SCC File No.: 38663

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, BILL C-74, PART V

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL UNDER THE *CONSTITUTIONAL QUESTIONS ACT, 2012*, SS 2012, c. C-29.01.

BETWEEN:

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-and-

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(Style of Cause continued on next page)

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PART I - OVERVIEW OF POSITION AND FACTS

1. Climate change caused by greenhouse gas ("GHG") emissions is the greatest public health threat of the 21st century. Climate change poses an "unacceptably high level of risk for the current and future health of populations across the world".[1] The Canadian Public Health Association ("CPHA") is a national, independent, non-governmental organization that has been at the forefront of public health research, policy and practice for over a century. CPHA intervenes in these appeals in support of the constitutionality of the *Greenhouse Gas Pollution Pricing Act* ("GGPPA").

2. The GGPPA falls within Parliament's jurisdiction to legislate for peace, order and good government ("POGG"). The national concern branch empowers Parliament to address public health threats that transcend provincial borders—in this case, by establishing minimum national standards integral to reducing nationwide GHG emissions. Only Parliament can coordinate the inter-jurisdictional action necessary to protect public health from climate change.

3. Federal jurisdiction over this public health threat does not displace provincial jurisdiction. Public health is a matter of concurrent jurisdiction where the double aspect doctrine applies. GHG emissions, like other public health matters, can be addressed by both federal and provincial legislation, provided the legislation is directed at a legitimate federal or provincial aspect.

4. In the alternative, CPHA submits that the GGPPA is constitutional under the criminal law power. Criminal law is a flexible tool to address threats to public health, and may indirectly regulate an activity with a view to behaviour modification, as does the GGPPA.

a) Climate change is the greatest public health threat of the 21st Century

5. Public health is the science and practice of protecting and improving the *collective* safety and health of populations as a whole, including at a national level. Public health should not be confused with health care, which treats diseases and injuries one patient at a time. Public health professionals work at a population level, identifying the causes of disease and disability and working to prevent systemic disease and injury.[2]

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[1] *Lancet Countdown Report–Briefing for Canadian Policymakers (2018)* at 54 and 58, Ontario Appellant's Record (**OAR**), Tab 20(1G) [***CPHA Lancet Briefing 2018***]
[2] *Public Health: A Conceptual Framework* (2017) at 35, OAR, Tab 20(1B)

6. GHG emissions are a quintessential public health concern because the emissions, wherever the source, disrupt biophysical and economic systems threatening the wellbeing and health of populations everywhere. A global consensus of experts recognize climate change as "the biggest global health threat of the 21st century."[3] The *Lancet Countdown on Health and Climate Change* concluded that "the human symptoms of climate change are unequivocal and potentially irreversible – affecting the health of populations around the world today. While these effects will disproportionately impact the most vulnerable in society, every community will be affected."[4]

7. Climate change has and will cause serious and extensive negative impacts on public health, impacts that do not respect political borders, including: (a) projected increase in morbidity and mortality from heat-related illnesses; (b) increased prevalence of vector-borne diseases as warming expands the geographic range of insects; (c) increased frequency and intensity of extreme weather events, threatening food security; and (d) elevated rates of depression, pre-and-post-traumatic stress and suicide. The consensus, reported by the Intergovernmental Panel on Climate Change ("IPCC"), is that, without rapid mitigation of GHG emissions, negative health impacts will only intensify.[5]

8. Canada's public health is, and will continue to be, particularly hard-hit by climate change. Here, warming is happening at double the global rate—triple in the Arctic. For example, in 2018 an extreme heat-wave caused over 90 deaths in Quebec. In 2017 and 2018, British Columbia experienced the most dangerous and expensive wildfire seasons ever.[6]

b) A federal role is necessary to protect public health from climate change

9. Public health principles and evidence make clear that fragmented, inconsistent approaches cannot solve a national and international public health threat of this magnitude and geographic extent.[7] As with tobacco control and food safety, consistent, coordinated, evidence-based

