

**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:

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APPELLANT

-and-

ATTORNEY GENERAL OF ALBERTA

RESPONDENT

(Style of Cause continued on next page)

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I. PART I – OVERVIEW AND STATEMENT OF FACTS

1. The majority opinion of the Alberta Court of Appeal [“ABCA”] in the *Alberta Carbon Reference* [or “ACR”] states that *R. v. Hydro-Quebec*, [1997] 3 SCR 213 [“*Hydro-Quebec*”] has been criticized as having a negative impact on the constitutional division of powers. This Court, however, has neither questioned, nor overturned, its decision in *Hydro-Quebec*. Based on an enumerated power, the case is a leading authority of this Court that has been the foundation for upholding the constitutionality of federal environmental legislation under criminal law, while respecting provincial powers, and which these Interveners submit supports the constitutionality of the *Greenhouse Gas Pollution Pricing Act* (the “GGPPA” or “Act”) in the within appeal.

Alberta Record, Vol. 1, Tab 1, Part I (“AR”): *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, para 270, footnote 177 [“*Alberta Carbon Reference*” or “ACR”]; *Hydro-Quebec*, para 5, 110, 128, 131; **Alberta Factum (“AF”):** para 12, 50.

2. The Interveners adopt certain of the facts set out in the *Alberta Carbon Reference*.
AR: *Alberta Carbon Reference*, para 66-73, 75-92.

II. PART II – STATEMENT OF QUESTION AT ISSUE

3. The appeal by the Attorney General of British Columbia [“AGBC”] to this Court asks the same question the Lieutenant Governor in Council [“LGC”] did in its reference to the ABCA: “Is the [Act] unconstitutional in whole or in part”? The question: (1) is also the same as that addressed by the Interveners in support of the Act’s validity under the criminal law power in response to the appeals by Saskatchewan and Ontario (the “companion appeals”); (2) necessitates the same response to the within appeal; and (3) is not limited to whether the Act comes within POGG because in a reference the appeal scope is governed by the specific question posed by the LGC.

AGBC, Notice of Appeal, March 25, 2020; **AR:** *Alberta Carbon Reference*, para 1; **AF:** para 3; *Reference re Goods and Services Tax*, [1992] 2 SCR 445 at 487.

III. PART III – STATEMENT OF ARGUMENT

4. The majority opinion of the ABCA agreed with the Saskatchewan Court of Appeal [“SKCA”] majority that the Act does not fall within Parliament’s criminal law power.

AR: *Alberta Carbon Reference*, para 257, footnote 169, referring to para 178-199 of *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [“*Saskatchewan Carbon Reference*” or “SCR” – found at **Saskatchewan Record (38663) (“SR”), Tab 1**].

5. However, in coming to this conclusion the ABCA did not acknowledge that some of the paragraphs it refers to from the *SCR* in fact state that arguments for the Act's constitutionality based on the criminal law power are "by no means devoid of merit" and "it might be possible to see the Act as having a valid criminal law purpose...". There is no indication in the *ACR* of agreement or disagreement with these findings from the *SCR*. But as a foundational decision of this Court on the application of the criminal law power to federal environmental legislation, *Hydro-Quebec* is integral to these findings. (While the SKCA ultimately found the *GGPPA* lacked prohibitions and, therefore, was not sustainable under the criminal law power, these Interveners dispute this finding in our earlier factum to this Court in the companion appeals).

SR, Tab 1: *Saskatchewan Carbon Reference*, para 191, 198; **Interveners' Factum – Saskatchewan-Ontario Appeals (38663, 38781) ("IF"):** para 17-25.

6. The *ACR* acknowledged that "certain provisions of an earlier version of the *Canadian Environmental Protection Act* ("*CEPA*") [relating to toxic substances] were upheld as constitutional in *Hydro-Quebec* under Parliament's criminal law power". However, the opinion also observed that the case "has been criticized for its negative impact on the constitutional division of powers". In support of this view, the ABCA cites three journal articles. However, a reading of the articles in conjunction with this Court's jurisprudence since it decided *Hydro-Quebec* does not support an argument that the case should be doubted as good law.

AR: *Alberta Carbon Reference*, para 270, footnote 177.

7. The first article, by Alexis Belanger, is a policy critique of federal environmental initiatives, not a sustained analysis of constitutional jurisprudence on the criminal law power generally, or the *Hydro-Quebec* decision, in particular. Its only reference to the criminal law power and *Hydro-Quebec* is to another article that Belanger says suggests that the decision "has given rise to many questions in terms of its negative impact on the balance of powers within the federation". However, neither the Belanger article, nor the *ACR*, discussed these alleged impacts.

