

**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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**APPELLANT**

**(Party Pursuant to Section 4 of  
*The Constitutional Questions Act, 2012*)**

**and**

**ATTORNEY GENERAL OF CANADA**

**RESPONDENT**

**(Party Pursuant to Section 5(4) of  
*The Constitutional Questions Act, 2012*)**

**and**

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ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA,  
ATTORNEY GENERAL OF BRITISH COLUMBIA and  
ATTORNEY GENERAL OF ALBERTA**

**INTERVENERS**

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**FACTUM OF THE INTERVENER SASKATCHEWAN POWER CORPORATION  
and SASKENERGY INCORPORATED  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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SCC File No: 38781

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

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC  
2018, c 12, s 186

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN  
COUNCIL TO THE ONTARIO COURT OF APPEAL UNDER THE *COURTS OF  
JUSTICE ACT*, RSO 1990, c C.34, s 8

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*(style of cause and cover continued on the next page #38663 & 38781)*

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## I. Part I – Overview and Facts

1. Saskatchewan Power Corporation (“**SaskPower**”) and SaskEnergy Incorporated (“**SaskEnergy**”) submit that the *Greenhouse Gas Pollution Pricing Act* (the “**GGPPA**”)<sup>1</sup> 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. Alternatively, the *GGPPA* imposes a tax on these provincial crown agents contrary to s. 125 of the *Constitution*, which prohibits taxing another level of government. In either event, the *GGPPA* regulates matters that are within exclusive provincial jurisdiction and therefore the legislation cannot be a matter of national concern within the federal power over peace, order, and good government.

2. SaskPower is an agent of the Crown,<sup>2</sup> responsible for generating, transmitting, distributing, purchasing, selling and supplying electricity in Saskatchewan.<sup>3</sup> SaskPower is also charged with promoting, participating in, and carrying out programs to encourage energy conservation.<sup>4</sup> SaskPower operates power generation facilities across Saskatchewan, including natural gas stations, coal-powered stations, hydroelectric stations, and wind facilities.<sup>5</sup> At present, the majority of SaskPower’s generation capacity comes from coal and natural gas.<sup>6</sup> SaskPower’s role includes reducing greenhouse gas emissions from provincial electrical generation, and the Crown agent has clean energy plans for moving towards cleaner technologies and renewable sources of electricity.<sup>7</sup> The geography and the location of

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<sup>1</sup> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12, s. 186.

<sup>2</sup> *The Power Corporation Act*, RSS 1978, c P-19, s. 3(3).

<sup>3</sup> *Ibid*, s. 8(1)(a).

<sup>4</sup> *Ibid*, s. 8(1)(h.1).

<sup>5</sup> SaskPower Annual Report 2018-19 at 136, online: <<https://www.saskpower.com/about-us/our-company/current-reports>>.

<sup>6</sup> Affidavit of Bruce Ughetto sworn December 17, 2018, at para 3 (Tab 34, Vol. VIII, Appellant’s Record) [“Ughetto Affidavit”].

<sup>7</sup> *Ibid* at para 8.

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.<sup>8</sup> SaskPower's options for adding renewable electrical generation capacity are limited to wind and solar power, which come at a significant cost (including the necessary upgrading of transmission grid infrastructure) to accommodate these forms of electrical generation.<sup>9</sup> SaskPower also engages in "Demand Side Management" initiatives towards conserving energy.<sup>10</sup>

3. SaskEnergy is also an agent of the Crown,<sup>11</sup> with the power to: "purchase, distribute, sell, manufacture, produce, transport, gather, compress, process and store gas,"<sup>12</sup> among other matters. 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" and engages in initiatives in this regard.<sup>13</sup>

## II. PART II – STATEMENT OF ISSUES

4. SaskPower and SaskEnergy's position on the question of whether the *Act* is unconstitutional in whole or in part is as follows:

- (a) The *Act* is wholly unconstitutional as it represents an attempt to legislate within the exclusive grant of power to the Provinces made by s. 92A of the *Constitution*;  
or
- (b) In the alternative, the *Act* is *ultra vires* the constitutional competence of Parliament of Canada in that it represents a tax on Crown property contrary to s. 125 of the *Constitution*.

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<sup>8</sup> *Ibid* at para 9.

<sup>9</sup> *Ibid* at para 10.

<sup>9</sup> *Ibid* at para 7.