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[3] *CPHA Lancet Briefing 2018*, *supra* note 1 at 58.
[4] Nick Watts et al., "The Lancet Countdown on health and climate change" (2017) 391:10120, at 571, *The Lancet* [***Lancet Countdown 2017***]
[5] *IPCC Special Report: Global Warming of 1.5°C Summary for Policy Makers* (2018), at 172-173, OAR Tab 20(1H) *[**IPCC Report 2018***]; *Lancet Countdown 2017*, *ibid* at 581.
[6] *IPCC Report 2018*, *ibid* at 165; *CPHA Lancet Briefing 2018*, *supra* note 1 at 59, 60, 67.
[7] Affidavit of Ian Culbert, OAR Tab 20(1) at para 40.

subnational, national and international action is required to address the public health risks of climate change.[8] Parliament has a necessary role to coordinate the inter-jurisdictional response, set national standards, and fill in gaps integral to reducing GHG emissions.

10. Carbon pricing is well-established as an economically efficient strategy to reduce GHG emissions to protect public health—if implemented consistently across jurisdictions.[9] Based on the best available evidence, CPHA's 2018 *Canadian Briefing* recommends carbon pricing instruments:

> The single most powerful strategic instrument to inoculate human health against the risks of climate change would be for governments to introduce strong and sustained carbon pricing, in ways pledged to strengthen over time until the problem is brought under control. Like tobacco taxation, it would send powerful signals throughout the system, to producers and users, that the time has come to wean our economies off fossil fuels...[10]

PART II - POSITION ON QUESTIONS RAISED

11. CPHA submits that the whole of the GGPPA is *intra vires* Parliament.

PART III - STATEMENT OF ARGUMENT

a) GHG emissions are a public health problem subject to concurrent jurisdiction

12. Public health is a constitutional responsibility of government shared across jurisdictional levels, where constitutional coordination is *required*. The ability to enact laws regarding public health, like the environment, is not allocated by the *Constitution Act, 1867* to one level of government or the other, and so is subject to concurrent jurisdiction. While provinces have jurisdiction over primary healthcare, Parliament has the authority to legislate to address national public health concerns and target public health evils.[11]

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[8] *IPCC Report 2018*, *supra* note 5 at 182 and 191-192; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [**ONCA Decision**] at paras 117–119 and 134.
[9] *CPHA Lancet Briefing 2018*, *supra* note 1 at 65; *IPCC Climate Change 2014 Synthesis Report Summary for Policymakers (2014)*, OAR Tab 20(1G) at 158.
[10] *CPHA Lancet Briefing 2018*, *ibid*.
[11] *Schneider v The Queen*, [1982] 2 SCR 112 [***Schneider***] at 141-142 (per Estey J); *R v Hydro Québec*, [1997] 3 SCR 213 [***Hydro Quebec***] at para 153; *Canadian Blood Services v. Manitoba (Human Rights Commission)*, 2011 MBQB 312 [***Canadian Blood Services***] at para 46; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 [***Assisted Human Reproduction***] at para 57.

13. This Court has long acknowledged Parliament's jurisdiction over public health matters, without displacing the provincial roles over local health matters.[12] As La Forest J. observed in *RJR MacDonald*, "health underlies many of our most cherished rights and values, and the protection of public health is one of the fundamental responsibilities of Parliament."[13] Parliament must be constitutionally empowered to fulfill this responsibility to protect Canada's public health.

b) Characterization—particularly in areas of concurrent jurisdiction, the pith and substances of the impugned provisions must be identified as precisely as possible

14. CPHA supports Canada's characterization of the pith and substance of the GGPPA: *establishing minimum national standards integral to reducing nationwide GHG emissions*. In the alternative, CPHA believes Hoy A.C.J.'s narrower characterization limited to minimum pricing standards is also valid and is protective of public health.[14]

