No. 05-85

In the Supreme Court of the United States

POWEREX CORP.,

Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE PROVINCE OF BRITISH COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37.2 of the Rules of this Court, the Province of British Columbia moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief. The Province has sought but not received consent from respondent People of the State of California, necessitating this motion.

In 1964 the Province of British Columbia created a new Crown corporation, BC Hydro and Power Authority ("BC Hydro"). BC Hydro is one of the largest electric utilities in Canada; it is responsible for the generation and distribution of energy to an area containing more than 94% of the Province's population. BC Hydro, *Our System*, *at* http://www.bchydro.com. Powerex was created in the 1980s as a wholly owned subsidiary of BC Hydro, the purpose of which is to sell the Province's wholesale electricity products outside the Province, for the benefit of British Columbians. To that end, Powerex is an active marketer of electric power in the western United States. By virtue of its cross-border trading relationships, Powerex is vulnerable to lawsuits in the United States, the financial burden of which will ultimately be borne by BC Hydro and the Province, Powerex's only owners. The Province is well situated to brief the Court on the importance of the issues presented in the petition to organs of non-U.S. governments that engage in business activities with and in this country.

This case is an excellent vehicle for the Court to clear up the growing confusion regarding the correct test for determining "organ" status under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 ("FSIA"). The FSIA was intended to protect foreign governments from the indignity of litigation in the United States, and to that end provides clear standards for determining when foreign governments will be immune. In cases where an exception to immunity is appropriate, the FSIA

recognizes the principle of mutual respect between sovereign nations by extending certain procedural privileges to the organ of a foreign government, including the rights to litigate in federal rather than state court, and to a trial without a jury.

In applying these standards, a majority of circuits have adopted a context-sensitive analysis, in recognition that American courts are likely to be unfamiliar with complex foreign methods of corporate organization and maintenance. In startling contrast to this contextual test, the Ninth Circuit has, in its decision below, taken a vastly different approach, refusing Powerex "organ" status under the FSIA based on a mere handful of factual circumstances (many of which it appraised inaccurately, as the Province can attest). The decision of the court below represents a marked departure from the flexible approach adopted by the Second, Third, and Fifth Circuits, as the Ninth Circuit's limited, narrow analysis ignored numerous key factors, zeroed in on a few isolated facts, and mischaracterized the relationship between Powerex and the Province.

The rigid, mechanical test applied by the court below vastly expands the ability of plaintiffs to seek compensation in U.S. state courts in relation to business transactions with foreign governments. If the approach adopted by the Ninth Circuit should stand, the Province of British Columbia, as well as other Provinces of Canada doing business in the Ninth Circuit and possibly elsewhere, could face a substantial increase in state court litigation. Under the decision below, state courts would become the arbiters of the liability of foreign governments – even as similarly situated American companies are granted the privilege of litigating their claims before federal courts.

The acontextual test adopted by the Ninth Circuit also has the potential of exposing numerous other Canadian Crown corporations to the burdens of state court litigation in the United States. The *amicus* Province has a substantial interest in seeing the restoration of the contextual test adopted by the Second, Third, and Fifth Circuits and inherent to the purpose of the FSIA,

which was designed to ensure that decisions about foreign sovereign immunity are based on uniform and consistent legal grounds, instead of shifting political grounds. At a minimum, the Province needs a coherent rule among the appellate courts in this country to order its legal expectations rationally.

The Province therefore should be granted leave to file the attached *amicus* brief.

Respectfully submitted.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

This case is about stripping foreign nations of the immunities and procedural protections supplied by the Foreign Sovereign Immunities Act, and leaving them to the mercies of U.S. state courts. The FSIA provides that a "foreign state shall be immune from the jurisdiction of the Courts of the United States and of the States" except in certain circumstances. 28 U.S.C. § 1604. A "foreign state" includes any "agency or instrumentality of a foreign state." *Id.* § 1603(a). The precise issue petitioner asks the Court to review is whether the FSIA should be interpreted in a mechanical manner, such as to refuse a foreign entity status as an "organ of a foreign state," where the entity's sole purpose and reason for being is to perform international treaty and trade obligations for the benefit of the foreign state, the foreign entity is completely owned by the foreign state's instrumentality, and the entity is subject to special treatment under foreign law. The second issue is whether an entity whose shares are wholly owned by the foreign state's instrumentality can nonetheless be denied "organ" status under the FSIA, when the instrumentality is an agent of the foreign government.

