defined as “greenhouse gases”, “cumulative dimensions of GHG emissions”, “minimum national standards of price stringency for GHG emissions” or some other definition, courts would face the same problem: that is, the federal government could gain a back door to regulate product markets, activities of intra-provincial industries, electrical power generation and natural resource extraction. Any jurisdiction for the federal government to regulate GHG emissions must be circumscribed to prevent invasion of the provincial powers for property and civil rights, local or private matters, natural resources and electrical power generation. Whatever its definition for the

27 *Anti-Inflation Reference* at 441-442.

28 *Crown Zellerbach* at para. 39.

29 *Crown Zellerbach* at para. 74 [Justice LaForest dissenting].

30 GHGs are distinguishable as specific chemical substances that absorb and emit infrared radiation, contributing to the so-called “greenhouse effect.” Of course, chemical substances from industrial processes or other activities that produce GHGs may have also local environmental effects. For example, coal combustion both produces chemicals with global warming potential and can negatively impact local air quality. Nonetheless, a distinction can be drawn between whether the purpose of regulating certain substances is to control the local effects of pollution or to control their impact as GHGs through cumulative atmospheric concentration.

national concern, the Supreme Court must confront the question of whether federal jurisdiction for GHG regulation includes activity-by-activity differentiation of applicable standards or prices for emitting GHGs.

CAN THE FEDERAL GOVERNMENT IMPOSE INDUSTRY-SPECIFIC CARBON PRICES OR STANDARDS?

The other glaring gap in both the Ontario and Saskatchewan decisions is their failure to consider the product-by-product benchmarks under the federal government's output-based pricing system (OBPS) for large emitters. During the Ontario Court of Appeal hearing, counsel for Canada conceded that Parliament "passing a law targeting specific sectors" would be outside the asserted "national concern" for regulating GHGs.³¹ Moreover, counsel for Ontario highlighted the concern about the "picking of favourites" in federal differentiation of carbon costs under the OBPS.³² However, this aspect was not addressed in the Ontario decision.

The federal backstop does not only establish a uniform national carbon price; rather, the OBPS differentiates carbon costs per tonne between different products and, for power generation, processes. Indeed, the July 2019 OBPS regulations

establish 78 separate benchmarks across 39 industrial activities. This means different average carbon costs per GHG tonne for each of these industries.

Specifically, the OBPS regulations establish separate GHG emission-intensity benchmarks for different products. A designated facility only pays the carbon price to the extent that its emission intensity exceeds the applicable benchmark. The OBPS regulations also prescribe benchmarks at different levels relative to the production-weighted average for different products.³³ For example, the benchmarks for iron, steel and cement production are 95 percent of the average emission intensity in the respective sectors while the benchmark for refineries and petrochemical production is 90 percent of average emission intensity and 80 percent for mining, potash or bitumen production and upgrading.³⁴

The effect of setting benchmarks at different levels relative to a sector's production-weighted average emission intensity results in different average carbon costs per tonne for producing different products. For example, at the 2020 carbon price of \$30 per tonne and current average emission intensity for the given sector,³⁵ iron, steel or cement production would face an average carbon cost of only \$1.50 per tonne while refineries and petrochemical production would face average carbon costs of \$3.00 per tonne and mining, potash

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- 31 CBC News. "Ontario Court of Appeal hears challenge to Canada's Carbon Tax: Day 4" (19 April 2019). Available online: <https://www.youtube.com/watch?v=nkKutJWkdsU&t=24m50s>.
- 32 *Ibid.* Available online: <https://www.youtube.com/watch?v=nkKutJWkdsU&t=74m50s> While Justice Sharpe appeared alert to this concern in his follow-up questions to counsel for Ontario, the issue interestingly escaped any analysis in the Ontario Court of Appeal's decision.
- 33 *Output-Based Pricing System Regulations*, SOR/2019-266 (Canada Gazette, Part II, Volume 153, Number 14). Available online: <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-07-10/html/sor-dors266-eng.html>.
- 34 *Output-Based Pricing System Regulations – Regulatory Impact Statement* (Table 3: Sectors/activities and assigned stringency levels in the OBPS). 28 June 2019. Available online: <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-07-10/html/sor-dors266-eng.html>.
- 35 The federal stringency was based on reporting of industries' GHG emission intensity between 2014 and 2016.