15. Both Appellants claim that the Act's pith and substance is broader; Saskatchewan argues that narrower categorizations are legally unsustainable.[15] On the contrary, this Court has directed that "it is important to identify the pith and substance of the impugned provisions as precisely as possible" particularly in the areas of public health and environment which have many aspects that can support the exercise of either federal or provincial authority. It is "therefore necessary to determine what aspect of the field in question is being addressed to avoid a superficial connection with a power of the other level of government."[16]

16. This Court has long employed precise characterization of the pith and substance to divide public health accurately between provincial and federal aspects. For example, in *Schneider* this Court held that the pith and substance of B.C.'s *Heroin Treatment Act* – "the medical treatment of heroin addicts" – is within provincial competence. In *Hauser*, this Court it held that the traffic in

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[12] *Schneider, ibid*.
[13] *RJR-MacDonald Inc v Canada (Attorney General),* [1995] 3 SCR 199 [***RJR***] at para 69.
[14] ONCA Decision at paras 166 and 175.
[15] Ontario's Factum at para 38; Saskatchewan's Factum at paras 36 – 46.
[16] *Assisted Human Reproduction*, *supra* note 11 at paras 190-191 (LeBel & Deschamps JJ) cited with approval in its recent decision in *Desgagnés Transport Inc. v Wärtsilä Canada Inc.,* 2019 SCC 58 [***Desgagnés***] at para 35.

narcotic drugs is within federal competence.[17] In both cases this Court rejected "narcotics" as too general a characterization.[18]

c) The GGPPA is *intra vires* Canada under the national concern branch of POGG

17. Federal authority over "public health matters that have attained national dimensions"[19] under the national concern branch has been recognized since the earliest temperance cases.[20] The national concern branch applies to matters that will degrade public health in a manner that transcends provincial borders, which includes the public health impacts of GHG emissions.[21]

18. Ontario and Saskatchewan focus on the *source* of the GHG emissions.[22] However, the source of GHG emissions does not assist in understanding if the dimension of the problem is national rather than local in nature or, using Ontario's qualifier, the issue is "qualitatively distinct" from provincial matters. Instead, it is the nature and scope of the public health *effects* that engage Canada's jurisdiction under POGG. As Justice Estey held in *Schneider*, the amorphous topic of health "can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the **nature or scope of the health problem** in question."[23]

19. GHG emissions are a provincial concern as a byproduct of provincially-regulated industries and activities, but also is a national public health problem for the purposes of POGG because their public health *effects* are borderless in nature and national or international in scope.

20. For example, in *Standard Sausage Co. v Lee*, the British Columbia Court of Appeal found federal food safety laws were *intra vires* Parliament under the POGG power because food safety was a public health matter requiring national action. [24] In *Ontario Hydro*, the national public health

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[17] *R v Hauser*, [1979] 1 SCR 984.
[18] *Schneider, supra* note 11; *R v Hauser, ibid* at 1000.
[19] Peter Hogg as cited in *Canadian Blood Services*, *supra* note 11 at paras 18, 34, 46 and 47.
[20] *Russell v The Queen*, [1882] UKPC 33 at 10; *A.-G. Ont. v. A.-G. Dom.*, [1896] AC 348; *Ontario (Attorney General) v. Canada Temperance Federation*, 1946 CanLII 351 (UK JCPC); *Labatt Breweries v Canada (Attorney General)*, [1980] 1 SCR 914 at para 17.
[21] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 [***Crown Zellerbach***] paras 30, 37; *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 [***Ontario Hydro***] at paras 84-85.
[22] Ontario's Factum at paras 8-12, 65-67; Saskatchewan's Factum at paras 1, 22 and 38.
[23] *Schneider*, *supra* note 11 at para 75.
[24] *Standard Sausage Co v Lee*, [1934] 1 DLR 706 (BCCA) [***Standard Sausage***], paras 11, 41–46.

