

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

(Appellant/Respondent on Cross-Appeal)

-and-

BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

Respondent

(Respondent/Appellant on Cross-Appeal)

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE  
PROVINCE OF BRITISH COLUMBIA

Respondent

(Respondent/Respondent on Cross-Appeal)

-and-

ATTORNEY GENERAL OF ONTARIO and  
ATTORNEY GENERAL OF ALBERTA

Interveners

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**FACTUM OF THE INTERVENER,  
ATTORNEY GENERAL OF ALBERTA**

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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**TABLE OF CONTENTS**

PART I – OVERVIEW AND STATEMENT OF FACTS..... 1

PART II – OVERVIEW OF POSITION ..... 1

PART III – ARGUMENT..... 2

    A. Case law distinguished ..... 3

    B. Legislative Charging Provisions ..... 7

    C. Indirect burden on the beneficiaries does not avoid the constraints of s. 125..... 9

    D. Trustee’s indemnification from the trust *res* ..... 11

    E. Concluding remarks ..... 12

PART IV - COSTS ..... 14

PART V – ORDER SOUGHT..... 14

PART VI – TABLE OF AUTHORITIES..... 15

## PART I – OVERVIEW AND STATEMENT OF FACTS

1. Alberta takes no position on the facts.
2. Alberta intervenes with respect to the applicability of s. 125 of the *Constitution Act, 1867* in relation to property held by the provincial Crown or a provincial Crown agent in trust.

## PART II – OVERVIEW OF POSITION

3. The application of s. 125 of the *Constitution Act, 1867* precludes the imposition of a tax on trust property or services provided in relation to that trust property when the trustee who has the legal title to the trust property is the provincial Crown or a provincial Crown agent.
4. Canada argues that the tax imposed under Part IX of the *Excise Tax Act*, or the burden of the tax, is permissibly imposed on the services provided by the Crown, in relation to the property of the beneficiaries, and that the Crown's constitutional immunity from taxation is not engaged.
5. When the provincial Crown is the trustee, the trust is legally the property of the provincial Crown and immune from taxation under s 125 of the *Constitution Act, 1867* and when the provincial Crown provided services in relation to that trust property, those services are immune from taxation under the principles identified in *Re: Exported Natural Gas Tax*.<sup>1</sup>
6. The *Excise Tax Act* in fact and in law creates a tax liability that is imposed on the trust with respect to services the trustee provides in relation to the trust *res*. Alberta recognizes that Parliament may have an expectation that the burden of the tax will ultimately be borne by the beneficiaries of the trust, but any indirect effect that the tax might have on the beneficiaries does not assist the legislation in avoiding the application of s. 125 of the *Constitution Act, 1867*.
7. Section 125 of the *Constitution Act, 1867* precludes Parliament's imposition of a tax that would be satisfied out of the provincial Crown trust *res* because payment of the tax from the trust *res* would deprive the Crown of a portion of its proprietary interest, which could have

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<sup>1</sup> *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004, 1982 CanLII 189 (SCC)

significant adverse financial consequences for the Crown, and which could impair the performance of constitutionally mandated government functions.

8. Alberta takes no position with respect to:
  - a. The nature and scope of the statutory trust and the pooled investment portfolios owned and managed by bcIMC;
  - b. The jurisdiction of the British Columbia Supreme Court; and
  - c. The cross-appeal in relation to the tax agreement between Canada and British Columbia.

### **PART III – ARGUMENT**

9. The provincial Crown is expressly, statutorily bound under the *Excise Tax Act* to collect and remit taxes lawfully imposed on others. However, the *Excise Tax Act* does not bind the provincial Crown to pay tax on taxable supplies that it receives. It follows that provincial Crown trust, as an emanation of the provincial Crown, should enjoy the same statutory immunity as the provincial Crown with respect to the services it receives. Therefore, the provincial Crown trustee should not be bound by the *Excise Tax Act* to pay tax on the services the provincial Crown trustee receives on behalf of the provincial Crown trust, and the provincial Crown trustee should not have to collect or remit taxes from the trust.
10. Legislatively deeming a trust owned by the provincial Crown, or a provincial Crown agent, to be a person does not strip the trust of its character as property legally owned by the provincial Crown. Rather, it simply creates a legal fiction, while the trust defined to be a person remains provincial Crown property.
11. A person legally owned by the provincial Crown who receives goods and services can only receive those goods and services as a provincial Crown-owned person. Moreover, the provincial Crown trustee, as the controlling mind of the provincially owned person engaged in activities on behalf of the provincial Crown, effectively ensures that the trust defined to be a person by s. 123(1) the *Excise Tax Act* is an emanation of the provincial Crown.

