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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

DOCUMENT: **FACTUM OF THE INTERVENORS, SASKENERGY INCORPORATED & SASKATCHEWAN POWER INCORPORATED**

REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL
TO THE COURT OF APPEAL OF ALBERTA
Order in Council filed the 20th day of June, 2019

FACTUM OF THE INTERVENORS,
SASKENERGY INCORPORATED and
SASKATCHEWAN POWER INCORPORATED

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TABLE OF CONTENTS

PART 1 – FACTS

1. Saskatchewan Power Corporation ("**SaskPower**") and SaskEnergy Incorporated ("**SaskEnergy**") submit that the *Greenhouse Gas Pollution Pricing Act* (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. 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 provincial jurisdiction and therefore the legislation cannot be a matter of national concern within the federal power over peace, order, and good government.

(i) SaskPower

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 power generation facilities across Saskatchewan, including natural gas stations, coal-powered stations, hydroelectric stations, and 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]

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

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[1] *The Power Corporation Act*, RSS 1978, c P-19, s. 3(3) ("*Power Corporation Act*"), SaskPower & SaskEnergy's Book of Authorities [SPSEBA] TAB 6.
[2] *Ibid*, s. 8(1)(a).
[3] *Ibid*, s. 8(1)(h.1).
[4] SaskPower Annual Report 2018-19 at 136, online: <https://www.saskpower.com/about-us/our-company/current-reports>.
[5] Affidavit of Bruce Ughetto sworn September 27, 2019, at para 5 [Ughetto Affidavit].
[6] *Ibid* at para 8.
[7] *Ibid* at para 9.

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]

(ii) SaskEnergy

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; the facilitation of financing to residential customers for purchasing energy-efficient appliances; and incentives to commercial customers for buying energy-efficient boilers and HVAC equipment.[13]

PART 2 – ISSUES

6. SaskPower and SaskEnergy's submissions will address the following issues:

(a) Whether the *GGPPA* encroaches on Saskatchewan's power under s. 92A of the *Constitution* to develop, conserve, and manage non-renewable natural resources and electrical generation facilities;

(b) Whether the *GGPPA* violates the prohibition in s. 125 of the *Constitution* against the federal government taxing property of the provincial Crown; and

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[8] *Ibid* at para 10.
[9] *Ibid* at para 11.
[10] *The SaskEnergy Act*, SS 1992, c S-35.1, s. 6 (the "*SaskEnergy Act*"), SPSEBA TAB 7.
[11] *Ibid*, s. 15(a).
[12] *Ibid*, s. 15(b).
[13] Affidavit of Megan Bunney sworn September 27, 2019 at para 4 [Bunney Affidavit].

(c) Whether the *GGPPA* can be upheld as within federal jurisdiction under the national concern doctrine.

PART 3 – ARGUMENT

(i) Introduction

7. The *GGPPA* has been characterized differently by different people, organizations, and Courts. The pith and substance analysis can be tailored to suit the interests of the party advocating for it. However, at its core, this law must either represent a tax on or regulation of the industry within which both SaskEnergy and SaskPower operate. If the *GGPPA* is, at its core, a tax, then it offends s. 125 of the *Constitution*. If the *GGPPA* is at its core a regulatory charge, it offends s. 92A of the *Constitution*.

8. This Court will be required to analyse the pith and substance of the *GGPPA* in order to determine whether it is constitutionally valid or not. This involves examining its purpose (including the "mischief" the legislation is aimed at curing) and its effect (how the law will operate and how it will affect Canadians).[14]

9. The Saskatchewan Court of Appeal determined that the pith and substance of the *GGPPA* is to 'establish minimum national standard of price stringency for GHG emissions' and went on to uphold the *GGPPA* under the 'peace, order, and good government' power ("**POGG**"), without any analysis of 92A. SaskPower and SaskEnergy respectfully submit that this characterization of the core purpose and effect of the *GGPPA* is artificially limited to one aspect of the legislation, as Part 2 of the *GGPPA* clearly is intended to have the broader purpose and effect of regulating GHG emissions and emitters (as the minority of the Court found[15] and as the *GGPPA* itself states). In any event, either characterization requires an analysis of 92A which was missing from the Saskatchewan Court of Appeal's reasons.