implications of nuclear power supported a finding that the legislation was constitutional under POGG.[25] In *Crown Zellerbach*, the *Ocean Dumping Control Act* at issue was concerned with the effect of pollution on both the environment and human health.[26] This Court held that "it is because of the inter-relatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment."[27]

21. In each of the above cases federal legislation was upheld under the national concern branch even though the *source* of the matters—alcohol sales, adulteration of food, nuclear power generation, and dumping in marine waters—was local. These matters attained national dimensions because of the nature and national scope of their potential *effects.*[28] Similarly, wherever their *source*, GHG emissions rise to the level of national concern not because of their sources or any direct impact in the vicinity of local sources, but because of their cumulative *effect* in causing global climate change, which comes with grave national and international public health risks.[29]

22. POGG empowers Parliament to meet this threat and overcome provincial inability. A province does not have the power to control the deleterious effects of GHGs emitted in other provinces, or to require other provinces to take steps to do so.[30] GHG pricing is impaired by inconsistent standards across jurisdictions. A legal vacuum would result without federal authority, impacting Canada's ability to mitigate this grave public health threat and others in the future.[31]

d) Parliament's jurisdiction over this national aspect does not displace provincial jurisdiction over GHG emissions

23. GHG emissions, like other public health problems, are subject to overlapping jurisdiction. This court recently reaffirmed in *Desgagnés* that overlaps are an inevitable—and legitimate—feature of the Canadian federal system.[32] This Court's modern trend is to strike a balance between

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[25] *Ontario Hydro*, *supra* note 21 at paras 31 and 85.
[26] *Crown Zellerbach*, *supra* note 21 at para 4.
[27] *Crown Zellerbach*, *ibid* at paras 38–40.
[28] *Interprovincial Co-operative Ltd. v R.*, [1976] 1 SCR 477 at 513; *Crown Zellerbach*, *ibid* at 514.
[29] Canada's Factum at para 11.
[30] ONCA Decision at paras 118-120.
[31] Canada's Factum at paras 69 and 97.
[32] *Desgagnés*, *supra* note 16 at paras 83-84; *Canadian Western Bank v Alberta*, 2007 SCC 22 [***Canadian Western Bank***] at para 42.

the federal and provincial governments through the application of pith and substance analysis, a restrained application of federal paramountcy, and more flexible concepts of double aspect and cooperative federalism.[33] Canada and other interveners correctly address these doctrines, which CPHA relies on and does not repeat.

24. It is well established that Parliament "legislating in respect of a matter does not lead to a presumption that it intended to rule out provincial legislation in respect of the same subject."[34] The approach that legislation by one level of government occupies the field and precludes complementary legislation by other levels has long since been rejected in Canada.[35] In *Rothmans, Benson & Hedges Inc. v. Saskatchewan,* a case regarding another national public health problem—tobacco—Justice Major for this Court held: "intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady*."[36]

25. Public health jurisprudence confirms that the POGG power is no different than other heads of power with respect to exclusive authority. When introducing the modern national concern doctrine in *Canadian Temperance Federation,* Lord Simon explicitly held that the double aspect doctrine applies.[37] As described above, federal jurisdiction over the national dimensions of public health has not displaced provincial authority over public health matters within provinces. Chief Justice Laskin in *Schneider* cautioned that a finding of provincial authority over a health matter "must not be taken as excluding federal authority over public health, viewed as directed to the protection of the national welfare".[38]

26. Ontario and Saskatchewan wrongly rely on aeronautics and radiocommunications jurisprudence to support their claims of displacement.[39] The appellants fail to acknowledge that in

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[33] *PHS Community Services Society v Canada (Attorney General),* 2011 SCC 44 [***PHS***] at para 65.
[34] *Canadian Western Bank*, *supra* note 32 at para 74.
[35] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, para 39.
[36] *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2005 SCC 13 at para 21, citing *O'Grady v. Sparling*, [1960] SCR 804.
[37] *Ontario (Attorney General) v Canada Temperance Federation*, 1946 CanLII 351 (UK JCPC).
[38] *Schneider*, *supra* note 11 at para 1.
[39] Ontario's Factum at para 64; Saskatchewan's Factum at para 50.

