

IN THE COURT OF APPEAL FOR SASKATCHEWAN

**IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING
ACT, BILL C-74, PART 5***

**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:

ATTORNEY GENERAL OF SASKATCHEWAN

APPELLANT

ATTORNEY GENERAL OF CANADA

RESPONDENT

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL
OF ONTARIO, ATTORNEY GENERAL OF NEW BRUNSWICK, CANADIAN
ENVIRONMENTAL LAW ASSOCIATION AND ENVIRONMENTAL
DEFENCE CANADA INC., SASKATCHEWAN POWER CORPORATION
AND SASKENERGY INCORPORATED, THE CANADIAN TAXPAYERS
FEDERATION, ATHABASCA CHIPEWYAN FIRST NATION, CLIMATE
JUSTICE *ET AL*, ASSEMBLY OF FIRST NATIONS, THE CANADIAN
PUBLIC HEALTH ASSOCIATION, UNITED CONSERVATIVE
ASSOCIATION, INTERGENERATIONAL CLIMATE COALITION,
ECOFISCAL COMMISSION OF CANADA, DAVID SUZUKI FOUNDATION,
AGRICULTURAL PRODUCERS ASSOCIATION OF SASKATCHEWAN
INC., AND INTERNATIONAL EMISSIONS TRADING ASSOCIATION

INTERVENORS

**FACTUM OF THE INTERVENORS,
SASKATCHEWAN POWER CORPORATION and
SASKENERGY INCORPORATED**

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**FACTUM OF THE INTERVENORS,
SASKATCHEWAN POWER CORPORATION and
SASKENERGY INCORPORATED**

I. INTRODUCTION

1. Saskatchewan Power Corporation (“SaskPower”) and SaskEnergy Incorporated (“SaskEnergy”) submit that the *Greenhouse Gas Pollution Pricing Act*, Bill C-74 (the “GGPPA”), encroaches on the provincial power under s. 92A of the *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (the “*Constitution*”) in relation to the development, conservation, and management of non-renewable natural resources and facilities for the generation and production of electricity in the provinces. The GGPPA also attempts to impose a tax on agents of the provincial government contrary to s. 125 of the *Constitution*, which prohibits taxing another level of government.

II. SUMMARY OF FACTS

2. SaskPower is an agent of the Crown,¹ responsible for generating, transmitting, distributing, purchasing, selling and supplying electricity in Saskatchewan.² SaskPower is also charged with promoting, participating in and carrying out programs to encourage energy conservation.³ SaskPower operates 24 power generation facilities across Saskatchewan, including five natural gas stations, three coal-powered stations, seven hydroelectric stations, and two wind facilities.⁴ At present, the majority of SaskPower’s generation capacity comes from coal and natural gas.⁵ SaskPower also engages in “Demand Side Management” initiatives towards conserving energy.⁶

¹ *The Power Corporation Act*, RSC 1978, c P-19, s. 3(3) (“*Power Corporation Act*”) [TAB 16, in the Book of Authorities (the “BOA”)].

² *Ibid*, s. 8(1)(a).

³ *Ibid*, s. 8(1)(h.1).

⁴ SaskPower Annual Report 2017-18 at 129, online: <<https://www.saskpower.com/about-us/our-company/current-reports>>.

⁵ Affidavit of Bruce Ughetto sworn December 17, 2018 at para 3 [Ughetto Affidavit] [TAB A].

⁶ *Ibid* at para 7.

3. SaskPower has committed that by 2030 it will reduce its carbon dioxide emissions to 40% below 2005 levels and achieve up to 50% renewable electrical generation capacity.⁷ To meet these goals, SaskPower plans over the next decade to gradually replace its coal plants with power generation facilities using renewable sources and natural gas. The geography and the location of population centres in the Province greatly impact the available options and the planning towards greater use of renewable sources of electricity; it does not allow for the introduction of significantly more hydroelectricity.⁸ SaskPower's options for adding renewable electrical generation capacity are limited to wind and solar power. There are significant costs to transitioning to renewable sources of electricity (including the necessary upgrading of transmission grid infrastructure) to accommodate these forms of electrical generation.⁹

4. SaskEnergy is an agent of the Crown,¹⁰ with the power to: "purchase, distribute, sell, manufacture, produce, transport, gather, compress, process and store gas",¹¹ among other matters. TransGas Limited ("TransGas") is a wholly owned subsidiary of SaskEnergy.