The interpretation of the FSIA adopted by the decision below conflicts with decisions of the Second, Third, and Fifth Cir-

[1] Under Rule 37.6 of the Rules of this Court, the *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

cuits, which have all adopted a fact-sensitive approach to determining "organ" status. The Ninth Circuit is a clear outlier on this issue, as those other circuits have taken the position that "organ" status must be determined by a contextual analysis. Under the context-specific test adopted by the majority of circuits, Powerex would constitute an organ of the Province and would be entitled to remove to federal court. Indeed, the Ninth Circuit's analysis is remarkable for its silence on such important facts as the reasons for Powerex's creation, the numerous public responsibilities Powerex fulfills for the benefit of the Province and its citizens, and the special status Powerex is accorded under Canadian laws as a wholly owned subsidiary of a Crown corporation. The rigid approach to organ status taken by the Ninth Circuit has not played into the risk calculations of the Province and its Crown corporations in their decision to engage in commerce (or not) with the United States.

The reach of the FSIA has become increasingly important in recent years, as the forces of globalization have shaped a fluid international marketplace. Cross-border trade between the United States and Canada is booming, with the two countries enjoying the world's largest trading relationship. Foreign & International Trade, Embassy of Canada, *Canada-United States: The World's Largest Trading Relationship*, at 5 (Apr. 2004), available at http://www.dfait-maeci.gc.ca/. The United States consumes more energy than any other country in the world, and its main supplier is its neighbor to the north. C.D. HOWE INSTITUTE, COMMENTARY NO. 178, CANADA AND THE U.S.: A SEAMLESS ENERGY BORDER?, at 2-3 (April 2003). Canada is the single largest provider of energy to the United States, accounting for almost $34 billion[2] of energy in 2003 alone, nearly three times as much as was provided by Saudi Arabia. Foreign & International Trade, Embassy of Canada (Apr. 2004), at 5.

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[2] All figures in U.S. dollars.

INTRODUCTION AND SUMMARY OF ARGUMENT

The practical consequences of the decision below – which exposes many Canadian crown corporations and their subsidiaries to litigation in state courts – are, by themselves, enough reason for this Court to grant certiorari. Stripped of the FSIA's procedural protections, British Columbia and probably other Canadian Provinces are likely to face numerous suits in state courts, as many Canadian crown corporations and their subsidiaries conduct business in the United States. Other foreign governments stand to be affected as well.

In addition, the Ninth Circuit's mechanical analysis is at odds with the contextual approach to foreign sovereign immunity adopted by three other circuits as well as by Canada. If subjected to the Ninth Circuit's inflexible, acontextual approach, *all* of the subsidiaries operated by Provincial instrumentalities are left uncertain whether they would be treated as "organs" under the FSIA. This is a wholly unacceptable derogation of the respect sovereigns owe one another as well as an intolerable impediment to ordering the Province's commercial affairs. The increased vulnerability to state court litigation will have a chilling effect on the normally healthy cross-border trade relations between Canada and the United States. The decision of the court below also violates the obligations of the United States under the non-discrimination provision of NAFTA, as the Ninth Circuit's decision accorded sovereign status to American entities that are functionally similar to Powerex, while denying such status to Powerex. Finally, the Ninth Circuit misapplied this Court's *Dole Food* test for the "ownership" prong of the organ test.

ARGUMENT

I. The Decision Below Creates a Rigid, Mechanical Test for Determining Whether a Foreign Entity is an "Organ" Under the FSIA, and Conflicts With the Contextual Test Adopted by Three Other Circuits

Since the Foreign Sovereign Immunities Act came into force, it has transformed the nature of international litigation in the United States. The FSIA is intended to ensure that foreign sovereign immunity decisions are based on legal, rather than foreign policy, grounds, allowing foreign governments to arrange their affairs according to a uniform set of legal guidelines. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983); see also *Republic of Austria* v. *Altmann*, 541 U.S. 677, 716-717 (2004) (Kennedy, J., dissenting). To achieve that goal, the FSIA grants foreign states immunity from suit in American courts subject to specified exceptions. If an exception applies, as the "commercial activities" exception undisputedly does here, see Pet. 9, the FSIA provides that in such cases the federal district courts shall have original jurisdiction and that any trials in federal court will be without a jury. If any suit is filed against a foreign country in a state court, the government has the right to remove the case to federal court. 28 U.S.C. § 1441(d).