AR: *Alberta Carbon Reference*, para 270, footnote 177 (Alexis Belanger, "Canadian Federalism in the Context of Combating Climate Change" (2011) 20:1 *Const. Forum* 21 at 23).

8. The second article, by Dwight Newman, is not so much a critique of *Hydro-Quebec*, as an evaluation of the impact of the *Assisted Human Reproduction Reference* on division of powers analysis and the criminal law power. Newman suggests that the judgment of LeBel and

Deschamps, JJ., supported by Abella and Rothstein JJ., enunciates a view of the criminal law power that Newman states is now the leading description of the scope of s. 91(27). This description requires that legislation enacted under the criminal law power: (1) “suppress an evil”; (2) demonstrate evidence of a reasoned apprehension of this evil; and (3) fit with the overall structure of the balance of Canadian federalism.

AR: *Alberta Carbon Reference*, para 270, footnote 177 (Dwight Newman, “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity” (2011) 74 Sask. L Rev 21 at 23-24, citing *Reference re Assisted Human Reproduction* [“AHRR”], [2010] 3 SCR 457, para 233, 237, 245-246).

9. Where Newman identifies what he describes as “significant subsequent criticism of [*Hydro-Quebec*]” he too merely references an article (the third cited by the ABCA and discussed below). What is important about Newman’s article for the within appeal is that the descriptors he says *AHRR* require are consistent with the *GGPPA* and the application of the *Hydro-Quebec* ratio, as discussed in our initial factum filed with this Court. First, the Act seeks to suppress an evil, namely the unprecedented risk of climate change inducing greenhouse gas emissions (“GHGE”) (in *Hydro-Quebec* suppression of an evil - in that case toxic substances - was explicitly acknowledged as a requirement that must be present in order to invoke the criminal law power). Second, the Act has as its foundation substantial evidence of a reasonable apprehension of the evil of GHGE (toxic substances that threatened human health and the environment were the evil addressed in *CEPA* and the sole focus of concern in *Hydro-Quebec*). *Syncrude* as well as the uncontroverted evidence in the record show GHGs to be a subset of toxic substances which, in our submission, connect *CEPA* and the *GGPPA*. Third, the Act is designed as a behavioural change inducing backstop applicable only in those provinces lacking adequate or any pricing measures as a means of suppressing the evil but still allowing provinces to act in the same area (a similar authority in *CEPA* - the equivalency provision - as well as a focus on just toxic substances and not the universe of all environmental pollutants were two of the benchmarks recognized in *Hydro-Quebec* as a means of avoiding unnecessarily broad prohibitions and their impact on provincial powers as well as charges of colourability).

AR: *Alberta Carbon Reference*, para 270, footnote 177, Newman at 26; **IF:** para 12-32; *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160, para 8-9; Act, sch. 3 (GHGs); *CEPA*, sch. 1 (List of Toxic Substances - items 74-79); *Hydro-Quebec*, para 121, 146-147, 153; **Canada Record (38663 & 38781), Vol. 1, Tab. 1 (“CR”):** Moffet Affidavit, para 6, 8, 17-26, 101, 116.

10. The third article, by David Beatty, was published shortly after the release of the *Hydro-Quebec* decision. Beatty's concerns included that *Hydro-Quebec*: (1) relied primarily on the issue of colourability to check federal encroachment (now overflow) on provincial powers; and (2) ignored the complex and administrative nature of *CEPA*, which contributed to the view that it was inconsistent with the structure of a statute based on the criminal law power and constituted an encroachment on provincial authority.

AR: *Alberta Carbon Reference*, para 270, footnote 177 (David M. Beatty, "Polluting the Law to Protect the Environment" (1998) 9:2 Const. Forum 55 at 56).