<sup>11</sup> *The SaskEnergy Act*, SS 1992, c S-35.1, s. 6.

<sup>12</sup> *Ibid*, s. 15(a).

<sup>13</sup> *Ibid*, s. 15(b).



### III. PART III – STATEMENT OF ARGUMENT

#### A. Pith and Substance

5. The Ontario Court of Appeal articulated the purpose of the *GGPPA* as being “to reduce GHG emissions on a nation-wide basis.”<sup>14</sup> That Court referred to the ‘effect’ of the law as to put a price on carbon pollution, and thereby incentivizing behavioral change in natural resource usage. Yet, the Court then went on to characterize the pith and substance as “establishing minimum national standards to reduce greenhouse gas emissions.”<sup>15</sup> The majority of the Saskatchewan Court of Appeal determined that the pith and substance of the *GGPPA* is to ‘ensure minimum national standards of price stringency for GHG emissions’<sup>16</sup> and went on to uphold the *GGPPA* under the ‘peace, order, and good government’ power (“**POGG**”).<sup>17</sup> The minority recognized that while this is a tool of the legislation, the *GGPPA* is clearly intended to have the broader purpose and effect of regulating GHG emissions and emitters;<sup>18</sup> in other words, regulating natural resource-related industries. This can be found in the very preamble to the legislation, which identifies the pricing tool as a means to bring about “behavioral change that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices.”

6. Given the purpose and intended effect is to regulate natural resource energy producers and users, it is startling that the constitutionality of this federal legislation has been examined by the Ontario and Saskatchewan Courts of Appeal without consideration of the section of the *Constitution* that specifically allocates the regulation of natural resources exclusively to the Provinces, being s. 92A.

#### B. Respect for Exclusivity and the Written Constitution

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<sup>14</sup> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 76.

<sup>15</sup> *Ibid* at para 77.

<sup>16</sup> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 120.

<sup>17</sup> *Ibid* at para 164.

<sup>18</sup> *Ibid* at para 333.

7. This Court has continually affirmed that “there are compelling reasons to insist upon the primacy of [the] written constitution,” as “[a] written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.”<sup>19</sup> Exclusivity is fundamental in Canadian federalism, with federalism being “the dominant principle of Canadian constitutional law.”<sup>20</sup>

8. Concepts like “flexibility” and “cooperation” have their place in some circumstances, however this Court has unanimously held: “While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers.”<sup>21</sup> 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.

### **C. The GGPPA Encroaches on s. 92A of the *Constitution***

9. SaskPower and SaskEnergy submit that s. 92A of the *Constitution* articulates a protected area of express Provincial competence, which the *GGPPA* regulates.

#### **(i) Background of s. 92A**

10. The history of s. 92A, and the jurisprudence interpreting it, recognize natural resources as “one of the mainstays of provincial power.”<sup>22</sup> Provinces had constitutional authority to legislate provincial natural resources prior to s. 92A’s enactment, including

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<sup>19</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53 [*Reference re Secession of Quebec*].

<sup>20</sup> *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 821; more recently cited in *Reference re Secession of Quebec*, *ibid.*, at para 57.

<sup>21</sup> *Reference re Securities Act*, 2011 SCC 66 at para 61, [2011] 3 SCR 837; See also *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 18; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at paras 18-19, [2015] 1 SCR 693.

<sup>22</sup> *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 376 [*Ontario Hydro*].

legislation around the rate at which these resources were produced and expended.<sup>23</sup> “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 that a constitutional amendment was required in this area.<sup>24</sup> The Western Provinces sought more from the constitutional reform process than they ultimately received through the enactment of s. 92A, as did the federal government.<sup>25</sup> 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.”<sup>26</sup>

11. 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.”<sup>27</sup> In establishing 92A, the federal government and the provincial governments recognized that Provinces can and should be trusted with the task of managing natural resources and electrical generation in a manner that takes into account differing

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<sup>23</sup> 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; *Spooner Oils Ltd. v Turner Valley Gas Conservation*, [1933] SCR 629.

<sup>24</sup> *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.

<sup>25</sup> 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.

<sup>26</sup> Cairns, Chandler & Moull, *supra* at 272-73.