12. Absent express statutory language removing the statutory immunity, the provincial Crown trust defined to be a person would enjoy the same statutory immunity that the provincial Crown enjoys when it receives goods and services, particularly when the controlling mind of the provincial Crown-owned person is a provincial Crown agent performing duties on behalf of the provincial Crown.
13. Section 125 of the *Constitution Act, 1867*, precludes Parliament's imposition of a tax on property held by the Crown in right of a Province and on transactions affecting provincial Crown property.<sup>2</sup> If the *Excise Tax Act* is to be interpreted as imposing a tax on the trust as a person receiving taxable supplies, the imposition of the tax on that person owned by the provincial Crown would amount to, and would in fact and law be, an imposition of a tax on provincial Crown property.

#### A. Case law distinguished

14. Canada argues at paras. 70 and 79 of its factum that the *Calgary and Edmonton Land Co. (A.G.)* and the *Smith v Vermillion Hills* cases stand for the proposition that s. 125 of the *Constitution Act, 1867* does not protect property held in trust by the Crown for the benefit of others. Canada misconstrues the ratios of these decisions.
15. The *Calgary and Edmonton Land Co. v Alberta (A.G.)* case was about the non-Crown owner's ability to avoid paying taxes by relying on the Crown's constitutional immunity. It was not argued that the Crown was liable for the unpaid tax. Indeed, the Crown was not bound by Alberta's *Local Improvements Act*<sup>3</sup> and could not have been subject to a tax imposed under that Act as the legal owner.
16. The *Calgary and Edmonton Land Co.* case makes it clear that the Crown's interest in a trust, whatever it might be, is constitutionally immune from taxation. In that case, Davies J. of the Supreme Court of Canada stated:

The legal title, it is true, still remained in the Crown until the patent passed, but the equitable title had become vested in the appellants to whom it had been transferred by the railway company. **The interest of the Crown**

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<sup>2</sup> *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004, 1982 CanLII, at para. 163.

<sup>3</sup> *The Local Improvements Act*, SA 1907, c. 11

**whatever it might have been could not be taxed**, but the beneficial interest of the appellants certainly was not exempted under or by virtue of the section of the “British North America Act, 1867,” under review.<sup>4</sup> [Emphasis added]

17. Justice Davies goes on to state:

A reference to the Act in question shews that its scope and purpose was to embrace within the lands liable to be assessed and taxed every beneficial interest therein. Here we have only to deal with **the legal estate which remained in the Crown and which the statute in no way affects or touches** and the beneficial interest which had passed to the company and which I think clearly came within the interests assessable under the Act.<sup>5</sup> [Emphasis added]

18. It follows that the *Calgary and Edmonton Land Co.* case in relation to the present matter stands for the proposition that the proprietary interest of the provincial Crown in a trust, whatever it might be, cannot be taxed by Parliament.

19. It should also be noted that the federal Crown had a bare legal estate in the property in the *Calgary and Edmonton Land Co.* case, and the Supreme Court of Canada agreed that the order vesting the property in the provincial Crown was valid. This, however, in no way indicates that the Crown interest in a bare legal estate or bare trust can be taxed. A tax on the Crown’s bare legal estate would be a tax on the Crown’s legal property interest, and the burden of such a tax would be borne by the Crown – clearly impermissible under of s. 125 of the *Constitution Act, 1867*. Rather, the case simply reflects the fact that when a tax is imposed on someone in relation to that person’s interest in Crown property and that person leaves that tax unpaid, the interest in the Crown’s property of that person may, in appropriate circumstances, be applied to satisfy the unpaid tax. Where the interest corresponds to a bare legal estate held by the Crown, it is constitutionally permissible to divest the Crown of that bare legal estate in favour of one who is entitled to receive that estate.