5. SaskEnergy has the statutory power to "promote, participate in or carry out programs to encourage the prudent, judicious and economic use, conservation or both use and conservation of gas."¹² SaskEnergy provides: education about reducing natural gas use to residential customers, loans to residential customers for purchasing energy-efficient appliances, and incentives to commercial customers for buying energy-efficient boilers and HVAC equipment.¹³

⁷ *Ibid* at para 8.

⁸ *Ibid* at para 9.

⁹ *Ibid* at para 10.

¹⁰ *The SaskEnergy Act*, SS 1992, c S-35.1, s. 6 (the "*SaskEnergy Act*") [TAB 17, BOA].

¹¹ *Ibid*, s. 15(a).

¹² *Ibid*, s. 15(b).

¹³ Affidavit of Megan Bunney sworn December 17, 2018 at para 4 [Bunney Affidavit] [TAB B].

III. POINTS IN ISSUE

6. SaskPower and SaskEnergy's submissions will address the following issues:
- (a) Whether the *GGPPA* encroaches on Saskatchewan's power under section 92A of the *Constitution* to develop, conserve, and manage non-renewable natural resources and electrical generation facilities; and
 - (b) Whether the *GGPPA* violates the prohibition in section 125 of the *Constitution* against the federal government taxing property of the provincial Crown.

IV. ARGUMENT

A. Encroachment on s. 92A of the *Constitution*

(i) Respect for Exclusivity and the Written Constitution

7. The Supreme Court of Canada has continually affirmed that “there are compelling reasons to insist upon the primacy of [the] written constitution”,¹⁴ as “[a] written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.”¹⁵ Exclusivity is fundamental in Canadian federalism, with federalism being “the dominant principle of Canadian constitutional law.”¹⁶

8. Concepts like “flexibility” and “cooperation” have their place in some circumstances, however the Supreme Court of Canada unanimously held: “While flexibility and cooperation are important to federalism, they cannot override or modify the separation

¹⁴ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53 [*Reference re Secession of Quebec*] [TAB 11, BOA].

¹⁵ *Ibid.*

¹⁶ *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 821; more recently cited in *Reference re Secession of Quebec*, *supra*, at para 57.

of powers.”¹⁷ Respect for federalism and the respect for the exclusivity of both heads of power in the written Constitution reinforces the recognition of the exclusive jurisdiction of the provinces over natural resources under s. 92A.

9. The doctrine of interjurisdictional immunity “is rooted in references to ‘exclusivity’ throughout ss. 91 and 92 of the *Constitution Act, 1867*”.¹⁸ Case law confirms that the express powers of one level of government must be protected against intrusions by the other level.¹⁹ A two-pronged test has been developed to trigger the application of the doctrine of interjurisdictional immunity. The first step is to determine whether the federal law intrudes on a protected matter of provincial competence.²⁰ If so, the second step is to determine whether the federal law's effect on the exercise of the protected provincial power is sufficiently serious to trigger the doctrine of interjurisdictional immunity.²¹ Case law in this area has been applied asymmetrically in favour of the Federal Government although as Professor Hogg notes, provinces may have a stronger claim to the immunity due to an inability to invoke paramountcy.²²

¹⁷ *Reference re Securities Act*, 2011 SCC 66 at para 61, [2011] 3 SCR 837 [TAB 12, BOA]; See also *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 18 [TAB 10, BOA]; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at paras 18-19, [2015] 1 SCR 693.

¹⁸ *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 34, [2007] 2 SCR 3 [CWB] [TAB 3, BOA].

¹⁹ See *CWB*, *supra* at paras 33-34; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 26, [2010] 2 SCR 536 [COPA] [TAB 6, BOA]; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 58, [2011] 3 SCR 134 [PHS] [TAB 2, BOA]. See generally *CWB*, *supra* at para 43 (for the exclusivity of the enumerated powers) wherein Binnie and LeBel JJ. (for the majority) held “...it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise” [emphasis added].