10. The Ontario Court of Appeal acknowledged that the purpose of the *GGPPA* is "to reduce GHG emissions on a nation-wide basis."[16] That Court referred to the 'effect' of the law as

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[14] See *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at para 55 [*Saskatchewan Reference*], Alberta Book of Authorities [ABBA] TAB 21. See also *Reference re Firearms Act*, 2000 SCC 31.
[15] *Ibid* at para 333.
[16] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 76 [*Ontario Reference*], ABBA TAB 20.

to put a price on carbon pollution, thereby limiting access to the atmosphere's capacity to absorb GHGs and incentivizing behavioral change. Yet, the Court then went on to characterize the pith and substance as "establishing minimum national standards to reduce greenhouse gas emissions"[17] and concluded the *GGPPA* was constitutional, again, and inexplicably, without any analysis of s. 92A.

(ii) Respect for Exclusivity and the Written Constitution

11. The Supreme Court of Canada has continually affirmed that "there are compelling reasons to insist upon the primacy of [the] written constitution",[18] as "[a] written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review."[19] Exclusivity is fundamental in Canadian federalism, with federalism being "the dominant principle of Canadian constitutional law."[20]

12. 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 of powers."[21] 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.

(iii) The *GGPPA* Encroaches on s. 92A of the *Constitution*

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

(A) Background of s. 92A

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

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[17] *Ontario Reference, ibid, at para 77.*
[18] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53 [*Reference re Secession of Quebec*], ABBA TAB 24.
[19] *Ibid.*
[20] *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 821, SPSEBA TAB 4; more recently cited in *Reference re Secession of Quebec, supra*, at para 57.
[21] *Reference re Securities Act*, 2011 SCC 66 at para 61, [2011] 3 SCR 837, ABBA TAB 25; See also *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 18, ABBA TAB 23; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at paras 18-19, [2015] 1 SCR 693, ABBA TAB 10.

(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."[22] As agents of the Crown, constitutional protections apply equally to SaskPower and SaskEnergy.

15. 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.[23] "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.[24] 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.[25] 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."[26]

16. 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

[22] *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 376 [*Ontario Hydro*], ABBA TAB 8.
[23] 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, SPSEBA TAB 9; *Spooner Oils Ltd. v Turner Valley Gas Conservation*, [1933] SCR 629.
[24] *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.
[25] 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, SPSEBA TAB 10.
[26] Cairns, Chandler & Moull, *supra* at 272-73.

and facilities in the province for the generation and production of electrical energy."[27] 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 provincial needs and circumstances.

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

17. A measure of interjurisdictional respect has resulted in very little case law involving s. 92A. 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. This represents the first substantive opportunity to test 92A against an overt attempt to regulate principally public utilities.

18. Unlike in past cases, the federal government is now relying on the power to enact laws for peace, order and good government on "Matters not coming within the Classes of Subjects ... assigned exclusively to the Legislatures of the Provinces."[28] The power to enact laws on these matters falls squarely within the exclusive purview of the provinces by virtue of s. 92A. Saskatchewan has chosen to exercise some of these powers through its agents, SaskPower and SaskEnergy.

19. The specific impacts of the *GGPPA* on SaskPower and SaskEnergy are significant.

SaskPower

20. The *GGPPA* directly impacts the very core of SaskPower's operations. The *GGPPA* has the primary effect of making it much more expensive for SaskPower to generate electricity from coal and making it somewhat more expensive to generate electricity from natural gas.[29] This negatively impacts SaskPower's plans to reduce emissions, and directly and adversely impacts electrical generation efficiency.

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[27] *Constitution Act, supra,* ss. 92A(1)(b)-(c).
[28] *Ibid,* s. 91.
[29] Ughetto Affidavit at para 18.

21. Part 2 of the *GGPPA* has a particularly severe impact on SaskPower's ability to move forward to a more carbon neutral environment. Because its power generation facilities are registered under Part 2, SaskPower pays excess emissions charges under the output-based pricing system. SaskPower paid approximately $34 million in excess emissions charges between January 1, 2019 and June 30, 2019.[30] SaskPower estimates that it will pay a total of approximately $500 million to $600 million between January 1, 2019, and December 31, 2022, in excess emissions charges.[31]

22. SaskPower's coal-fuelled units ran near maximum capacity before Part 2 of the *GGPPA* came into effect, in part because they were one of SaskPower's lower-cost generation sources, and in part because they run more efficiently near their maximum capacity.[32] Under the *GGPPA*, the cost of running the coal-fuelled units near their maximum capacity has increased significantly.[33] 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.[34]

23. 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.[35] 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.[36]

24. The *GGPPA* is causing SaskPower to reconsider its plans to build a new 350 megawatt combined-cycle natural gas power generation facility.[37] With the new descending emissions threshold under the output based pricing system, SaskPower may not be able to recoup its investment given the substantial excess emissions charges it will pay to operate this facility.[38] This