20. The imposition of the tax under the *Excise Tax Act* is distinguishable from the tax imposed in the *Calgary and Edmonton Land Co.* case. There, the tax imposed under the *Local*

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<sup>4</sup> *Calgary and Edmonton Land Co v Alberta (AG)*, 45 SCR 170, 1911 CanLII 39 (SCC) at 179.

<sup>5</sup> *Calgary and Edmonton Land Co v Alberta (AG)*, 45 SCR 170, 1911 CanLII 39 (SCC) at 180.

*Improvements Act* was imposed on the “owner” or “occupant” while the Act defined the “owner” to include the holder of “any right, title or estate whatsoever or any interest other than a mere occupant in any land”, and the “occupant” to include the “inhabitant occupier” or in the absence of an inhabitant occupier “the person entitled to possession”.<sup>6</sup> The Crown was not bound by the legislation and could not be an owner or occupant liable to taxation under the *Local Improvements Act*.

21. In contrast, the *Excise Tax Act* makes no attempt to identify and isolate the beneficiaries or the beneficial interests that they hold in the trust and to impose a tax solely on the beneficiaries or on their beneficial interests. Rather, the *Excise Tax Act* imposes the tax on the trust *res* by defining the trust to be a person without differentiating between the legal and beneficial interests in the trust. It then makes the legislatively defined trust person the recipient of the trustee’s services, with the natural expectation that the trustee, who is liable to collect and remit the tax for the services rendered, will recover the tax from the trust *res*, which reduces the value of the trust and diminishes the value of the legal interest held by the trustee.
22. The *Calgary and Edmonton Land Co.* case does not stand for the proposition that Parliament can tax the legal interest of the provincial Crown in a bare trust. Nor does it stand for the proposition that property in a provincial Crown trust is available to satisfy beneficiaries’ tax obligations. Rather, it simply stands for the proposition that the interests of others in Crown property can be taxed. When the Crown is a bare trustee, the beneficiaries, or those who exercise rights through the beneficiaries, may be able to compel the Crown to transfer the legal interest to the beneficiaries to unite the legal and equitable interests since the trustee’s only remaining obligation would be to transfer the property to the beneficiaries. However, where the Crown trustee is not a bare trustee, the trust *res* is not available to satisfy the beneficiaries’ tax liabilities. The case in no way implies that a tax can be imposed on the Crown’s legal interest in a bare trust for which the Crown is a trustee.
23. To avoid the restrictions established by s. 125 of the *Constitution Act, 1867*, the tax may only be imposed on the beneficiaries or on their beneficial interest and would only be payable from property the beneficiary has a lawful right to use to satisfy the liability. Except in those

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<sup>6</sup> *The Local Improvements Act*, SA 1907, c. 11, ss. 2(13) and (15).

cases were the beneficiary's interest corresponds precisely to a bare provincial Crown trust, the trust *res* would not be available to satisfy the tax liability. Using property from the trust *res* to satisfy the tax would diminish the Crown's legal interest with potentially grave consequences for the Crown's financial position.

24. Canada also relies on *Vermilion Hills (RM 195) v Smith*.<sup>7</sup> At issue in the *Vermilion Hills* case was liability for tax imposed under provincial legislation on a tenant who had leased federal Crown land. The tenant of the federal land argued that he was not liable for the tax because the land belonged to the federal Crown and was immune from taxation under s. 125 of the *Constitution Act, 1867*.
25. In *Vermilion Hills*, the Privy Council considered legislation in Saskatchewan similar to that under consideration in the *Calgary and Edmonton Land Co.* case and followed the decision of the Supreme Court of Canada in the *Calgary and Edmonton Land Co.* case. Saskatchewan's Act, like Alberta's, included broad definitions of owner and occupant and imposed a tax liability on both.<sup>8</sup> Like the legislation in Alberta, the Act did not bind the Crown, thereby excluding the Crown as owner from any tax liability under the Act. The Court concluded that s. 125 of the *Constitution Act, 1867* did not shield the tenant from the tax imposed under the authority provincial legislation on those who held beneficial interests in federal Crown land.