²⁰ The Supreme Court of Canada has noted the doctrine of interjurisdictional immunity should apply equally to protect the provincial heads of power (*Windsor (City) v Canadian Transit Co.*, 2016 SCC 54 at para 64, [2016] 2 SCR 617 [TAB 14, BOA]; *PHS*, *supra* at para 65). See *Rogers Communications Inc. v Châteauguay (City)*, 2016 SCC 23 at para 59, [2016] 1 SCR 467 [Rogers Communications] [TAB 13, BOA]; *COPA*, *supra* at para 27; *CWB*, *supra* at para 48. Compare *PHS*, *supra* at para 68, wherein “the claimants ... failed to identify a delineated “core” of an exclusively provincial power.”

²¹ See *Rogers Communications*, *supra* at para 59; *COPA*, *supra* at para 27.

²² Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (2018-1) 5th ed, vol 1 (Toronto: Thomson Reuters, 2016) at 10.9(f) [TAB 19, BOA].

10. SaskPower and SaskEnergy submit that s. 92A is a protected matter of express provincial competence and that the *GGPPA* purports to significantly regulate this area.

(ii) Background of s. 92A

11. Section 92A provides the provinces with *exclusive* jurisdiction relating to:

- (a) exploration for non-renewable natural resources in the province;
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
- (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

The history of s. 92A, and the jurisprudence interpreting it, recognize natural resources as “one of the mainstays of provincial power”.²³ As agents of the Crown, constitutional protections apply equally to SaskPower and SaskEnergy.

12. Notably provinces had constitutional authority to legislate provincial natural resources prior to s. 92A’s enactment, including legislation around the rate at which these resources were produced and expended.²⁴ “Interventionist policies” of the federal government, as characterized by La Forest J. in *Ontario Hydro*, led to over a decade of contentious intergovernmental natural resource disputes and strained Confederation to such a degree, a constitutional amendment was required in this area.²⁵ In this constitutional reform process, the Western Provinces sought more than they ultimately received through the

²³ *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 376 [*Ontario Hydro*] [TAB 5, BOA].

²⁴ See Robert D. Cairns, Marsha A. Chandler & William D. Moull, “The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism” (1985) 23 Osgoode Hal LJ 253 at 270 [TAB 20, BOA]; *Spooner Oils Ltd. v Turner Valley Gas Conservation*, [1933] SCR 629.

²⁵ *Ontario Hydro*, *supra* at 376. See generally (on the intergovernmental natural resources dispute) Western Premiers’ Task Force on Constitutional Trends, Third Report (March 1979); William D. Moull, “Natural Resources and Canadian Federalism: Reflections on a Turbulent Decade” (1987) 25 Osgoode Hall LJ 411; William D. Moull, “Natural Resources: The Other Crisis in Canadian Federalism” (1980) 18 Osgoode Hall LJ 1; Roy Romanow, “Reworking the Miracle: The Constitutional Accord 1981” (1982) 8 Queen’s LJ 74; Susan Blackman, Janet Keeping, Monique Ross & J. Owen Saunders, “The Evolution of Federal/Provincial Relations in Natural Resources Management” (1994) 32 Alta L Rev 511.

enactment of Section 92A, as did the federal government.²⁶ Section 92A did not give the provinces everything they sought, but: “[t]he provincial governments under section 92A can now control the rate of development of resource industries within their borders....The federal government, on the other hand, has retained the power to ensure the preservation of a Canadian common market.”²⁷

13. This was the balance struck as part of the efforts to preserve Confederation. It included the federal government recognizing that the provinces have *exclusive* power to legislate over the “development, conservation and management of non-renewable natural resources” and of “sites and facilities in the province for the generation and production of electrical energy”.²⁸

(iii) Section 92A and the GGPPA Impact on SaskPower and SaskEnergy

14. A measure of interjurisdictional respect has resulted in very little case law involving s. 92A. It is important to note that in reported cases, the federal government has relied on its defined and declaratory powers (e.g. ss. 92(10)(a) and (c)); federal powers that are not relied upon in this case.