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[30] *Ibid* at para 16.
[31] *Ibid.*
[32] *Ibid* at para 19.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid* at para 24.
[36] *Ibid.*
[37] *Ibid* at para 20.
[38] *Ibid.*

has forced SaskPower to consider other, higher emission producing alternatives such as expanding its seven existing natural gas plants (which run using an older, less efficient technology than the new facility would operate under) or delaying the construction of the new facility all together, which would delay SaskPower's plans to phase out coal generation entirely by 2030.[39] Because it is now so expensive to operate its coal and natural gas producing facilities, and because SaskPower is unable to introduce significantly more hydroelectric generation in the province, SaskPower is also considering the possibility that it may need to bring power in from other provinces, which would result in many Saskatchewan jobs being lost.[40]

25. The *GGPPA* represents a pernicious notion that Saskatchewan citizens and their duly-elected and authorized provincial officials do not know how and cannot be trusted to manage non-renewable resources and reduce carbon emissions in their 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*.

26. In addition to purporting to regulate the way 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.[41]

[39] *Ibid* at para 21.
[40] *Ibid* at para 23.
[41] *Ibid* at paras 12-13.

SaskEnergy

27. SaskEnergy engages in the development, conservation and management of non-renewable natural resources, specifically natural gas.[42] SaskEnergy and its subsidiary, TransGas, distribute, process and transport natural gas throughout the province of Saskatchewan, and operate pipeline facilities for transporting their products.[43] 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.

28. SaskEnergy and TransGas will see significant financial impacts as a result of Parts 1 and 2 of the *GGPPA*. Due to Part 1 of the *GGPPA*, SaskEnergy will be required to pay approximately $575 million in fuel charges in connection with the natural gas distributed to customers between April 1, 2019, and March 31, 2023. In the same period, they will pay approximately $3 million in fuel charges related to their operations.[44] TransGas estimates it will be required to pay approximately $5.6 million under Part 2 of the *GGPPA* for excess emissions from its pipeline and compressor station operations.[45] As a result, SaskEnergy and TransGas will be required to increase the amounts charged to their customers to partially cover the costs imposed by the *GGPPA*.[46]

29. 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.

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[42] *SaskEnergy Act*, *supra*, s. 15.
[43] *Ibid.*
[44] Bunney Affidavit at para 6.
[45] *Ibid.*
[46] *Ibid.*

(iv) Violation of s. 125 of the Constitution

30. The *GGPPA* may also represent a tax. 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."

31. 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."[47] 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,"[48] as the courts have recognized that "a power to tax is a power to destroy."[49] 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."[50]

(A) Taxation Immunity for Crown Agents

32. 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."[51] 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.[52]

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[47] *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at para 17 [*Westbank*], SPSEBA TAB 5.
[48] *Re Exported Natural Gas Tax*, [1982] 1 SCR 1004 at 1065 [*Natural Gas Reference*], SPSEBA TAB 3.
[49] *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), **SPSEBA TAB 1**, citing *M'Culloch v Maryland*, 17 US (4 Wheat.) 316 at 431 (1819), Marshall CJ.
[50] *Ibid.*
[51] Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (2018-1) 5th ed, vol 1 (Toronto: Thomson Reuters, 2016) at 31.13(a), SPSEBA TAB 8.
[52] *Nova Scotia Power Inc. v Canada*, 2004 SCC 51 at paras 12-13, [2004] 3 SCR 53, SPSEBA TAB 2.

33. 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*.

34. 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.[53] Therefore, if s. 125 immunity protects the property itself, the receipt of the property does not fall outside the immunity afforded by s. 125.[54]

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

35. 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 the hallmarks of a "tax" and should be considered as such.

36. 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.[55] Gonthier J. added an additional consideration, stating the levy will be a tax if it is "unconnected to any form of a regulatory scheme."[56] 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.

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

(C) Impacts of the *GGPPA* on SaskEnergy and SaskPower through Taxation

38. 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.

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[53] *Natural Gas Reference, supra* at 1078.
[54] *Ibid* at 1078-79.
[55] *Westbank, supra* at para 21.
[56] *Ibid* at para 43.

39. As referred to above, SaskPower has registered its facilities as "covered facilities" under Part 2 of the *GGPPA* and estimates that it will pay a total of approximately $500 million to $600 million between January 1, 2019, and December 31, 2022, in excess emissions charges.[57]

40. SaskPower is passing 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 more than 7% by the end of 2022.[58] However, there are affordability and competitiveness concerns that limit the costs SaskPower is able to pass on to its customers.[59]

(v) Inapplicability of the National Concern Doctrine

41. Both the Saskatchewan and Ontario Courts of Appeal determined that the *GGPPA* is constitutional because of the national concern branch of POGG, without addressing 92A. This was an error that should not be repeated here. The federal POGG power is residuary in nature according to the language of s. 91 of the *Constitution*, which allows the federal government: "to make laws for the peace, order, and good government of Canada, in relation to **all matters not coming within the classes of subjects** by this Act assigned exclusively to the Legislatures of the provinces…"[60] The national concern doctrine is premised on a legislative "gap", which in this case cannot be supported.

