Court File No. 39116

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Alberta)

In the Matter of the *Greenhouse Gas Pollution Pricing Act,* SC 2018, c. 12

And in the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act,* RSA 2000, c. J-2, s. 26

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT
(Intervener)

- and -

ATTORNEY GENERAL OF ALBERTA

RESPONDENT
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF SASKATCHEWAN, CANADIAN TAXPAYERS ASSOCIATION, CANADIAN ENVIRONMENTAL

INTERVENERS

(Title of Proceeding continued on next page)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The majority of the Alberta Court of Appeal opined that the *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*")[1] is *ultra vires* Parliament's residual peace, order and good government ("POGG") power. Manitoba will focus on three reasons why the Alberta majority opinion is correct.

2. First, the *GGPPA* substantially intrudes into areas of provincial jurisdiction, significantly upsetting the balance of federalism. That is so even if Parliament were limited to imposing minimum pricing standards under POGG. In any event, there is no principled basis to distinguish pricing from other forms of minimum regulatory standards aimed at reducing Greenhouse Gas ("GHG") emissions to fight climate change. The effect is a massive usurpation of provincial authority. Secondly, the double aspect doctrine cannot salvage provincial jurisdiction because both levels of government are seeking to achieve the identical purpose from the same aspect: impose minimum standards to reduce GHGs. If inserting the words "national standards" somehow creates a distinct federal aspect, federalism becomes meaningless. Upholding the *GGPPA* under POGG would impermissibly create concurrent jurisdiction over the regulation of GHG emissions. Thirdly, the *GGPPA* allows Cabinet to review the exercise of admitted provincial jurisdiction over GHG regulation (which includes carbon pricing) and displace provincial policy regardless of whether it conforms to any uniform benchmark. This delegation of a "standardless sweep" of authority to the federal Executive is problematic in the context of POGG.[2] Discretionary federal supervision of valid provincial policies to reduce GHG emissions undermines our constitutional architecture, which is based on coordinate levels of government acting autonomously within their respective spheres of jurisdiction.

PART II – QUESTIONS IN ISSUE

3. The *GGPPA* cannot be sustained under the national concern branch of POGG or any other head of federal jurisdiction.

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[1] *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12.

[2] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at paras. 227-228, 238, 323, 552 [Alberta's Record in SCC Files 38663 & 38781, Vol. 1 at 1-273] ("ABCA Reasons").

PART III – ARGUMENT

A. THE *GGPPA* SUBSTANTIALLY INTRUDES INTO AREAS OF PROVINCIAL JURISDICTION

4. The fact that local activities contribute to cumulative atmospheric GHG levels is hardly sufficient to ground federal jurisdiction under POGG. Otherwise, almost every aspect of provincial jurisdiction over natural resources, industries and residents would be subject to federal regulation to reduce GHG emissions, whether by pricing or more direct means.[3] Carbon levies pervasively affect local economies and the day-to-day lives of residents by dampening consumer and industrial demand for fuels that produce GHG emissions. The dissenting opinions in the Ontario and Saskatchewan references also highlighted the *GGPPA*'s sweeping impact on provincial heads of power.[4]

5. Jurisdiction to impose minimum standards under POGG would cover "the entire waterfront of regulation of all aspects of GHG emissions".[5] This leads to the inevitable conclusion:

> …if minimum national standards for pricing of GHG emissions or any variation on this were permitted, then, on this theory, the federal government could impose minimal national standards on innumerable areas under provincial jurisdiction: roadways, building codes, public transit, home heating and cooling.[6]

6. Professor Schwartz similarly observers that the extraprovincial effect of GHG emissions cannot support federal jurisdiction because of the pervasive intrusion into provincial matters:

> If the federal level had regulatory authority over any and all GHG emissions that have some extraprovincial effect, there would be no effective limit to how extensive and intrusive federal regulations might be, from the perspective of provincial jurisdiction. Everything from speed limits on local roads to local building codes to the detailed operation of provincial energy corporations might be regulated in detail.[7]

7. The Attorney General of British Columbia argues the reach of the federal POGG power is narrower, by suggesting that pricing and regulation are qualitatively different. Such limit is illusory. Parsing out a single regulatory tool – pricing – is an artificial attempt to confine an

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[3] ABCA Reasons, paras. 22, 227, 292-293, 333, 335, 389.
[4] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para. 339; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at paras. 215, 237.
[5] ABCA Reasons, para. 253.
[6] ABCA Reasons, para. 335. See also concurring reasons of Wakeling J.A. at para. 389.
[7] Bryan P. Schwartz, "The Constitutionality of the Federal Carbon Pricing Benchmark and Backstop Proposals", (2018) 41 MLJ 211 at 260 ("Schwartz").

expansive intrusion into provincial jurisdiction. Undoubtedly, important policy differences may exist between pricing and other forms of regulation, but the distinction has no constitutional significance for the POGG analysis.