those cases this Court applied the doctrine of interjurisdictional immunity ("IJI")—this Court held in those circumscribed areas of activity that application of IJI was necessary to enable Parliament to achieve the purpose for which exclusive legislative jurisdiction was conferred.[40] By contrast, in cases concerning matters of federal jurisdiction over conflicts between provincial laws with cross-border effect, as in *Interprovincial Cooperatives*, there was no suggestion that there could not be provincial jurisdiction as well.[41]

27. This Court has now confirmed that IJI should "in general be reserved for situations already covered by precedent" like aeronautics and radiocommunications, and there is no precedent for applying IJI to a broad and amorphous area of jurisdiction such as public health.[42] Any extension of IJI or other "occupied field" concepts to the matters at issue in this reference risks creating a "legal vacuum"—ironically precluding national solutions where national welfare is at stake—which is "inimical to the very concept of the division of powers".[43]

28. The GGPPA is akin to the draft federal law in the *Pan-Canadian Securities Reference*. The Court unanimously upheld a federal regulatory scheme for securities that deferred to existing provincial regulations, as a matter for which there was provincial inability as required under the general trade and commerce power. Just as the national securities legislation was validly enacted to address systemic risk that "slips through the cracks" and posed a threat to the Canadian economy as a whole, the GGPPA operates to address provincial failure to meet minimum standards integral to reducing GHG emissions.[44] The GGPPA avoids encroaching on existing provincial jurisdiction, and backstops provincial action only insofar as needed to avoid the systemic risk.

29. Both Ontario and Saskatchewan highlight GHG-emitting sectors falling under Provincial jurisdiction and promise GHG-reduction initiatives for each, yet neither has identified a single provincial law that would be conflicted out by the GGPPA.[45] Parliament has provided a minimum

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[40] *Canadian Western Bank*, *supra* note 32; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39.
[41] *Interprovincial Co-operatives*, *supra* note 28.
[42] *Canadian Western Bank*, *supra* note 32 at para 77; *PHS*, *supra* note 33 at para 60.
[43] *PHS*, *supra* note 33 at paras 64, 65 and 69.
[44] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 17, 88 and 92.
[45] Ontario's Factum at paras 15-21; Saskatchewan's Factum at paras 11-13.

floor for GHG pricing. It is open to the provinces to do more. Provincial legislation aimed at reducing GHG emissions enhances rather than conflicts with the federal legislative purpose.

e) In the alternative, the GGPPA is a valid exercise of the criminal law power

30. In the alternative, the GGPPA is constitutional pursuant to the s. 91(27) criminal law power. Public health is a fundamental concern of the criminal law[46] and "the scope of the federal power to create criminal legislation with respect to health matters is broad".[47] Criminal laws protecting public health may have incidental effects on property and civil rights in a province.[48] Use of the criminal law power to protect, among other things, the health of citizens, occupies a broad area of concurrency. Criminal laws have three elements: (1) a prohibition, (2) a penalty, and (3) a typically criminal purpose. This is not a restrictive definition; this Court has upheld a variety of regulatory laws enacted under Parliament's criminal law power.

31. In *Hydro-Quebec*, the criminal power authorized regulation of pollutants under the *Canadian Environmental Protection Act* ("CEPA").[49] This was, among other reasons, to protect health.[50] Regulation of GHGs also protects public health. As the Federal Court of Appeal held in *Syncrude*, "it is uncontroverted that GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power."[51]

32. The GGPPA shares similarities with CEPA. Both enable inspections, enforcement, offences and penalties, [52] with sentencing principles that draw on the *Criminal Code* and on deterrence, denunciation and "polluter pays" principles. [53]