11. The subsequent jurisprudence of this Court does not support the concerns raised by Beatty. In the *Firearms Reference*, this Court applied *Hydro-Quebec* to a complex federal gun safety registration regime (noting as well that Parliament corrected the difficulty identified by the dissent in *Hydro-Quebec* by ensuring that the offences were not defined by an administrative body). In *AHRR* itself, this Court relied on *Hydro-Quebec* (as well as the *Firearms Reference* and *RJR-MacDonald*) for the proposition that a valid criminal law requires a substantive component (suppression of a real or apprehended evil) to be present and it is this component that assumes particular importance considering the liberal interpretation now given by the Court to the formal component (i.e. prohibition accompanied by a penalty). *AHRR* goes on to say in this regard that in *Hydro-Quebec* the Court held a regulatory scheme to be valid criminal law after finding that Parliament had the power to prevent certain toxic substances from entering the environment. The choice of means is a matter for Parliament, recognizing that while the criminal law power is broad it is not unlimited. What limits it is having a legitimate criminal law purpose – suppression of a real or apprehended evil – which must be present for the legislation to be upheld as a valid exercise of the power. There is no suggestion in *AHRR* that this Court had concerns about, or had resiled from, any aspect of the decision or reasons in *Hydro-Quebec*. In the *Genetic Non-Discrimination Reference*, this Court referred approvingly to *Hydro-Quebec* as authority for the proposition that threats of harm, such as from toxic substances, are evils that may be properly targeted by Parliament using the criminal law.

Hydro-Quebec, para 130; *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783, para 33, 37; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 3 SCR 199, para 44; *AHRR*, para 234, 237; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, para 95 (majority), 242, 266 (dissent).

12. Therefore, contrary to the opinion expressed in the *ACR*, *Hydro-Quebec* has not had a negative effect on the constitutional division of powers. In fact, it has had a beneficial effect for the reasons submitted herein as well as in our earlier factum to this Court concerning the companion appeals. *Hydro-Quebec* also strikes an appropriate cautionary note not reflected in the articles. Justice La Forest, in *Hydro-Quebec*, observed that although he expressed concern in *Crown Zellerbach* with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament, he would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces under s. 92(13), control over the environment in a manner that prevented Parliament from: (1) exercising the leadership role on the environment expected of it in the international community; and (2) protecting the basic values of Canadians regarding the environment through the criminal law power.

Hydro-Quebec, para 154.

13. *Hydro-Quebec* remains robust law, recently relied upon to uphold as valid criminal law, a federal statute addressing the evil of imminent harm to species at risk using a regulatory regime comparable in complexity to *CEPA*, the *Firearms Act*, or the *GGPPA*, while still minimizing the impact on provincial powers. Along with the other authorities cited in this and our earlier factum, *Hydro-Quebec* is integral to upholding the validity of the *GGPPA* under the criminal law power.

Groupe Maison Candiac Inc. v. Canada (Attorney General), 2020 CAF 88, para 46, 49-55, 57-62, 65, 67.

IV. PART IV – COSTS

14. The Interveners request no costs be awarded to or against them in respect of this appeal.

V. PART V – ORDER SOUGHT

15. The Interveners make no statement on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF AUGUST 2020.

as agent for
Joseph F. Castrilli

as agent for
Theresa McClenaghan

as agent for
Richard D. Lindgren

Counsel for the Interveners, Canadian Environmental Law Association, Environmental Defence Canada Inc., and Sisters of Providence of St. Vincent de Paul

VII. PART VII – TABLE OF AUTHORITIES

Cases	Para(s)
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<i>Reference re Genetic Non-Discrimination Act</i>, 2020 SCC 17, para 95, 242, 266	11
<i>Reference re Goods and Services Tax</i>, [1992] 2 SCR 445 at 487	3
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<i>Syncrude Canada Ltd. v. Canada (Attorney General)</i>, 2016 FCA 160, para 8-9	9

Secondary Sources	Para(s)
Alexis Belanger, “Canadian Federalism in the Context of Combating Climate Change” (2011) 20:1 Const. Forum 21 at 23	7
Dwight Newman, “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity” (2011) 74 Sask. L Rev 21 at 23-24, 26	8-9
David M. Beatty, “Polluting the Law to Protect the Environment” (1998) 9:2 Const. Forum 55 at 56	10

Legislation	Para(s)
<p><u>Greenhouse Gas Pollution Pricing Act, being Part 5 of the Budget Implementation Act, 2018, No. 1, SC 2018, c. 12, s 186; Sch. 3</u> (Greenhouse Gases);</p> <p><u>Loi sur la tarification de la pollution causée par les gaz à effet de serre, LC 2018, c 12, art 186; Annexe 3 (Gaz à effet de serre)</u></p>	9
<p><u>Canadian Environmental Protection Act, 1999, SC 1999, c. 33, Sch. 1 (List of Toxic Substances, items 74-79 being greenhouse gases);</u></p> <p><u>Loi canadienne sur la protection de l'environnement (1999), L.C. 1999, ch. 33, Annexe 1, (Liste des substances toxiques; les gaz à effet de serre – 74-79)</u></p>	9