or bitumen production and upgrading would face average carbon costs of \$6.00 per tonne.³⁶

Additionally, as elaborated in a recent C.D. Howe Institute E-Brief (Bishop 2019a), Ottawa’s fuel-specific benchmark for electricity applies different benchmarks to producers of the same product with the result that high-emission coal power plants may pay a lower carbon cost per GHG tonne than less emission-intensive natural gas power facilities. Specifically, under the federal OBPS for 2019, power generation by existing natural gas-fired facilities faced a benchmark of 370 GHG tonnes per GWh while power generation using coal faced a benchmark of 800 GHG tonnes per GWh. New or expanded power-generation facilities using natural gas will face another separate benchmark. Despite the higher GHG emission intensity of coal power generation, the federal OBPS regulations favour coal over natural gas (see Box 4).

In economic terms, output-based carbon pricing can maintain the marginal incentive for a facility to reduce its emissions intensity (the so-called “intensive margin”), but the average carbon costs per tonne are the relevant consideration for how much output a facility produces at its current emissions intensity (that is, the “extensive margin”). This is a point elaborated in a C.D. Howe Institute submission concerning the Alberta government’s proposed Technology Innovation and Emissions Reduction (TIER) system (Bishop 2019b).

By varying per-tonne costs for GHGs by industry, the federal OBPS departs from the principle of a uniform carbon price across the economy, tinkering with the incentive to abate emissions in particular sectors. In order for the federal OBPS

to be constitutionally valid, the Supreme Court would need to find that a national concern includes allowing the federal government to establish industry-specific carbon prices and standards.

Such product-by-product differentiation appears the very sort of industry-level regulation that has concerned courts in previous division-of-powers cases.³⁷ By differentiating average carbon costs per tonne by product, the federal government is arguably not regulating only GHGs as a single, distinct subject matter but also engaging in industry-specific regulation. If any federal jurisdiction for regulating GHGs is not fettered to prevent such product- and process-level differentiation of carbon costs per tonne, the national concern could provide a “Trojan Horse” for federal interference in intra-provincial industry.

For example, if permitted to differentiate carbon costs between industries, the federal government could effectively relieve certain industries from the burden of carbon pricing while imposing costs that render other industries’ production non-economic. For electricity, the federal government’s OBPS imposes process-specific benchmarks, which could reorder the offer curve for dispatching different types of power generation – arguably intruding on provincial jurisdiction for generation and production of electrical energy.

The federal government’s stated aim for differentiated carbon costs through its OBPS is to address competitiveness challenges for certain emission-intensive, trade-exposed industries (so-called “leakage” to jurisdictions that do not price carbon). However, this is a separate concern from the regulation of GHGs or even imposition of

36 If a given producer receives credits for 95 percent of its GHG emission intensity (i.e., GHG tonnes per unit of output), its net costs for emitting GHGs will be only on the remaining 5 percent of its emissions. Therefore, that producer’s average cost per GHG tonne emitted will be 5 percent multiplied by the carbon price. For the \$30 per GHG tonne federal carbon price for 2020, that producer’s average costs per GHG tonne will be \$1.50.

37 For example, see the Supreme Court’s conclusion regarding the overreach of the proposed federal *Securities Act* (“descending well into industry-specific regulation”) in *Reference re Securities Act*, 2011 SCC 66 at para. 117.

Box 4: Moving the “Coal Posts” for Power Generation under the Federal OBPS

The C.D. Howe Institute E-Brief, “Moving the Coal-Posts” (Bishop 2019a) discusses the distortionary impact of the (then-proposed, now-promulgated) federal OBPS regulations on power generation. To determine the constitutionality of output-based carbon pricing under Part II of the GGPPA, the Supreme Court must address whether any national concern confers federal jurisdiction for industry-by-industry differentiation of standards and carbon costs per GHG tonne. The following explanation of the economics of output-based carbon pricing for power generation demonstrates that the federal OBPS represents activity-level regulation.

Specifically, the federal OBPS regulations involve different benchmarks between coal and natural gas power generation. Coal-fired power generation receives output-based allocations of 0.8 GHG tonnes per MWh, while natural gas generation is subject to a “best gas” benchmark at 0.37 GHG tonnes per MWh.