15. Unlike the past cases, the federal government is relying on the power to enact laws for peace, order and good government on “[m]atters not coming within the Classes of subject ... assigned exclusively to the Legislatures of the Provinces”.²⁹ Contrary to the doctrine of interjurisdictional immunity, this law seeks to directly regulate the rate of usage of natural resources and generation of electricity within the Province.³⁰ The power to enact laws on these matters falls squarely within the exclusive purview of Saskatchewan by virtue

²⁶ See J. Peter Meekison, Roy J. Romanow & William D. Moull, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: Institute for Research on Public Policy, 1985) at 29-30 [TAB 18, BOA].

²⁷ Cairns, Chandler & Moull, *supra* at 272-73.

²⁸ *Constitution Act, supra*, ss. 92A(1)(b)-(c) [TAB 15, BOA].

²⁹ *Ibid*, s. 91.

³⁰ See Factum of the Attorney General of Canada at paras 111-16.

of s. 92A; it has chosen to exercise some of these powers through its agents, SaskPower and SaskEnergy.

16. The specific impacts on SaskPower and SaskEnergy are significant.

(A) SaskPower

17. The *GGPPA* will directly impact regulating the very core of SaskPower's operations. For SaskPower, the *GGPPA* has the primary effect of making it much more expensive to generate electricity from coal and making it somewhat more expensive to generate electricity from natural gas.³¹ This negatively impacts SaskPower's future plans to reduce emissions, and directly and adversely impacts electrical generation efficiency.

18. SaskPower's coal-fuelled units currently run near maximum capacity. They are one of the lower-cost generation sources as coal-fuelled units run more efficiently near their maximum capacity.³² Under the *GGPPA*, the cost of running the coal-fuelled units will increase significantly. To minimize the fuel charges or excess emissions charges, SaskPower will need to run the coal-fuelled units at lower, suboptimal levels. Doing so requires more coal to generate each unit of electricity. Running units at suboptimal levels will increase the wear on machines, resulting in a shorter lifespan and increased maintenance needs.³³

19. The fuel charges or excess emissions charges imposed by the *GGPPA* will also impede SaskPower's plans to transition to more wind and solar power, as it will make it more difficult for SaskPower to make the investments required for the transition.³⁴ Any capital SaskPower has available will likely be used in the construction of new natural gas generation units, rather than transitioning to wind or solar facilities, as natural gas is the affordable option in the short term.³⁵

³¹ Ughetto Affidavit at para 18.

³² *Ibid* at para 19.

³³ *Ibid* at para 18.

³⁴ *Ibid* at para 20.

³⁵ *Ibid*.

20. The *GGPPA* represents a pernicious notion that the Saskatchewan people and their duly-elected/authorized officials do not know how and cannot be trusted to manage non-renewable resources and reduce carbon emissions in this Province. The ironic effect of the *GGPPA* in Saskatchewan will be to slow the move towards renewable/non-carbon emitting sources of electrical generation. Both this notion and the resulting effect are incompatible with s. 92A of the *Constitution*.

21. In addition to purporting to regulate the manner in which SaskPower generates electricity, the *GGPPA* also purports to directly impact and regulate how much SaskPower charges for electricity on the assumption that SaskPower will simply pass on the financial burden to the customer. This type of regulation falls squarely within the Province's exclusive power to enact laws around the management of electrical facilities and generation of electrical power. Indeed, the Province has enacted laws specifically in this area. The rates SaskPower charges its customers are reviewed by the Saskatchewan Rate Review Panel. SaskPower is constrained by affordability and competitiveness concerns when setting its rate. As such, SaskPower is limited in its ability to pass its increased costs arising from the *GGPPA* on to its customers. The financial impacts for SaskPower are discussed further in Part B of this Factum.