A "foreign state" includes any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The provision at the heart of the controversy in this case is 28 U.S.C. § 1603(b), which defines an "agency or instrumentality of a foreign state" as:

> any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other

ownership interest is owned by a foreign state or a political subdivision thereof, and

(3) which is neither a citizen of a State of the United States * * * nor created under the laws of any third country.

A. The decision of the court below departs from the contextual analysis developed for determining agency or organ status under the FSIA, an approach adopted by three federal circuits, and previously followed by the Ninth Circuit itself. See *Gates* v. *Victor Fine Foods*, 54 F.3d 1457, 1460-61 (9th Cir. 1995) (in determining that company was an agent of Canada, examining day-to-day control, purposes served by the entity, and Provincial laws and regulations).[3] Consequently, the Province of British Columbia and other foreign states now lack predictable and consistent jurisdictional guidelines.

The terms "organ" or "agency" in the FSIA are to be interpreted broadly and flexibly. *Gates,* 54 F.3d at 1460. Determination of a foreign entity's status requires close examination of context, including the reasons for the entity's creation, how the entity is treated under foreign law, the level of supervision and control exercised by the foreign government, whether the foreign state requires the hiring of public employees and pays their salaries, and whether the entity holds exclusive rights to something in the foreign country. See *Filler* v. *Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), cert. denied, 125 S. Ct. 677 (2004); *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 206-214 (3d Cir. 2003); *Kelly* v.

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[3] Although the Province is aware that this Court does not generally resolve so-called "intra-circuit" conflicts, the Province sits in geographic proximity to the Ninth Circuit States and thus views with particular dismay the Ninth Circuit's failure to follow a consistent path in deciding issues of great importance to the Province. In any event, the decision below conflicts with the decisions of three other circuits, not just the Ninth Circuit's own prior decision in *Gates*.

Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 846-848 (5th Cir. 2000). No single factor is determinative. See, *e.g.*, *EIE Guam Corp.* v. *Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir. 2003) (organ status is appropriate even where the entity enjoys "some autonomy"); *EOTT Energy Operating Ltd. P'ship* v. *Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (organ status is appropriate even where the government is "not involved in the day-to-day activities" of the entity); *Gates*, 54 F.3d at 1461 (same).

In contrast to the fact-sensitive approach to the FSIA advocated by at least three circuits, the decision of the court below gives an abbreviated picture of the relationship among Powerex, BC Hydro, and the Province. The Ninth Circuit based its denial of "organ" status on a handful of facts stripped of their context, namely that Powerex was not run or staffed by civil servants, and was not immune from suit in Canada. Pet. App. 15a-16a. The Court also incorrectly concluded that Powerex exhibited a "high" degree of independence from BC Hydro, was not supported financially by the Province, and did not hold any special privileges or duties under Canadian law. *Ibid.*

The Ninth Circuit both omitted examination of numerous factors showing interdependence between the Province and Powerex, and misapprehended key facts about the Province-Powerex relationship. By ignoring the circumstances of Powerex's creation, the responsibilities Powerex exclusively carries out on behalf of and in coordination with BC Hydro and the Province, the special privileges Powerex enjoys under Canadian law, and the Provincial employment policies imposed on Powerex, the court below carried out only a partial analysis under the FSIA. The Ninth Circuit's limited analysis has rudely disturbed the standing expectations of the Province, which believed that the context of the creation of Powerex, as well as its special status and duties under Provincial law, would entitle Powerex to the protections of the FSIA.

B. The Ninth Circuit's decision stands in stark contrast to the contextual approach that Canada has adopted to the doctrine of foreign sovereign immunity, which is in line with the approach developed by a majority of circuits in the United States. Canada's State Immunity Act, R.S.C., ch. S-18 (1985) ("SIA"), was largely patterned after the American model. *Re Canada Labour Code*, 2 S.C.R. 50, ¶ 13 (Can. 1992). Like the FSIA, the SIA grants a "foreign state" immunity from the jurisdiction of Canadian courts, defining a "foreign state" to include "any political subdivisions of the foreign state, including any of its departments, and any agency of the foreign state." R.S.C., ch. S-18, § 2. An "agency of a foreign state" is "any legal entity that is an organ of the foreign state but that is separate from the foreign state." *Ibid.*