Because a facility pays only the carbon price to the extent that its emission intensity exceeds the benchmark, the output-based allocation results in an average carbon cost for any facility that is lower than the nominal carbon price. Bishop (2019a) discusses the impact of a fuel-specific benchmark compared to a product-specific benchmark on the incentive to dispatch coal versus natural gas facilities. Relative to a single product-specific best-gas benchmark, differentiating benchmarks between fuel types biases dispatch toward coal generation. This is because the average carbon cost per GHG tonne for coal generation is further reduced relative to the nominal carbon price.

To illustrate the lower average carbon costs compared to the nominal carbon price under the federal OBPS, Figure 1 plots the average GHG emission intensity of coal and natural gas power generation in selected provinces, as well as the applicable fuel-specific benchmarks under the federal OBPS. Using these average GHG emission intensities, Figure 2 shows the average carbon costs that coal and natural gas generation would face in those provinces under the fuel-specific benchmarks in the federal OBPS. Figure 2 also shows the average carbon costs that coal faces under a product-specific benchmark, such as Alberta’s current Carbon Competitiveness Incentive Regulation (CCIR) and forthcoming Technology Innovation Emission Reduction (TIER) system.^a Note that output-based pricing significantly reduces the average carbon cost for power generation relative to the nominal carbon price. Additionally, applying a fuel-specific benchmark, rather than a product-specific benchmark, further reduces average carbon costs for coal generation.

This bias toward coal generation is illustrated by Figure 3 and Figure 4. Figure 3 exhibits the estimated average carbon costs facing Alberta natural gas and coal power generation facilities under the Alberta CCIR. Although all facilities face average carbon costs lower than the carbon price under such a product-specific benchmark, average carbon costs are higher for facilities with higher emission intensity.

In contrast, Figure 4 exhibits the estimated impact on average carbon costs under the federal OBPS. Under the fuel-specific benchmarks, coal-fired generation facilities would face lower average carbon costs than many natural gas facilities – despite the comparatively higher GHG emissions from each MWh of coal generation.

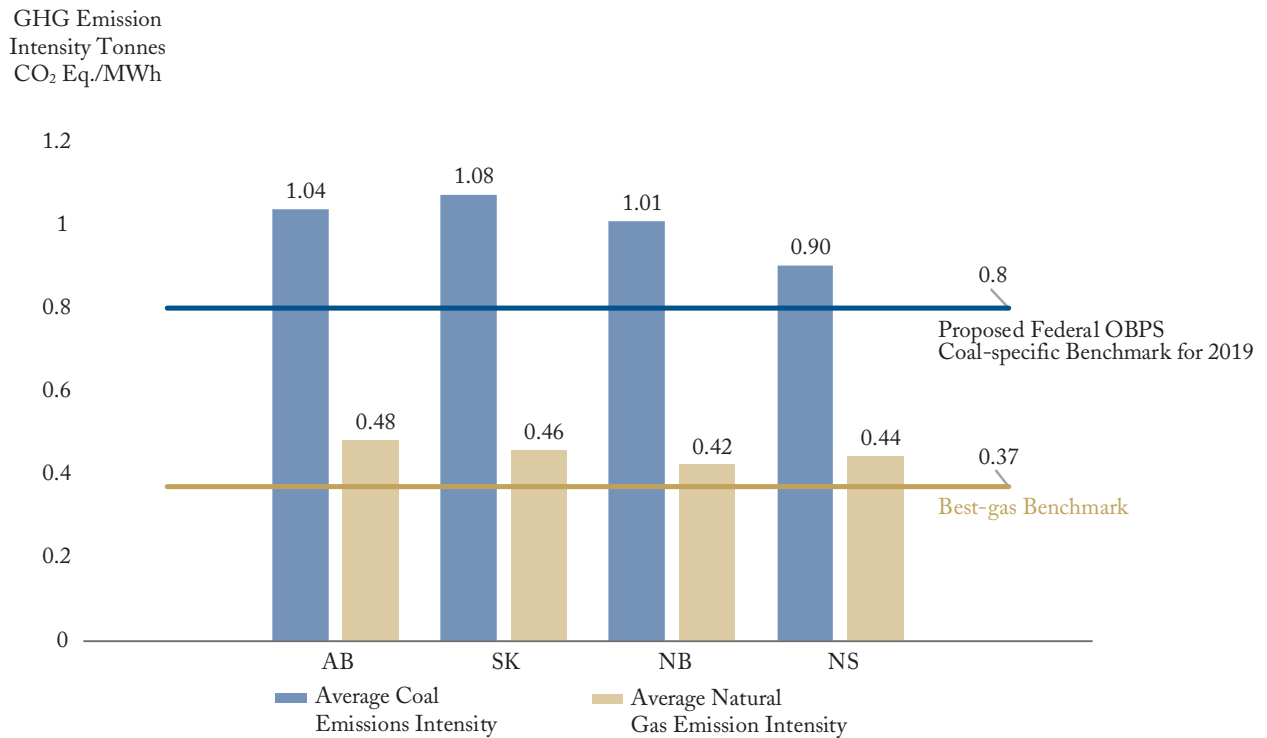
Again, this illustration of the economics of output-based carbon pricing is critical to questions around the constitutionality of the GGPPA. It underscores that the federal OBPS is not simply applying a uniform carbon price on GHG emissions. Rather, the federal OBPS represents activity-level regulation that imposes different average per-tonne GHG costs depending on the activity. The Supreme Court must consider whether