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<sup>7</sup> *Smith v Rur Mun of Vermilion Hills*, [1916] 30 DLR 83, 1916 CanLII 420 (UK JCPC)

<sup>8</sup> *The Local Improvements Act*, SS 1906, c. 36, ss. 2(13) and (14) and s. 50:

2(13) "Owner" includes any person who has any right, title or estate whatsoever or any interest other than that of a mere occupant in any land;

2(14) "Occupant" includes the inhabitant occupier of any land or if there be no inhabitant occupier the person entitled to the possession thereof and the leaseholder or holder under agreement for sale and any person having or enjoying in any way or for any purpose whatsoever the use of land;

50. The council may cause to be levied in each year for the general purposes of the district a tax not less than one and one quarter cents and not more than five cents per acre upon every owner or occupant in the district for land owned or occupied by him:

Provided that any person whose assessment would be less than fifty cents shall be assessed fifty cents.

26. The *Vermilion Hills* case, like the *Calgary and Edmonton Land Co.* case, stands for the proposition that the interest of others in Crown property can be taxed and is not sheltered by the immunity the Crown enjoys under s. 125 of the *Constitution Act, 1867*. However, the Privy Council made it clear that the Crown's interest in property could not be taxed. Viscount Haldane stated:

It is thus clear that the authorities of the province have no power to tax Crown lands, and the real question is whether this restriction prevents them from imposing the tax in controversy upon a tenant of Crown lands.<sup>9</sup>

Viscount Haldane refers to the reasoning of the courts below, in particular the reasoning of the Supreme Court of Canada, and states:

Their Lordships agree with this reasoning. They are of opinion that, although the appellant is sought to be taxed in respect of his occupation of land the fee of which is in the Crown, **the operation of the statute imposing the tax is limited to the appellant's own interest**. It appears to them that not only can the statute be read as meaning this and no more than this when it uses the word "land", **but that it ought to be so read in order to make it consistent with sec. 125 of The British North America Act of 1867** and not a nullity.<sup>10</sup> [Emphasis added]

## B. Legislative Charging Provisions

27. The authority for the charging provisions in the relevant legislation considered in both the *Calgary and Edmonton Land Development Co.* and the *Vermilion Hills* cases provided for the imposition of a tax on private persons or their beneficial interests in Crown land, not for a tax on the Crown or the Crown's interest in land.<sup>11</sup>

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<sup>9</sup> *Smith v Rur Mun of Vermilion Hills*, [1916] 30 DLR 83, 1916 CanLII 420 (UK JCPC) at 84, 85.

<sup>10</sup> *Smith v Rur Mun of Vermilion Hills*, [1916] 30 DLR 83, 1916 CanLII 420 (UK JCPC) at 86.

<sup>11</sup> *The Local Improvement Act*, SA 1907, c. 11, s. 52; *The Local Improvements Act*, SS 1906, c. 36, s. 50

28. In the *Excise Tax Act*, the charging provision in Part IX of the Act imposes the tax on trusts and makes the trustee liable to collect and remit the tax. The *Excise Tax Act*:

- (1) deems a trust to be a person, thereby enabling the trust like other persons to be the recipient of services;
- (2) imposes tax liability on the recipient of services; and,
- (3) in relation to trusts makes the trustee the recipient of the trustee's services, thereby making the trustee both the supplier of a service and the recipient.<sup>12</sup>

This makes the tax in relation to trusts an *in rem* tax that is calculated on the basis of the cost of the service. As an *in rem* tax, when the Crown is the trustee, it is a tax on the property that legally belongs to the Crown. This falls squarely within the protection afforded by s. 125 of the *Constitution Act, 1867* which prohibits the taxation of Crown property.

29. The trust *res* for which the provincial Crown is trustee enjoys constitutional immunity under s. 125 of the *Constitution Act, 1867* and, by extension, the provincial Crown enjoys constitutional immunity for the services it provides for the purpose of the provincial Crown trust under the principles identified in *Re: Exported Natural Gas Tax*. Even as an *in personam* tax imposed on the trust as a person which must be collected and remitted by the provincial Crown trustee, that tax should also fall under s. 125 of the *Constitution Act, 1867*.