(B) SaskEnergy

22. SaskEnergy engages in the development, conservation and management of non-renewable natural resources, specifically natural gas.³⁶ SaskEnergy and its subsidiary, TransGas, distribute, process and transport natural gas throughout the province of Saskatchewan, and operate pipeline facilities for transporting their products.³⁷ Section 92A enables SaskEnergy to manage natural gas as a natural resource, including determining the rate at which it distributes natural gas throughout the province. The *GGPPA* purports to regulate both of these aspects of SaskEnergy's resource management.

³⁶ *SaskEnergy Act*, *supra*, s. 15.

³⁷ *Ibid.*

23. SaskEnergy and its subsidiary TransGas will see significant financial impacts as a result of Parts 1 and 2 of the *GGPPA*. As a consequence of Part 1 of the *GGPPA*, SaskEnergy will be required to pay approximately \$540 million in fuel charges in connection with the natural gas distributed to customers and approximately \$3 million in fuel charges related to their operations.³⁸ TransGas estimates it will be required to pay approximately \$7 million under Part 2 of the *GGPPA* for excess emissions from its pipeline and compressor station operations.³⁹ As a result, SaskEnergy and TransGas will be required to increase the amounts charged to their customers to cover the costs imposed by the *GGPPA*.⁴⁰

24. Overall the *GGPPA* represents an attempt by the federal government to directly regulate aspects of natural resources and electrical generation; areas in the express legislative authority of the Provinces pursuant to s. 92A. This direct regulation of natural resources will have extensive implications for SaskPower and SaskEnergy and directly impairs the core competence of the Province over the development and management of natural resources.

(iv) Inapplicability of the National Concern Doctrine

25. The opening words of s. 91 of the *Constitution* expressly confines the power to make laws for peace, order and good government to “matters not coming within the classes of subject ... assigned exclusively to the Legislatures of the Provinces.” Not only is the national concern doctrine premised on a legislative “gap”, which in this case cannot be supported, but the criteria established for a matter to constitute a national concern have not been satisfied.

³⁸ Bunney Affidavit at para 6, calculated for the time period between April 1, 2019 and March 31, 2023 and based on current and projected natural gas demand.

³⁹ *Ibid*, calculated for the time period between January 1, 2019 and December 31, 2022 and based on current and projected emissions from pipeline and compressor station operations.

⁴⁰ *Ibid*.

26. In order for a matter to constitute a “national concern”, it must meet the criteria established by the Supreme Court of Canada.⁴¹ “National concern” requires that the matter has 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. It also considers 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.⁴²

27. Based on the jurisprudence concerning the above criteria, it is respectfully submitted that Parliament has not demonstrated the matter it seeks to legislate constitutes a “national concern”.

(A) Lack of Distinctiveness

28. A “national concern” must be distinctive and distinguishable from matters of provincial concern. The environment “is not an independent matter of legislation under the *Constitution Act, 1867* and ... it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.”⁴³

29. In *Oldman River*, La Forest J. echoed his findings in *Crown Zellerbach* and opined that “environmental control, as a subject matter, does not have the requisite distinctiveness to meet the test under the ‘national concern’ doctrine.”⁴⁴

⁴¹ See *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373 at 458 [*Anti-Inflation Reference*], *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at 431-32 [*Crown Zellerbach*] [TAB 7, BOA] and more recently cited in *R v Hydro-Québec*, [1997] 3 SCR 213 at para 65 [*Hydro-Québec*] [TAB 8, BOA].

⁴² *Hydro-Québec*, *ibid.*

⁴³ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 64 [*Oldman River Society*].

⁴⁴ *Ibid*; Although La Forest J. wrote for the minority in making the statement, his reasons were notably not contested by the majority.