8. In *Home Oil Distributors Ltd. v. A.G. of British Columbia,* provincial legislation authorized setting minimum or maximum prices for the sale of coal and petroleum products in the province. One purpose of fixing a minimum price on fuel oil was to favour the provinces' coal industry. The Act was held to be in relation to the regulation of business in the province. The British Columbia Court of Appeal rejected any distinction, for constitutional purposes, between fixing prices and other forms of product control or regulation: "price-fixing is a form of regulation". This Court affirmed the decision.[8]

9. Nor is it only an "unreasonably high price" that has the practical effect of regulating provincial business, as British Columbia suggests. By its nature, a regulatory price "may be set at a level designed to proscribe, prohibit or lend preference to behaviour."[9]

10. The Working Group on Carbon Pricing observed that carbon pricing can include both explicit mechanisms (e.g. carbon taxes, cap-and-trade or performance standards) and implicit pricing such as command and control regulations (e.g. closing a coal fired plant, clean energy standards, sector emission caps).[10] Both forms of regulation impose costs on businesses and consumers. This reinforces the artificial dichotomy, from a constitutional perspective, between pricing and other types of regulation aimed at reducing GHG emissions.

11. It may be true, as British Columbia argues, that putting a price on emissions does not purport to regulate who can emit GHGs or set conditions how they do it. But that does not provide a principled basis to distinguish between regulating GHGs through minimum pricing standards versus other regulatory standards. In either case, the matter of national concern is identical: the reduction of GHGs to mitigate climate change. By analogy, setting a higher minimum price on tobacco to discourage smoking does not preclude government from directly regulating *who* can

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[8] *Home Oil Distributors Ltd. et al. v. A.G. B.C. et al.*, [1939] 3 DLR 397 (BCCA) at 402, 410 aff'd [1940] S.C.R. 444 at 448, 454.
[9] *620 Connaught Ltd. v. Canada (A.G.)*, 2008 SCC 7 at para. 20.
[10] Working Group on Carbon Pricing Mechanisms Final Report, Canada's Record, Vol. IV, pp. 45, 53, 55.

smoke (e.g. children) or setting other *conditions* of smoking (e.g. restrictions in indoor public places).

12. The necessary implication of authorizing Parliament to establish minimum pricing standards to reduce GHG emissions is to open the door to a vast array of federal minimum regulatory standards under POGG to achieve the same end. Only the specific tool would change.

13. Moreover, even if this Court were to strictly limit the scope of the POGG power to the establishment of minimum national pricing standards to reduce GHG emissions, to the exclusion of other types of minimum standards, it would still entail a substantial impairment of provincial jurisdiction over property and civil rights. The Alberta majority opinion aptly noted:

> Since a price can be attached to anything, price stringency charges could be imposed on an endless list of GHG producing items and things: the purchase of beef; living in a single family home or one exceeding a certain size; ownership of a second residence for personal use; ownership of a vehicle or one that exceeds a certain age; ownership of more than one vehicle per family; taking a holiday by plane, car, cruise ship or bus; the purchase of consumer goods…and the consumption of electricity, to mention only a few.[11]

14. Professor Schwartz echoes the concern that even limiting the matter of national concern to "carbon pricing" would still involve a significant intrusion into provincial jurisdiction:

> "The environment" is too broad, as is "global warming". "Greenhouse gas emissions" sounds more modest, but again, the Pan-Canadian Framework illustrates how many regulatory areas would be involved – many of them being within provincial jurisdiction. "Carbon pricing" would be more limited still, but is open to the objection that it would still permit highly intrusive federal regulation into areas of provincial jurisdiction. For example, Parliament might then establish a complicated and varied regime, which includes elements of taxation, a carbon trading add-on and command-and-control edicts that set out maximum prices. Parliament might also establish a federal regulatory agency which could be authorized to manage (or even micromanage) different producers, in different ways.[12]

15. The notion that provinces remain free to regulate GHGs as they see fit, provided they comply with the minimum federal pricing standard, is flawed. First, as discussed below, it wrongly assumes that both levels of government have concurrent jurisdiction to pass a law, the dominant thrust of which is to reduce GHGs through carbon pricing. Secondly, it ignores the problem that

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[11] ABCA Reasons, para. 333.
[12] Schwartz at 254.