30. The case law tells us that whether the tax is *in rem* or *in personam* is of no moment. The immunity provided by s. 125 of the *Constitution Act, 1867* is not premised on the characterization of a tax as either an *in rem* or an *in personam* tax. Critically, this Court has recognized that s. 125 of the *Constitution Act, 1867* protects both the property of the provincial Crown and transactions with respect to that property from taxes imposed by Parliament:

Section 125 provides, in broad terms, that no lands or property of the federal or provincial Crown shall be “liable to taxation”. The purpose of this immunity, as we have seen, is to prevent one level of government from

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<sup>12</sup> *Excise Tax Act*, RSC 1985, c. E-15, ss. 123 (1), 165(1), and 267.1(5)(a).

appropriating to its own use the property of the other, or the fruits of that property. **This immunity would be illusory if it applied only to taxes “on property” but not to a tax on the Crown in respect of a transaction affecting its property or on the transaction itself. The immunity would be illusory since, by the simple device of framing a tax as “in personam” rather than “in rem”, one level of government could with impunity tax away the fruits of property owned by the other.** The fundamental constitutional protection framed by s. 125 cannot depend on subtle nuances of form.<sup>13</sup> [Emphasis added]

### C. Indirect burden on the beneficiaries does not avoid the constraints of s. 125

31. If, as Canada suggests at para. 55 of its factum, it is the beneficiaries of the trust and not the trustee who bear the burden of the tax, the tax would be viewed as an indirect tax. That is, the trustee would be expected in the ordinary course to transfer the burden of the tax to the beneficiaries of the trust. However, whether the tax is direct or indirect, the critical question is who under the legislation is actually responsible for the tax.
32. Alberta recognizes that the GST imposed under Part IX of the *Excise Tax Act* is generally viewed as a direct tax.<sup>14</sup> As a direct tax imposed on a trust it would be expected that the burden of the tax would not, in the ordinary course, be passed on.
33. Alberta says that the tax is imposed on the trust and the trustee is responsible for its payment. The beneficiaries are not charged with the tax, and any possible indirect burden that is transferred to the beneficiaries does not alter the fact that the tax is a tax imposed on the trust and that the obligation to pay the tax becomes the responsibility of the trustee.
34. Given the case law concerning who is actually taxed when an indirect tax is imposed, Canada’s submission is tantamount to an admission that the tax is not imposed on the beneficiaries of a trust nor on their beneficial interest at all, but is imposed on the provincial Crown trustee.
35. If it is intended to impose a direct tax on the property interest of the beneficiaries, it would be necessary for the legislation’s charging provision to identify the beneficial interest as the

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<sup>13</sup> *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004, 1982 CanLII 189 (SCC), at para. 163.

<sup>14</sup> *Sorbara v Canada (Attorney General)* (2008), 93 O.R. (3d) 241, 2008 CanLII 61246, at para. 21.

object of the tax. This is different than imposing an indirect tax on the trust or the trustee with the expectation that the burden of the tax will be passed on to some other person, and that the person who is actually charged with paying the tax will be indemnified.

36. The Privy Council in *Lambe v North British & Mercantile Fire & Life Insurance Co.*, provided comment on the distinction between direct and indirect taxes for the purpose of Canada's Constitution stating:

Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.<sup>15</sup>

37. The Federal Court of Appeal in *Saugeen Indian Band v Canada* considered the nature of direct and indirect taxes in its analysis to determine who was actually charged with paying a tax. The Court stated:

The question 'Who pays the tax?', as opposed to 'Who bears the burden of the tax?' is in fact not addressed by the constitutional cases at all, and therefore seems to me to fall to be decided by a different line of cases, one which deals directly with issues as to payment and recovery.<sup>16</sup>

38. The Court goes on to state:

I would therefore conclude on this point that the appellant cannot be said to be taxed by the *Excise Tax Act*, even though the burden of the tax is undoubtedly passed on to it, as several of the invoices made explicit. What the appellant paid was not the tax as such, but commodity prices which included the tax. This is sufficient, for constitutional purposes, to make the tax indirect. But it is not enough, for tax purposes, to establish the appellant as the real taxpayer.<sup>17</sup>

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<sup>15</sup> *Lambe v North British & Mercantile Fire & Life Insurance Co.*, (1887) 12 AC 575, at 582.