30. Similarly, Justice Beetz (with whom Martland, Ritchie, Pigeon and de Grandpré JJ. agreed with on this point) in *Re Anti-Inflation Act*, denied that price controls should be classified as a national concern, as ““containment and reduction of inflation”” ... 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.”⁴⁵

(B) Absence of Provincial Inability

31. The provincial inability test considers whether the matter “requires a single or uniform legislative treatment” due to the “interrelatedness of the intra-provincial and extra-provincial aspects of the matter.”⁴⁶ Professor Hogg states “[t]he national concern branch of the peace, order, and good government power will support measures to control pollution of air ... that are beyond the capacity of the province to control.”⁴⁷

32. The present case can be distinguished from previous pollution cases for several reasons. First, the Court went to great lengths in *Crown Zellerbach* to ensure the impugned legislation was sufficiently separate and distinct, finding the distinction between salt water and fresh water as limiting the application of the *Act* met the considerations in the *Anti-Inflation Reference* – “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.”⁴⁸ In dissent, La Forest J. wrote that allocating pollution to the federal government would involve “sacrificing the principles of federalism enshrined in the Constitution.”⁴⁹

33. Second, in *Oldman River Society*, s. 92A was not addressed, as there were no arguments made in respect of s. 92A, nor consideration of the direct regulation of an

⁴⁵ *Anti-Inflation Reference*, *supra* at 458.

⁴⁶ *Crown Zellerbach*, *supra* at 434.

⁴⁷ Hogg, *supra* at 30.7(b) [emphasis added].

⁴⁸ *Crown Zellerbach*, *supra* at 437-38.

⁴⁹ *Ibid* at 455.

exclusive provincial power by the federal government. In that decision, La Forest J., writing for the majority, referred to his dissenting opinion from *Crown Zellerbach* and stated “environmental control, as a subject matter, does not have the requisite distinctiveness to meet the test under the ‘national concern’ doctrine.”⁵⁰ La Forest J. made mention that although he wrote for the minority in *Crown Zellerbach*, his opinion was not contested by the majority. La Forest J. stated that “the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power.”⁵¹

34. The *GGPPA* is not connected to an enumerated head of power, as referenced by La Forest J. Under ss. 166 and 189 of the *GGPPA*, Parliament expressly acknowledges the provinces have the ability and competency to address emissions. In allowing provinces to provide their own mechanism for regulating emissions, the federal government has not met the burden of demonstrating the provinces are incapable of regulating emissions on their own.

B. Violation of s. 125 of the *Constitution*

35. Section 125 of the *Constitution* prohibits the Crown from taxing lands or property of the provinces, declaring: “No Lands or Property belonging to Canada or any Province shall be liable to Taxation.”

36. The Supreme Court of Canada has recognized the importance of s. 125 in ensuring “the proper functioning of Canada’s federal system ... It is founded upon the concept that imposing a tax on a level of government may significantly harm the ability of that government to exercise its constitutionally mandated governmental functions.”⁵² Section 125 affords the Provinces protection and “is plainly intended to prevent inroads, by way of taxation, upon the property of one level of government, by another level of government”,⁵³

⁵⁰ *Oldman River Society*, *supra* at 64.

⁵¹ *Ibid* at para 67.

⁵² *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at para 17 [*Westbank*].

⁵³ *Re Exported Natural Gas Tax*, [1982] 1 SCR 1004 at 1065 [*Natural Gas Reference*] [**TAB 9, BOA**].

as the courts have recognized that “a power to tax is a power to destroy.”⁵⁴ The distribution of powers signifies “[t]he provinces are to keep the property assigned to them and enjoy the fruits of that property free from any right of the [federal government] to assume it.”⁵⁵

(i) Taxation Immunity for Crown Agents

37. As stated by Professor Hogg: “The lands or property of a Crown corporation ... enjoy the same immunity as if the lands or property were owned directly by the Crown.”⁵⁶ SaskPower and SaskEnergy, as agents of the provincial government, are immune from taxation by the federal government when acting within their statutory mandates. An entity can become an agent of the Crown if either, (a) it satisfies the common law test for control or, (b) if it is expressly made an agent of the Crown by statute.⁵⁷

38. SaskPower is an agent of the government of Saskatchewan by virtue of s. 3 of the *Power Corporation Act*. SaskEnergy is an agent of the government of Saskatchewan by virtue of s. 6 of the *SaskEnergy Act*.