42. Furthermore, the criterion for a matter to constitute a national concern have not been satisfied. In order for a matter to constitute a "national concern", it must meet the criteria established by the Supreme Court of Canada.[61] "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

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[57] Ughetto Affidavit at para 16.
[58] *Ibid* at para 17.
[59] *Ibid.*
[60] Emphasis added.
[61] See *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373 at 458 [*Anti-Inflation Reference*], ABBA TAB 17, *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at 431-32 [*Crown Zellerbach*], ABBA TAB 15; and more recently cited in *R v Hydro-Québec*, [1997] 3 SCR 213 at para 65 [*Hydro-Québec*], ABBA TAB 13.

intra-provincial aspects of the matter.[62] Based on the jurisprudence concerning these criteria, it is respectfully submitted that Parliament has not demonstrated the matter it seeks to legislate constitutes a "national concern."

(A) Lack of Distinctiveness

43. 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."[63]

44. 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."[64]

45. Similarly, Justice Beetz[65] 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."[66]

(B) Absence of Provincial Inability

46. 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."[67] 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**."[68]

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[62] *Hydro-Québec, ibid.*
[63] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 64 [*Oldman River Society*], ABBA TAB 4.
[64] *Ibid*; Although La Forest J. wrote for the minority in making the statement, his reasons were notably not contested by the majority.
[65] Note that Martland, Ritchie, Pigeon and de Grandpré JJ. agreed with Justice Beetz on this point.
[66] *Anti-Inflation Reference, supra* at 458.
[67] *Crown Zellerbach, supra* at 434.
[68] Hogg, *supra* at 30.7(b) [emphasis added].

47. 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."[69] In dissent, La Forest J. wrote that allocating pollution to the federal government would involve "sacrificing the principles of federalism enshrined in the Constitution."[70]

48. 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 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."[71] 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."[72]

49. The *GGPPA* falls within an enumerated head of provincial power through 92A. Moreover, under ss. 166 and 189 of the *GGPPA*, Parliament expressly acknowledges the provinces have the ability and competency to address emissions. The federal government has allowed provinces to provide their own mechanism for regulating emissions and therefore cannot demonstrate that the provinces are incapable of regulating emissions on their own.

[69] *Crown Zellerbach, supra* at 437-38.
[70] *Ibid* at 455.
[71] *Oldman River Society, supra* at 64.
[72] *Ibid* at para 67.

PART 4 – RELIEF SOUGHT

50. SaskPower and SaskEnergy support the Province's position that the *GGPPA* is unconstitutional and beyond the scope of the Parliament's powers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30TH DAY OF OCTOBER, 2019 BY

McKercher LLP

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David M.A. Stack, Q.C., counsel for
SaskEnergy and SaskPower

PART 5 – TABLE OF AUTHORITIES

Tab of SPSEBA	Tab of ABBA	CASE LAW	CITED AT PAGE
1		*Attorney-General of the Province of British Columbia v Attorney-General for Canada* (1922), 64 SCR 377	10
	4	*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3	13
2		*Nova Scotia Power Inc. v Canada*, 2004 SCC 51, [2004] 3 SCR 53	10
	8	*Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327	5
	10	*Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693	4
	15	*R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401	12
	13	*R v Hydro-Québec*, [1997] 3 SCR 213	12
	17	*Reference Re Anti-Inflation Act*, [1976] 2 SCR 373	12
3		*Reference Re Exported Natural Gas Tax*, [1982] 1 SCR 1004	10
	20	*Reference Re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544	3
	21	*Reference Re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40	3
	23	*Reference Re Pan-Canadian Securities Regulation*, 2018 SCC 48	4
4		*Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753	4
	24	*Reference re Secession of Quebec*, [1998] 2 SCR 217	4
	25	*Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837	4
5		*Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134	10

TAB OF SP & SE	Tab of Alberta Table of Legislation	LEGISLATION AND OTHER AUTHORITIES	CITED AT PAGE
	5	*Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5	1
	1	*Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186	1
6		*The Power Corporation Act*, RSS 1978, c P-19	1
7		*The SaskEnergy Act*, SS 1992, c S-35.1	2
8		Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (2018-1) 5th ed, vol 1 (Toronto: Thomson Reuters, 2016)	10
9		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	5
10		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)	5