the mere existence of a federal carbon price significantly constrains provincial policy options.[13] The *GGPPA* has no regard to whether a province might wish to choose other means (or a combination of means) to reduce GHG emissions:

> In fact, there is no flexibility provided to a province which actually adopts alternative measures to reduce GHG emissions that are as stringent as carbon pricing. A province that reduces its net emissions by a combination of other means apparently would not escape the application of federal carbon tax/levy measures. For example, a province might have a program which includes phasing out coal plants, carbon capture and subsidizing green technologies. While this program might be as effective as carbon pricing (or even more effective), the federal carbon tax/levy would still apply.[14]

B. MINIMUM GHG PRICING STANDARDS DO NOT HAVE A DOUBLE ASPECT

16. The *GGPPA's* impact on provincial jurisdiction is not attenuated by the double aspect doctrine. That doctrine reflects the modern view of federalism, which attempts to accommodate overlapping jurisdiction where possible.[15] But the dominant tide of flexible federalism cannot be allowed to sweep provincial powers out to sea.[16] This caution is particularly important in relation to the national concern doctrine of POGG, which is strictly residual. If regulating GHG emissions generally – or even more narrowly, establishing minimum pricing standards for GHG emissions – falls within the national concern doctrine, Parliament's jurisdiction would be exclusive and plenary.[17]

17. It is well established that the double aspect doctrine is inapplicable when both levels of government purport to legislate for the same purpose and in the same aspect.[18] Therefore, if POGG applies, both levels of government could not enact legislation for the identical purpose of reducing GHG emissions, including through carbon pricing.[19] If provincial legislation were in relation to

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[13] ABCA Reasons, para. 282; Schwartz at 275.
[14] Schwartz at 226.
[15] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras. 22-24.
[16] *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at para. 39.
[17] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at 433-434; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 at para. 67; ABCA Reasons, para. 209.
[18] *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 S.C.R. 749 at 765-766, 853; *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para. 16, aff'd 2020 SCC 1; ABCA Reasons, para. 209.
[19] ABCA Reasons, para. 209; See also: *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at paras 130-131 (majority opinion) and 433-434 (dissenting opinion).

regulating GHGs or imposing a minimum carbon pricing scheme to reduce GHG emissions, its essential thrust would be identical to the *GGPPA* and therefore unconstitutional.[20] There is simply no distinct provincial aspect over the matter of national concern because it requires a uniform federal law.

18. This is illustrated in clear terms by the *Lacombe* decision regarding aeronautics. The double aspect doctrine did not validate a provincial zoning law in relation to the location of aerodromes because such legislation falls within exclusive federal jurisdiction over aeronautics under POGG. While a provincial zoning law might incidentally affect aerodromes, its dominant purpose and effect cannot be about the placement of aerodromes.[21]

19. Notably, POGG does not merely enable Parliament to enact legislation that is paramount over provincial laws, from time to time, depending on how Cabinet decides to exercise its discretion. POGG displaces provincial jurisdiction with exclusive federal power to enact a uniform law over the subject matter of national concern. For example, the provinces cannot regulate airports unless and until the federal Executive decides it is no longer content with provincial standards. Yet that is the effect of the *GGPPA* in relation to carbon pricing.

20. Manitoba submits that GHG emissions are unlike the concept of systemic risk discussed in the securities references.[22] Systemic risk is qualitatively different than provincial regulation of the securities industry because, by definition, such risk involves a cascading domino effect that jeopardizes the entire financial system. If a systemic risk materializes anywhere, it will necessarily impact capital markets everywhere. Therefore, it must be regulated federally. That is not so with GHG emissions. For the foreseeable future, GHGs will continue to be emitted everywhere in Canada including in provinces with stringent carbon pricing. The failure of one or more provinces to impose a minimum carbon price will not inevitably lead to catastrophic climate change. Nor does it mean that Canada will necessarily fail to meet its nationally defined contribution towards its Paris Agreement targets. There are diverse ways of reducing GHGs locally without

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[20] ABCA Reasons, paras. 263, 310.
[21] *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 at paras. 26-30.
[22] *Reference re Securities Act*, 2011 SCC 66; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48.

jeopardizing Canada's national goal. Indeed, the federal government also has ample jurisdiction to act to reduce GHG emissions under its enumerated heads of power in s. 91.[23]

21. Although a majority of the Saskatchewan Court of Appeal ultimately opined that establishing minimum national standards to reduce GHGs is a matter of matter of national concern, Richards CJ identified the problem of analogizing GHG emissions with systemic risk:

> On the face of things, this idea has some attraction. But, a substantial difficulty lies just below the surface. There is no practical or operational break point between individual GHG emissions and *cumulative* GHG emissions. The reality is that the latter is no more than the direct and simple sum of the former. Regulating cumulative emissions is only possible through the regulation of specific or individual emissions. Thus, recognizing federal authority over "the cumulative dimensions of GHG emissions", if that authority is to be meaningful, amounts to the same thing as recognizing Parliamentary authority over "GHG emissions" in the general sense.[24] [Emphasis added]

22. This is not to deny that all GHGs produced anywhere contribute to the problem of climate change. Rather, it recognizes that both the source of the problem and the solutions can be tailored to local circumstances. Does the province have much agriculture or forests? Is it heated primarily with coal or clean hydro? Do your cities have sufficient active transportation networks, convenient public transit and electric car stations? Matters like systemic risk in capital markets or aviation cannot tolerate local rules. It would be chaos if airport signals meant different things in different places. In contrast, a uniform national standard is not required to reduce GHGs.

C. DISPARATE TREATMENT OF PROVINCES UNDER POGG UNDERMINES FEDERALISM

23. When analyzing the constitutional validity of the *GGPPA*, it is essential to bear in mind the unique nature of the POGG power. Unlike enumerated heads of federal power, POGG is residual and exceptional in nature. It applies in very limited circumstances. The federal government cannot invoke POGG just because it does not approve of how provinces have exercised their jurisdiction on important issues of the day. The national concern branch of POGG only comes into play when it is imperative to override local or regional diversity by imposing clear, uniform national standards of conduct over a single, distinct and indivisible subject matter.

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[23] ABCA Reasons, para. 289

[24] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at paras. 135-136.

POGG does not authorize malleable standards that vary depending on negotiations with individual provinces or Cabinet's preferences.

24. Even if there were scope for Parliament to regulate GHG emissions under POGG (which is denied), Manitoba submits the *GGPPA* is constitutionally deficient because it fails to impose objective, uniform national standards for GHG pricing across Canada. Instead, the Act permits Cabinet to review and judge the suitability of provincial legislation on an ongoing basis. The pillar of the Act, the so-called benchmark, is not even legislated. The "stringency" of carbon pricing mechanisms is left undefined. The Alberta majority described it as an open-ended, entirely subjective concept, determined in the sole opinion of the Executive. The *GGPPA* delegates a "standardless sweep of authority" to the federal Executive, allowing it to override the exercise of provincial jurisdiction as it sees fit:[25]

> Indeed, it even allows for differences between provinces, there being no requirement anywhere in this *Act* that the charges be uniform across the country. The entire scheme allows the federal government to prefer, or not prefer, provinces as it chooses.[26]

25. British Columbia argues that delegating wide discretion does not mean legislation is unconstitutional. Manitoba does not quarrel with this general proposition. However, it is highly problematic to permit variable standards of behaviour in the context of the national concern branch of POGG. The provinces know the consequences of failing to live up to the federal government's expectations (the backstop will be imposed). However, they are left to guess what objective benchmark of behaviour is expected. Whether a provincial scheme validly enacted under s. 92 stands or falls is left entirely to Cabinet's ongoing supervision.

26. Canada argues that assessing the stringency of carbon pricing against a benchmark is complex.[27] That is undoubtedly true but complexity does not confer jurisdiction under POGG to impose variable standards. A benchmark can be designed to accommodate different pricing mechanisms (e.g. cap-and-trade or levy or hybrid system) but an entirely discretionary benchmark is no benchmark at all. Cabinet is not bound to apply it evenly. The lack of any clear standards to which all provinces must uniformly adhere combined with unfettered Executive discretion to

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[25] ABCA Reasons, paras. 221-224, 227, 228, 238, 246.
[26] ABCA Reasons, para. 228.
[27] Attorney General of Canada's reply factum in File Nos. 38663 and 38781, at paras. 13, 15-17.

prefer or not prefer provincial policies as it sees fit is not merely a matter for judicial review. It is at least that. More fundamentally, it is antithetical to the POGG power in a mature federation.

27. Under the *GGPPA*, the federal government treats provinces like its subordinates, rather than autonomous governments possessing coordinate jurisdiction. The provinces must submit their pricing plans to the federal government for a stringency assessment. This federal review of provincial policies takes place annually. What are the rules? On what basis can a province successfully negotiate exemptions from the benchmark, such as the scope of coverage or price? What non-pricing provincial policies, if any, will Cabinet take into account? Will the same consideration be given to provinces with less political clout or whose interests may be of lesser concern to the federal government?[28] Will the stringency assessment of provincial policies change depending on which government is in power or who is sitting around the Cabinet table at any particular moment? As the Alberta majority put it, the federal government is saying to the provinces "we can't trust you, but you can trust us".