39. Section 125 provides not only immunity from taxes levied on Crown property, but also from taxes levied on persons or transactions in respect of Crown property.⁵⁸ Therefore, if s. 125 immunity protects the property itself, the receipt of the property does not fall outside the immunity afforded by s. 125.⁵⁹

⁵⁴ *Attorney-General of the Province of British Columbia v Attorney-General for Canada* (1922), 64 SCR 377 at 385 (“*Johnnie Walker*” case) (aff’d [1924] AC 222) citing *M’Culloch v Maryland*, 17 US (4 Wheat.) 316 at 431 (1819), Marshall CJ. [TAB 1, BOA].

⁵⁵ *Ibid.*

⁵⁶ Hogg, *supra* at 31.13(a).

⁵⁷ *Nova Scotia Power Inc. v Canada*, 2004 SCC 51 at paras 12-13, [2004] 3 SCR 53 [TAB 4, BOA].

⁵⁸ *Natural Gas Reference*, *supra* at 1078.

⁵⁹ *Ibid* at 1078-79.

(ii) An Attempt to Characterize a Tax as a Regulatory Charge

40. The *GGPPA* ultimately attempts to regulate SaskPower and SaskEnergy through what the Attorney General of Canada terms a “regulatory charge”, however the “charges” bear all of the hallmarks of a “tax” and should be considered as such.

41. Gonthier J. listed the indicia of taxation in *Westbank*, explaining that an impugned charge will be a “tax” if it is: (i) Enforceable by law; (ii) Imposed under the authority of the legislature; (iii) Imposed by a public body; and (iv) Intended for a public purpose.⁶⁰ Gonthier J. added an additional consideration, stating the levy will be a tax if it is “unconnected to any form of a regulatory scheme.”⁶¹ The charges imposed by the *GGPPA* apply to the property of agents of the Crown, SaskPower and SaskEnergy and bear all the indicia of a tax.

42. To the extent any regulatory scheme is present, it offends s. 92A. Otherwise it is an unlawful tax on provincial property.

(iii) Impacts of the *GGPPA* on SaskEnergy

43. As previously outlined, SaskEnergy and TransGas will experience financial impacts from the charges levied under Parts 1 and 2 of the *GGPPA*. To cover the increased costs arising from Parts 1 and 2 of the *GGPPA*, SaskEnergy and TransGas will be required to increase the amounts charged to its customers.

(iv) Impacts of the *GGPPA* on SaskPower

44. Based on consultation with its fuel suppliers, SaskPower believes the suppliers intend to pass fuel charges along to SaskPower for any fuel charges paid under Part 1 of the *GGPPA*. SaskPower estimates approximately \$2.75 billion in fuel charges will be passed

⁶⁰ *Westbank*, *supra* at para 21.

⁶¹ *Ibid* at para 43.

along by its fuel suppliers.⁶² SaskPower has applied to register its facilities as “covered facilities” under Part 2 of the *GGPPA*, for which it estimates that it will pay approximately \$442 million as compensation for its excess emissions.⁶³

45. SaskPower intends to pass on the cost incurred for excess emissions to its customer base to the extent that the rate review process allows SaskPower to do so. As a result, SaskPower customers will see an increase of approximately 5.1% in total by the end of 2022.⁶⁴

V. RELIEF

46. SaskPower and SaskEnergy support the Province’s position that the *GGPPA* is unconstitutional and beyond the scope of the Parliament’s powers. In addition, SaskPower and SaskEnergy respectfully submit that the interjurisdictional immunity doctrine renders the *GGPPA* inapplicable to their respective operations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Saskatoon, Saskatchewan, this 24th day of January, 2019.

McKERCHER LLP

Per: 

Solicitors for the Intervenors,
Saskatchewan Power Corporation and
SaskEnergy Incorporated

⁶² Ughetto Affidavit at para 14, calculated for the time period between January 1, 2019 and December 31, 2022 and based on the volumes and types of fuel SaskPower expects to buy, multiplied by the charge rates in the *GGPPA*.

⁶³ *Ibid* at para 15, calculated for the time period between January 1, 2019 and December 31, 2022 and based on the projected excess emissions of each facility, multiplied by the charges specified in the *GGPPA*.

⁶⁴ *Ibid* at para 17.

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