<sup>27</sup> *Constitution Act*, *supra*, ss. 92A(1)(b)-(c).

provincial needs and circumstances. The preamble to the *GGPPA* suggests that a perceived “lack of stringency” in some Provinces’ clean energy strategies has led the federal government to conclude that Provinces should not be trusted to combat climate change in their ways. Respectfully, 92A was instituted for the very purpose of preventing the federal government from determining when Provinces should be trusted with natural resource regulation and from unilaterally deciding when to intervene in the natural resource and electrical generation industries.

**(ii) Section 92A and the National Concern Doctrine**

12. As a result of a measure of interjurisdictional respect, the courts have not been called upon to apply s. 92A to any significant degree since its inception. In the case law relied on by the federal government, Canada 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.

13. Today, we have federal legislation overtly seeking to regulate the energy production and usage in the Provinces under the national concern doctrine. With that, s. 92A’s time has come. It is time to determine whether 92A will serve its intended role: as the shield to protect against the temptation for federal overreach; as a bulwark against the return of that pernicious notion that a federal government knows better how to regulate energy production and conserve natural resources than the residents of a Province and their duly-elected officials. This also represents the first substantive opportunity to test 92A against an overt attempt to regulate provincial public utilities like SaskPower and SaskEnergy.

14. Unlike in past cases, the federal government is now relying on the power to enact laws for peace, order and good government. However, this power is expressly limited to “Matters not coming within the Classes of Subjects ... assigned **exclusively** to the Legislatures of the Provinces.”<sup>28</sup> Since the *GGPPA* is intended to regulate natural resources and the energy industries, this is a law that trespasses on a class of subjects that was assigned exclusively to the Provinces in a direct response to federal interventionist policies in these

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<sup>28</sup> *Ibid* at s. 91(emphasis added).

very subject areas. The regulations made pursuant to the *GGPPA* contain detailed provisions relating to “Electrical Generation” and “Natural Gas Transmission”<sup>29</sup> and various other provisions relating to these subjects in the legislation and regulations. The regulatory effect of this legislation is easily demonstrated by considering the specific and significant impacts of the *GGPPA* on SaskPower and SaskEnergy.

15. 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.<sup>30</sup> This, and particularly the financial impacts of Part II, negatively impacts SaskPower’s plans to reduce emissions, and directly and adversely impacts electrical generation efficiency.<sup>31</sup> 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.<sup>32</sup> 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 which means burning more coal. Running units at suboptimal levels will also increase the wear on machines, resulting in a shorter lifespan and increased maintenance needs.<sup>33</sup>

16. SaskPower estimates that it will pay approximately \$442 million between January 1, 2019 and December 31, 2022, as a result of registering its electrical generation facilities as covered facilities under Part 2 of the *GGPPA*.<sup>34</sup> The *GGPPA* 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

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<sup>29</sup> See for instance, *Output-Based Pricing System Regulations*, SOR/2019-266 generally, and at: s. 36; Part 38 of Schedule 3; paragraph 38, Column 1, Schedule 1; and Part 5 of Schedule 2.

<sup>30</sup> Ughetto Affidavit at para 18.

<sup>31</sup> *Ibid* at para 19.

<sup>32</sup> *Ibid* at para 20.

<sup>33</sup> *Ibid* at para 19.

<sup>34</sup> *Ibid* at para 15.

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 and SaskPower is limited in its ability to pass its increased costs arising from the *GGPPA* on to its customers.<sup>35</sup>

17. Similarly, 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 these aspects of SaskEnergy's resource management. SaskEnergy and its subsidiary, TransGas, estimate that between April 1, 2019, and March 31, 2023, they will pay approximately \$540 million in fuel charges under Part 1 of the *GGPPA* for natural gas they distribute to customers, and another \$3,020,000 in fuel charges under Part 1 in respect of their operations.<sup>36</sup> TransGas will pay approximately \$7,605,000 under Part 2 between January 1, 2019, and December 31, 2022.<sup>37</sup>

18. 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.

19. It is submitted that the national concern doctrine has never been used in the face of a legislative grant as specific and pointed as 92A. It may be sometimes possible for a single and distinctive matter to be surgically removed from a broadly worded provincial grant of legislative authority, such as property and civil rights or matters of local concern, when such a matter has become a matter of "national concern." However, if the national concern doctrine were to be applied in this case, it would permit the federal government to manage natural resources and electrical generation, and then 92A, as an exclusive legislative grant of

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<sup>35</sup> *Ibid* at paras 11-12.

<sup>36</sup> Affidavit of Megan Bunney sworn December 17, 2018 at page 2 (Tab 35, Vol. VIII, Appellant's Record).