28. The lack of a legislated benchmark establishing a uniform "minimum standard" is not merely a theoretical concern. Despite Canada's argument that jurisdiction to price GHGs under POGG is necessary to ensure all provinces adhere to a basic minimum standard, the Record shows that the benchmark was not applied uniformly across the country.[29] One commentator argues that the asymmetrical application of the *GGPPA* backstop to some provinces that failed to meet the benchmark is likely the result of federal-provincial negotiations.[30] Professor Schwartz observes that, as a "have-not" province, Manitoba has not been accorded the same flexibility to craft its own solution as other provinces. The selective application of the backstop offends the principle that provinces have equal power to legislate:

> Provinces are not equal economically or politically. But it is a bedrock principle of federalism that they all have the same power to legislate. Constitutional adjudication looks at reality, not just legal form. The proposed carbon tax/levy, with its selective backstop feature, appears neutral on its face – it does not single out any particular provinces for favours or burdens. <u>But the practical reality is that Manitoba's elected government and Legislative Assembly would be overborne by the federal</u>

[28] ABCA Reasons, para. 245.
[29] ABCA Reasons, paras. 238, 323; See the Attorney General of Manitoba's companion factum in File Nos. 38663 and 38781, at paras. 49-51.
[30] Sujit Choudhry, "Constitutional Law and the Politics of Carbon Pricing in Canada", Institute for Research on Public Policy, Study No. 74 (November 2019) at pp. 6, 10-11.

> government–effectively being told how to exercise their taxing and regulatory authority – in a way most provinces are not.[31] [Emphasis added].

29. Recently, in his dissenting opinion in *Reference re Genetic Non-Discrimination Act*, Justice Kasirer wrote that "Parliament's dissatisfaction with the state of the law in matters of provincial jurisdiction does not allow it to use the blunt tool of the criminal law to occupy a field to which it has no proper claim".[32] Whatever debate may surround the validity of the Act at issue there, it is hard to quarrel with this general proposition, especially in the unique context of POGG. Indeed, Wakeling J.A. expressed the very same sentiment in his concurring opinion in this reference.[33]

30. Manitoba submits that reducing GHG emissions, whether through carbon pricing, command and control regulations or otherwise, does not require uniformity. Flexible solutions can be tailored to each province's unique economic and environmental circumstances. However, in the alternative, if this Court holds that reducing GHGs to mitigate climate change is a matter of nation4al concern under POGG, then it requires clear, transparent, objective and uniform standards. The *GGPPA* is not a valid exercise of POGG. Parliament cannot employ POGG as a blunt tool to occupy the field of regulating GHGs (or setting minimum pricing standards) and at the same time allow Cabinet to apply undefined and disparate standards on a regional basis. POGG does not permit Cabinet to impose a backstop whenever it believes a particular province's policy is deficient. Our constitutional architecture is based on cooperative federalism between autonomous levels of government, not discretionary federal oversight of valid provincial policy making.

PART IV – COSTS

31. Manitoba does not seek costs and requests that no costs be awarded against it.

PART V – ORDER SOUGHT

32. Manitoba asks this Court to advise that Parts 1 and 2 of the *GGPPA* are unconstitutional.

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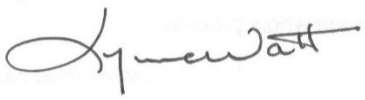
[31] Schwartz at 275.
[32] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para. 256.
[33] ABCA Reasons, per Wakeling J.A. (concurring) at para. 552.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on August 10, 2020.

for: 

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PART VII – LIST OF AUTHORITIES

Cases:	Cited at paragraph no.
620 Connaught Ltd. v. Canada (A.G.), 2008 SCC 7	9
Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail), [1988] 1 SCR 749	17
Home Oil Distributors Ltd. et al. v. A.G. B.C. et al., [1939] 3 DLR 397 (BCCA), affirmed [1940] SCR 444	8
Quebec (Attorney General) v. Lacombe, 2010 SCC 38	18
R. v. Crown Zellerbach Canada Ltd., [1988] 1 SCR 401	16
R. v. Hydro-Québec, [1997] 3 SCR 213	16
Reference re Environmental Management Act (British Columbia), 2019 BCCA 181, affirmed 2020 SCC 1	17
Reference re Genetic Non-Discrimination Act, 2020 SCC 17	16, 29
Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544	4
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Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12, s. 186	1, 2, 3, 4, 15, 16, 17, 19, 23, 24, 27, 28, 30, 32

Other:	**Cited at paragraph no.**
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