a Alberta released details of its new TIER program for large emitters on October 29, 2019 (see: <https://www.alberta.ca/technology-innovation-and-emissions-reduction-system.aspx>). Following legislative enactments, TIER will replace CCIR on January 1, 2020. TIER will provide equivalent treatment for power generation as under CCIR, applying a “best-gas” product-specific benchmark to all power generation.

Box 4: Continued

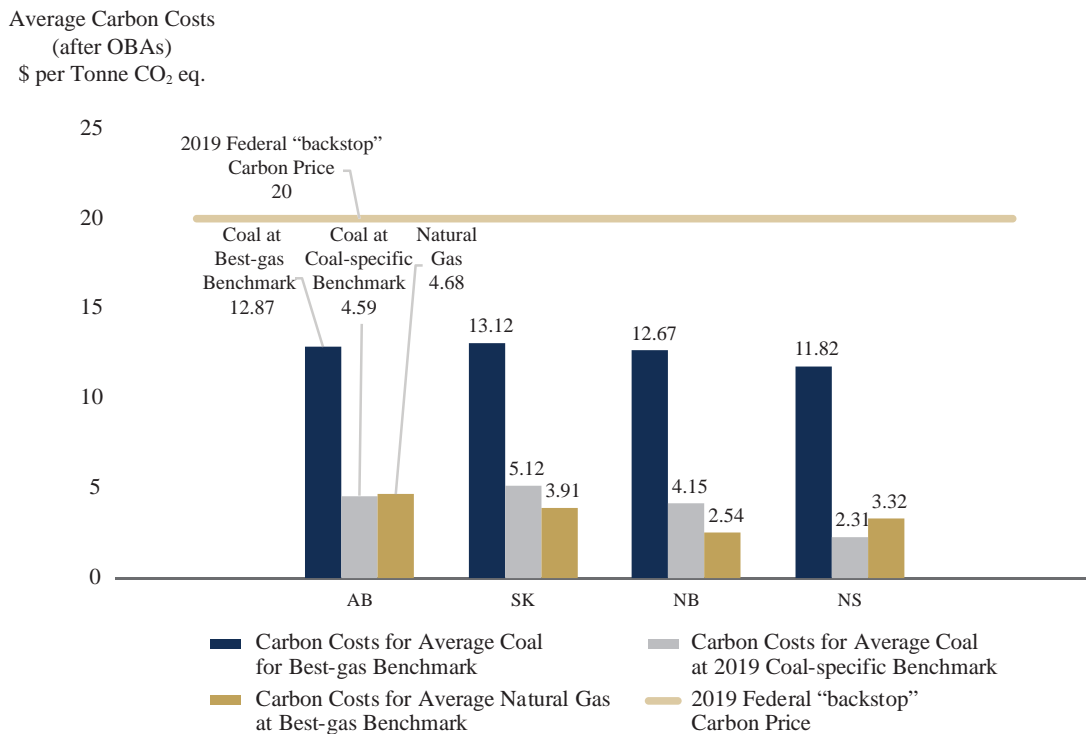
any national concern confers federal jurisdiction for such activity-level regulation. Specifically, does any national concern allow the federal government to impose industry-by-industry standards and differentiate carbon costs according to products?