<sup>37</sup> *Ibid*.

authority to the Provinces, would be lost. This outcome would contradict the express caution in s. 91; that the POGG power may not be used to intrude on matters exclusively assigned to the Provinces.

20. As La Forest J. stated in *Oldman River Society*, “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.”<sup>38</sup> SaskPower and SaskEnergy, as crown agents, are engaging in clean energy strategies and plans pursuant to 92A. The *GGPPA* seeks to regulate them and this area. It is respectfully submitted that the national concern doctrine cannot be used to trump the appropriate head of power in this case, being 92A.

21. This doctrine also does not apply in the absence of provincial inability to address the concern in question. Under ss. 166 and 189 of the *GGPPA*, Parliament expressly acknowledges the Provinces have the ability and competency to address emissions. As noted in the preamble to the *GGPPA*, the true reason for this legislation is the fact that the federal government does not accept that the clean energy strategies of some of the Provinces are sufficiently stringent. If the national concern doctrine is available to trump an exclusive head of power such as 92A on this basis, it would mean that any provincial head of power is subject to interventionist federal law whenever a federal government disagrees with the policy strategies of a provincial counterpart on important societal issues. Far from respecting the division of powers, it is respectfully submitted that such an approach would instead encourage the collision of powers.

### **(iii) Violation of s. 125 of the Constitution**

22. Section 125 of the *Constitution* prohibits the Crown from taxing lands or property of the Provinces. The Provinces and the Courts relied on s. 125 when the federal government last tried to impose a series of interventionist policies, including pricing policies, in the energy sector through the National Energy Program in the 1980s. This Court stated in the *Exported Natural Gas* reference that s. 125 confirms the constitutional value that neither

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<sup>38</sup> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.

Canada nor a Province can take possession of a source of revenue which has been assigned to the other.<sup>39</sup> Referring to provincial assets, this Court noted that “...it was important for the survival of the Provinces and of Canadian federalism that this vital source of provincial revenue be protected from erosion through taxation.”<sup>40</sup> If the *GGPPA* is not a regulation of the subject matter of 92A, then it must be a tax on Crown property and therefore *ultra vires* the Canadian Parliament.

23. As noted in *Exported Natural Gas*, and repeated recently, this Court has “emphasized a substantive approach in giving s. 125 a broad and generous interpretation, not a narrow one.”<sup>41</sup>

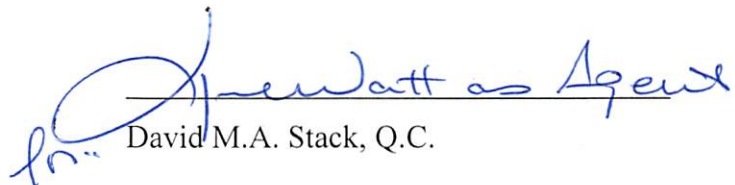
#### IV. PART IV - SUBMISSION CONCERNING COSTS

24. SaskPower and SaskEnergy do not seek costs and request that no costs be ordered against them.

#### V. PART V – ORDER SOUGHT

25. SaskPower and SaskEnergy support the orders requested by the Attorneys General of Saskatchewan and Ontario declaring that the *GGPPA* is wholly unconstitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of January, 2020.

  
David M.A. Stack, Q.C.

<sup>39</sup> *Reference re Exported Natural Gas Tax*, [1982] 1 SCR 1004 at 1066 [*Exported Natural Gas*].

<sup>40</sup> *Ibid* at 1066.

<sup>41</sup> *Canada (AG) v British Columbia Investment Management Corp.*, 2019 SCC 63 at para 80, referencing *Exported Natural Gas Tax*, *ibid*.



## VI. PART VI – TABLE OF AUTHORITIES AND LEGISLATION

	<b>Cited at Paragraph No.</b>
<b>Authorities</b>	
<i>Canada (AG) v British Columbia Investment Management Corp.</i> , <a href="#">2019 SCC 63</a>	10
<i>Friends of the Oldman River Society v Canada (Minister of Transport)</i> , <a href="#">[1992] 1 SCR 3</a>	8
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<i>Greenhouse Gas Pollution Pricing Act</i> , <a href="#">SC 2018, c. 12, s. 186</a>	1

<i>The Power Corporation Act</i> , <a href="#">RSS 1978, c P-19</a>	1
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