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[46] *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 1 at para 145.
[47] *RJR*, *supra* note 13 at para 32
[48] *Standard Sausage*, *supra* note 24 at para 66; *Hydro Quebec*, *supra* note 11 at para 129; *RJR*, *supra* note 13.
[49] *Canadian Environmental Protection Act*, RSC, 1985, c 16 (4th Supp.) [**CEPA**]. This Act was the precursor the current *Canadian Environmental Protection Act, 1999*, SC 1999, c 33.
[50] *Hydro Quebec*, *supra* note 11.
[51] *Syncrude Canada Ltd. v Attorney General of Canada*, 2016 FCA 160 [***Syncrude***], at para 62.
[52] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 [**GGPPA**], ss 37(1), 131, 133, 141, 203(1), 218, 219 and 232(2); CEPA, *supra* note 50, ss. 95, 98, 218(1), 272 and 272.1.
[53] GGPPA, *ibid*, ss. 232(3), 247- 249; CEPA, *supra* note 50, ss. 272(3), 287, 287.1 and 291.

33. Criminal laws may indirectly regulate an activity with a view to behaviour modification, as does the GGPPA. In *RJR-MacDonald,* this Court held that the *Tobacco Products Control Act* was a valid criminal law, even though it did not prohibit the use and sale of tobacco, but controlled consumer behaviour through advertising and labeling. A valid criminal law purpose may exist, even if Parliament takes a "circuitous path" to reach its goal.[54]

34. In *Syncrude*,[55] the Federal Court of Appeal considered s. 5(2) of *the Renewable Fuels Regulations.*[56] Like the GGPPA, this regulation combatted GHGs indirectly, by requiring diesel fuel produced, imported or sold in Canada to contain at least 2% renewable fuel. Syncrude argued that criminal law could not indirectly regulate to create demand for renewable fuels. The Court disagreed, holding that "Parliament may use indirect means to achieve its ends. A direct and total prohibition is not required." The Court held that "all criminal law seeks to deter or modify behaviour, and it remains a valid use of the power if Parliament foresees behavioural responses, either in persons or in the economy."[57]

35. In the same way, the GGPPA aims to reduce GHG emissions by prohibiting or regulating prescribed individuals from engaging in certain activities, unless they comply with the requirements of the fuel charge or output-based pricing system. The prohibition is accompanied by penalties, enforced in a similar manner as other statutes upheld under the criminal law power. Here, as in *Syncrude*, the criminal law power should be applied to protect Canada's public health.

PART IV – COSTS

36. CPHA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January 2020.

Jennifer L. King / Michael Finley / Liane Langstaff

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[54] *RJR, supra* note 13 at para 51.
[55] *Syncrude, supra* note 51.
[56] *Renewable Fuels Regulations*, SOR/2010-189.
[57] *Syncrude, supra* note 51 at paras 84 and 69.

PART V - TABLE OF AUTHORITIES

JURISPRUDENCE	Paragraph(s) in Parts I to IV
114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40	24
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Canadian Blood Services v The Manitoba Human Rights Commission and Zoldy, 2011 MBQB 312	12
Canadian Western Bank v Alberta, 2007 SCC 22	23, 24, 26, 27
Quebec (Attorney General) v Canadian Owners and Pilots Association, 2010 SCC 39	26
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A.-G. Ont. v. A.-G. Dom., [1896] AC 348	17
R v Crown Zellerbach Canada Ltd., [1988] 1 SCR 401	17, 20, 21
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R v Hydro Quebec, [1997] 3 SCR 213	12, 30, 31
Reference re Assisted Human Reproduction Act, 2010 SCC 61	15, 17
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RJR-MacDonald Inc. v Canada (Attorney General), [1995] 3 SCR 199	13, 30, 33
Rothmans, Benson & Hedges Inc. v Saskatchewan, 2005 SCC 13	24
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Greenhouse Gas Pollution Pricing Act, S.C. 2018, c 12, s 186	1, 2, 4, 11, 14, 28, 29, 30, 32, 33, 34, 35
Renewable Fuels Regulations, SOR/2010-189	34