<sup>16</sup> *Saugeen Indian Band v Canada*, [1990] 1 FC 403, 1989 CarswellNat 609, at para. 12.

<sup>17</sup> *Saugeen Indian Band v Canada*, [1990] 1 FC 403, 1989 CarswellNat 609, at para. 19.

39. Given Parliament's broad power of taxation, it matters little that the tax imposed on the trust is direct or indirect. However, the charging provision in Part IX of the *Excise Tax Act* imposes the tax on the trust legally held by the trustee, and not on the beneficiaries or on any discrete beneficial interest the beneficiaries might have. The *Excise Tax Act* makes no effort to isolate the beneficial interests in the trust and impose a tax on that interest. It authorizes the imposition of the tax on the trust property, and when the trust property is legally held by the provincial Crown or a provincial Crown agent, the tax is in fact and in law imposed on the property of the provincial Crown, contrary to s. 125 of the *Constitution Act, 1867*.

**D. Trustee's indemnification from the trust *res***

40. When the tax is imposed on the trust *res* and the trustee is compelled to collect the tax from the trust and remit the tax to the federal government, in doing so the trustee is obliged to transfer a portion of the value of the trust to the federal government, thereby diminishing the value of trustee's legal interest. Where the trustee is the provincial Crown or a provincial Crown agent, the provincial Crown's legal interest is diminished by the application of the tax. This makes the tax a tax on the provincial Crown in relation to its property, which is contrary to s. 125 of the *Constitution Act, 1867*.
41. Using funds in the trust *res* to satisfy the trust's tax liability would reduce the value of the trust. Reducing the value of the trust *res* cannot be accomplished without affecting the Crown's interest. It follows that the provincial Crown's legal interest would be affected and diminished by operation of the *Excise Tax Act*. Moreover, the reduction of the trust *res* might well impair the provincial Crown trustee's performance of the trustee's duties and could have grave consequences for the Crown's financial position, particularly in relation to pension funds held in trust for provincial Crown employees. These funds typically are subject to numerous statutory and contractual obligations of the provincial Crown imposed on or assumed by the provincial Crown for the purpose of achieving government objectives.
42. The diminution of the trust *res* in this way can have serious adverse consequences for the Crown's position as trustee, particularly when a reduction of the size of the trust *res* can have a direct effect on the investment returns the Crown trustee is able to earn to satisfy the Crown's obligations to the beneficiaries of a trust.

43. Alberta submits that where the trustee is the provincial Crown or a provincial Crown agent, s. 125 of the *Constitution Act, 1867* precludes the imposition of the tax on the trust for services the trustee provides in relation to the trust *res*. That the tax may have indirect effect on the value of the beneficiaries' interests and that the tax burden may ultimately be borne by the beneficiaries does not save the *Excise Tax Act* from the operation of s. 125 of the *Constitution Act, 1867*.

#### **E. Concluding remarks**

44. A provincial Crown trustee holding pension funds in trust will not typically be a bare trustee. A trust composed of pension funds held by the Crown is likely to represent contributions made by both the Crown and its employees past and present, and the varying beneficial interests of numerous beneficiaries subject to various contractual rights and fiduciary duties.
45. There may be some beneficiaries who have an immediate entitlement to the commuted value of their trust benefits, while there may be others whose entitlement to the commuted value remains future and possibly contingent or transitory. However, the largest portion of pension trust *res* may well embody rights to payments from the trust *res* subject to the terms and conditions of employment contracts. These terms may include the obligation of present employees to ensure that there are sufficient funds to provide benefits to those currently receiving pension benefits.
46. Moreover, as a matter of government policy or statutory obligation, the provincial Crown may find it necessary to address and provide for any unfunded liability associated with a particular provincial Crown pension trust. To suggest that a provincial Crown trust, particularly a provincial Crown trust intended to provide for pension benefits for provincial Crown employees, can be taxed with impunity by Parliament flies in the face of the judicially recognized purpose of s. 125 of the *Constitution Act, 1867*.
47. That purpose was succinctly identified by Gonthier J. of this Court in the *Westbank First Nation* case where he stated:

The section is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It grants to each level of government sufficient operational space to govern without interference. **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.**<sup>18</sup>  
[Emphasis added]

48. A provincial Crown trust may well be at the core of the government's exercise of its constitutionally mandated functions. In this regard, it is difficult to imagine governmental functions being performed without the aid of government employees compensated from the public purse. When Parliament taxes the provincial Crown trustee for services it provides to a provincial Crown trust, particularly a provincial Crown pension trust, it transgresses the fundamental principles that sufficient operational space must be left to each level of government to pursue its constitutionally mandated functions, particularly when the tax "may significantly harm the ability of that government to exercise its constitutionally mandated governmental functions."<sup>19</sup>
49. Deeming a trust to be a person may be an effective legislative mechanism that can be used to identify an activity to be taxed. The value of the services received by that person may also serve as useful means to quantify the amount of the tax imposed. However, when the trustee is the provincial Crown, the use of that mechanism to tax the services of a provincial Crown trustee when the services are supplied to property held in trust by that trustee, the legislative mechanism runs afoul of s. 125 of the *Constitution Act, 1867*.
50. A tax imposed by Parliament on a provincial Crown trust unavoidably and impermissibly taxes the property of the provincial Crown. No good is served by allowing Parliament to tax provincial Crown trusts. Parliament's broad jurisdiction to raise revenue through the imposition of taxes is not hampered or stymied by the protection afforded provincial Crown trusts under s. 125 of the *Constitution Act, 1867*. Rather, if as Canada suggests, the tax is intended to tax the beneficiaries, Parliament would have to craft legislation that in fact does that without imposing tax on provincial Crown property.

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<sup>18</sup> *Westbank First Nation v British Columbia Hydro & Power Authority*, [1999] 3 SCR 134, 1999 CanLII 655 (SCC), at para. 17.

<sup>19</sup> *Ibid.*

**PART IV - COSTS**

51. Alberta does not seek costs and asks that costs not be awarded against Alberta.

**PART V – ORDER SOUGHT**

52. Alberta requests that it be permitted to present oral argument no longer than 10 minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22 day of March, 2019.

  
for: L. Christine Enns, QC  
Randy Steele

Counsel for the Intervener,  
the Attorney General of Alberta

## PART VI – TABLE OF AUTHORITIES

### CASELAW

No.	Authority	Paragraph Reference
1	<u><i>Re: Exported Natural Gas Tax</i>, [1982] 1 SCR 1004, 1982 CanLII 189 (SCC)</u>	13, 29, 30
2	<u><i>Calgary and Edmonton Land Co v Alberta (AG)</i>, 45 SCR 170, 1911 CanLII 39 (SCC)</u>	14 to 19, 22 25 to 27
3	<u><i>Smith v Rur Mun of Vermilion Hills</i>, [1916] 30 DLR 83 1916 CanLII 420 (UK JCPC)</u>	14, 24-27
4	<u><i>Sorbara v Canada (Attorney General)</i> (2008), 93 O.R. (3d) 241, 2008 CanLII 61246</u>	32
5	<i>Lambe v North British &amp; Mercantile Fire &amp; Life Insurance Co</i> , (1887) 12 AC 575	36
6	<i>Saugeen Indian Band v Canada</i> , [1990] 1 FC 403, 1989 CarswellNat 609	37-38
7	<u><i>Westbank First Nation v British Columbia Hydro &amp; Power Authority</i>, [1999] 3 SCR 134, 1999 CanLII 655 (SCC)</u>	47-48

### STATUTES

No.	Statute	Paragraph Reference
8	<i>The Local Improvements Act</i> , SA 1907, c. 11, ss. 2913) and (15)	15, 20
10	<u><i>Excise Tax Act</i>, 1985, c. E-15, ss. 123(1), 165(1) and 267.1(5)1(a)</u>	20, 28, 31, 39, 41, 43
11	<i>The Local Improvements Act</i> , SS 1906, c. 36, ss. 2(13) and (14) and s. 50	25