Figure 1: Average GHG Emission Intensity of Coal and Natural Gas Power Generation for Selected Provinces in 2016



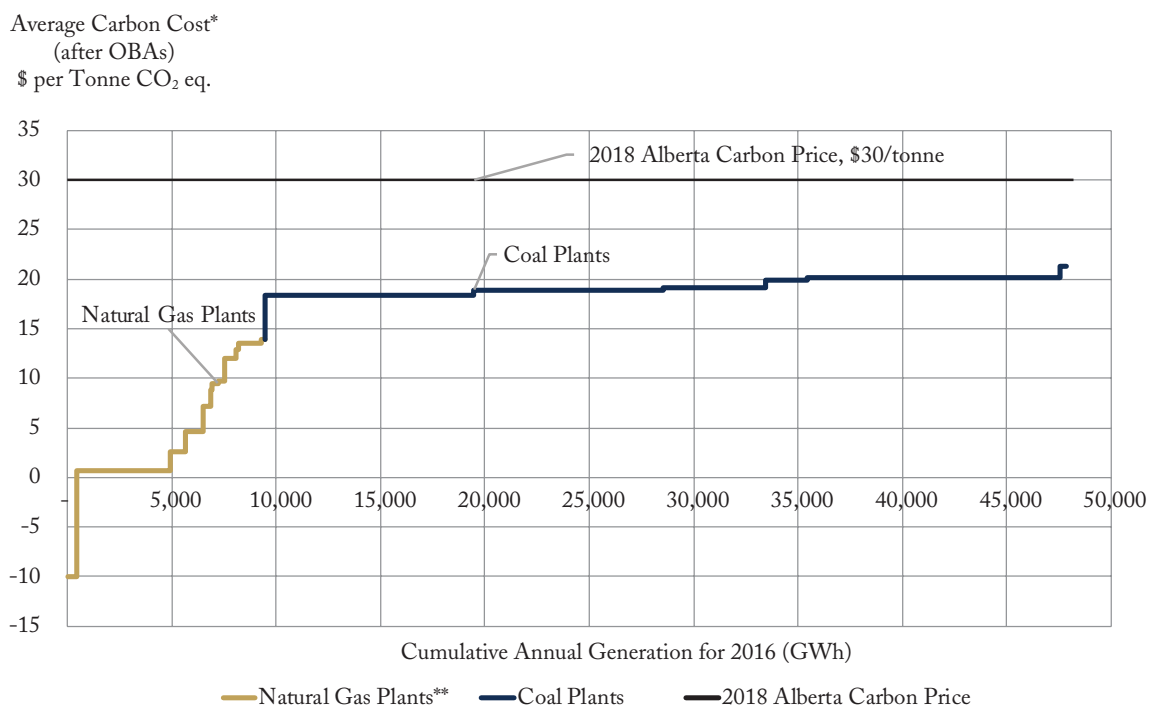
Source: Environment and Climate Change Canada GHG Inventory.

Figure 2: Average Carbon Costs for Coal and Natural Gas Power Generation for Selected Provinces under Federal OBPS (in 2019)



Source: Environment and Climate Change Canada GHG Inventory, author's calculation.

Figure 3: : Estimated 2019 Carbon Costs* for Select Alberta Coal and Natural Gas Power Generation Facilities under Alberta CCIR



Notes:

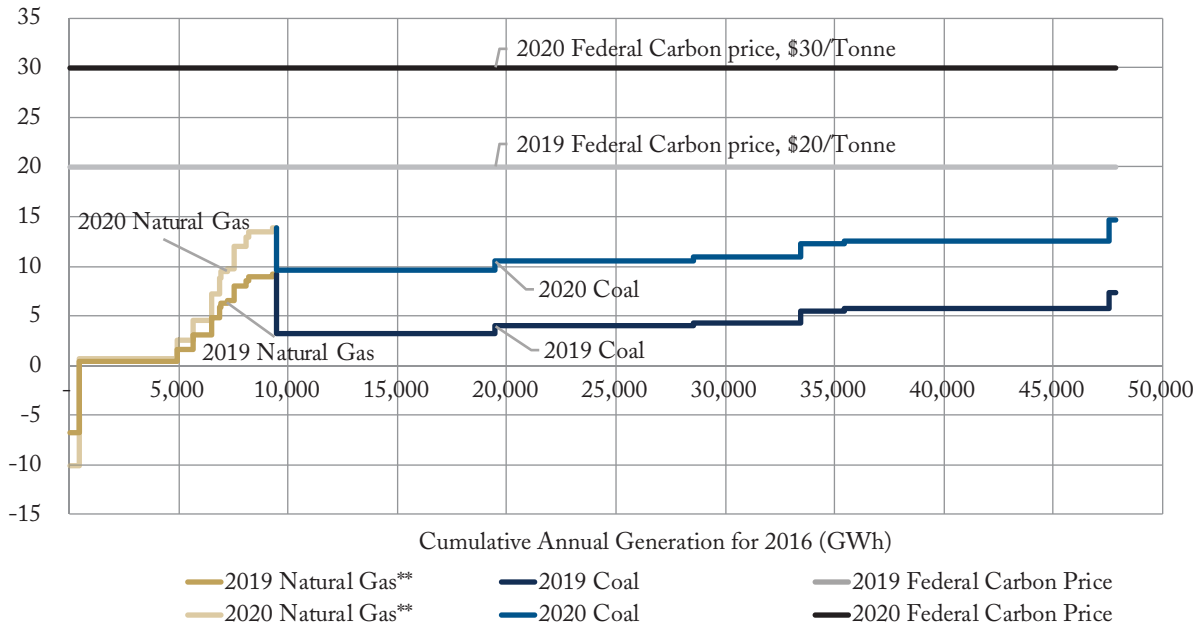
* Average carbon price is calculated as explained in technical appendix to Bishop (2019a).

** Omits co-generation and industrial generation facilities for which ECCC GHG Inventory does not provide GHG emissions specific to power generation.

Source: AESO ETS, Environment and Climate Change Canada Specified Emitter GHG Inventory, author's calculations.

Figure 4: Estimated 2019 and 2020 Carbon Costs* for Select Alberta Coal and Natural Gas Power Generation Facilities under Federal OBPS

Average Carbon Costs*
(after OBAs)
\$ per Tonne CO₂ eq.



Notes:

* Average carbon price is calculated as explained in technical appendix to Bishop (2019a).

** Omits co-generation and industrial generation facilities for which Environment and Climate Change Canada GHG Inventory does not provide GHG emissions specific to power generation.

Source: AESO ETS, Environment and Climate Change Canada Specified Emitter GHG Inventory, author's calculations.

minimum national standards for a carbon price. To uphold the OBPS would require affirming federal jurisdiction to regulate GHGs *by industry* or to impose minimum national standards for carbon pricing *by industry*. The consequences would reach beyond the immediate GGPPA scheme, allowing the federal government to set different GHG emission rules for any intra-provincial industry that emits GHGs.

While leakage concerns may support a policy of output-based carbon pricing,³⁸ courts must confront the question of whether such industry-by-industry regulation fits under any construction for a federal jurisdiction to regulate GHGs. The Supreme Court has emphasized that what is optimal policy must not be confused with the analysis of the division-of-powers.³⁹

38 See, e.g., arguments by Beugin (2017).

39 Reference re Securities Act, 2011 SCC 66 at para. 90.

HOW CAN FEDERAL JURISDICTION FOR REGULATING GREENHOUSE GASES BE CONTAINED?

The acknowledged concern for defining “greenhouse gases” as the national concern is that this could confer jurisdiction on the federal government to regulate any activity that emits GHGs. If the federal government gains jurisdiction to throttle up or down any GHG-emitting activity, this would effectively eviscerate provincial jurisdiction for industrial regulation, natural resource extraction and electrical power generation. Indeed, since a nearly all-encompassing range of human activities emit GHGs, how could federal jurisdiction for “greenhouse gases” be contained?

Prohibiting the federal government from imposing activity-specific standards or prices could be an appropriate way to constrain an exclusive federal jurisdiction for regulating GHGs. Restricting the federal government from industry-level carbon pricing would mean Ottawa could still set a uniform national carbon price but could not tweak carbon prices for particular industries or set activity-specific emission limits. The federal government could regulate GHG emissions but not the specific GHG-emitting activities. Provincial jurisdiction for regulating intra-provincial industries and natural resources would be preserved against the risk of federal intrusion under the guise of its jurisdiction for GHGs.

But would exclusive federal jurisdiction for regulating GHGs negate the ability of provincial governments to address economic challenges for trade-exposed industries? The provincial heads of power should still underpin legislation to provide financial support to industries in transition. For example, even with exclusive federal jurisdiction for

regulating GHGs, provincial governments should be constitutionally capable to provide product-specific output-based subsidies to producers in order to address competitiveness concerns.⁴⁰ Canada’s constitution does not restrict provinces from establishing financial transfers to producers in different intra-provincial industries based on units of output. Exclusive federal jurisdiction for regulating GHGs should mean only that provincial legislation aimed at regulating GHG emissions would be invalid.

As well, the federal government could potentially address competitiveness issues under the international trade branch of its trade and commerce power. Specifically, an alternative measure to address leakage could be “border adjustments” whereby exports are rebated for any carbon costs attributed to the given product. The federal government similarly rebates the Goods and Services Tax (GST) and Harmonized Sales Tax (HST) paid on qualifying products that are exported. Such a border adjustment that rebates any charges for GHG emissions to exports should be constitutionally within the federal jurisdiction for international trade. Similarly, the federal government should have jurisdiction to levy a comparable carbon price on imports for the embedded GHG emissions.

Certain economists have proposed border adjustments for Canada to ensure that imports from jurisdictions without a carbon price face equivalent costs to products produced in Canada (Courchene and Allan 2008). President-elect Ursula von der Leyen committed to introducing a “carbon border tax” in her political guidelines for the European Commission (von der Leyen 2019 at p.5), and a joint French–German statement in September 2019 supported this agenda, echoing

40 Of course, without access to revenue from carbon pricing, provincial finances could be stretched to provide financial support to those industries that face competitiveness challenges. These fiscal constraints could be addressed by a federal government commitment to recycle any revenues from federal carbon pricing to the provincial government of the source province.

openness to “examine possible measures to prevent carbon leakage, notably a carbon border tax” (Federal Republic of Germany and Republic of France 2019).⁴¹ A practical issue would be what amount of GHG emissions would be assigned to particular imports. However, a possible solution could be to impute default GHG emission intensity to each particular product code unless an importer could demonstrate lower carbon usage for a reduced rate. As well, specific designs for border adjustments would need to comply with international trade obligations – in particular, prohibitions on discriminatory treatment under the General Agreement on Tariffs and Trade (GATT). Nonetheless, research by international trade scholars (e.g., Veel 2009) and reports from the World Trade Organization (e.g., WTO 2009) have outlined how border carbon adjustments could be designed to be GATT-compliant.

CONCLUSION

Policy research has consistently recommended pricing of GHG emissions as the most economically efficient policy to internalize an externality and reduce Canada’s GHG emissions at

the least economic cost. However, because a carbon price is good policy does not mean courts should contort Canada’s constitutional architecture.

In their policy-motivated efforts to allow both federal and provincial governments to concurrently regulate GHGs, the Ontario and Saskatchewan majorities risk undermining the exclusive federal jurisdiction for other national concerns. In the upcoming appeals of these decisions, the Supreme Court must tackle the vital constitutional questions that these courts neglected.

In particular, the Court must: address the obvious problems with a “minimum national standards” approach to defining national concerns; coherently confront whether or not “greenhouse gases” are a national concern for which the federal government would have exclusive jurisdiction; and consider whether output-based pricing of GHGs with product- and process-specific benchmarks intrudes into provincial jurisdiction.

41 The French text of this joint communique reads: “Nous soutenons pleinement les travaux sur la stratégie proposée par Ursula von der Leyen, présidente élue de la Commission, pour examiner les mesures envisageables afin d’empêcher les « fuites de carbone », notamment la mise en place d’une taxe carbone aux frontières.”

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