In defining the outer limits of SIA application, Canadian courts have been generous, recognizing the delicate compromises and balances inherent to the doctrine of international sovereign immunity. As the Ontario Court of Appeals concluded, "the use of the broad word 'organ' in the [State Immunity] Act, which was promulgated to codify the application of the doctrine [of sovereign immunity] in Canada, indicates the intention of [P]arliament to protect individuals and institutions who act at the request of a foreign state in situations where that state would enjoy sovereign immunity." *Walker (Litig. Guardian of)* v. *Bank of New York, Inc.*, 16 O.R. (3d) 504, ¶ 10 (C.A. 1994) (holding that the Bank and its employees were "organs" of the United States); see also *Jaffe* v. *Miller*, 13 O.R. (3d) 745, ¶¶ 31-32 (C.A. 1993) (holding that functionaries of an agency of a foreign government were entitled to immunity); *P.(R.)* v. *Westwood*, 2003 B.C.S.C. 1279, ¶ 19 (B.C. 2003) (same).

Taking a cue from their American counterparts, Canadian courts have been careful to apply sovereign immunity with an eye to the circumstances of an entity's creation, as well as its responsibilities and obligations, recognizing that foreign govern-

ments often use complex structural or organizational models with which Canadian courts may not be familiar. See, *e.g.*, *Re Canada Labour Code*, 2 S.C.R. at ¶ 36 (the "lesson" to be drawn from the American FSIA in applying sovereign immunity is that "the proper approach to characterizing state activity is to view it in its *entire context*") (emphasis added); see also *Sarafi* v. *The "Iran Afzal,"* 2 F.C. 954, ¶¶ 6, 9 (Tr. Div. 1996) (holding that a shipping line created by the Iranian government to hold the assets of a nationalized line was an "agency" of Iran).

As the Supreme Court of Canada has held, "a contextual approach is the only reasonable basis of applying the doctrine of * * * immunity." *Re Canada Labour Code*, 2 S.C.R. at ¶ 30. By emphasizing the importance of a context-specific approach, Canada has rejected mechanical analyses as inappropriate to the doctrine of foreign sovereign immunity. *Id.* at ¶¶ 26, 30 (rejecting "rigid dichotomies" as "not helpful" in sovereign immunity analysis). A majority of American circuits are in agreement, carefully analyzing a host of factors, including the genesis, maintenance, and supervision of the foreign entity. See *Filler*, 378 F.3d at 217; *USX Corp.*, 345 F.3d at 206-214; *Kelly*, 213 F.3d at 846-848. If permitted to stand, the decision of the court below threatens to put the Ninth Circuit out of step not only with its colleagues in other circuits, but with the global trend toward a fair and contextual analysis of foreign sovereign immunity.

C. Contrary to the conclusion of the Ninth Circuit (Pet. App. 15a-16a), there is significant and undisputed evidence establishing Powerex's status as an organ of a foreign state under the FSIA. With respect, the court below either overlooked or misapprehended several key facts.

- Powerex was created for a public purpose.

The Ninth Circuit essentially ignored the circumstances surrounding the birth of Powerex. In 1964 the Province passed what is now called the Hydro and Power Authority Act,

R.S.B.C., ch. 212 (1996) ("Hydro Act") (Pet. App. 163a), creating a new Crown corporation that came to be known as BC Hydro. Pet. App. 50a, 162a-189a. In the 1980s, the Province undertook a massive restructuring of BC Hydro. As part of this project, Powerex came into being in December 1988. BC Hydro, *Company History*, *at* http://www.bchydro.com; see also Pet. App. 53a.

Powerex was created for one purpose: to act as the exclusive marketer of surplus power outside of British Columbia, for the benefit of British Columbia's citizens. Pet. App. 53a. As a wholly owned subsidiary of BC Hydro, Powerex is a Crown corporation and satisfies the requirements for a government corporation under the Province's Financial Administration Act ("FAA"), R.S.B.C., ch. 138, § 1 (1996). As such, Powerex is ultimately accountable to the Provincial government, and is subject to certain obligations and responsibilities and entitled to certain rights and benefits under Provincial law that are not applicable to private businesses. See *ibid*. By structuring Powerex this way, the Province ensured that, although Powerex would have the flexibility necessary to participate actively in the energy market, in the end the Province would retain control through the series of checks and balances imposed by Provincial law on government corporations.

- Powerex holds the exclusive right to market surplus power outside of the Province, and is frequently used by the Province to fulfill public obligations.

Powerex is the sole entity in the Province with the right to market BC Hydro's surplus energy outside of British Columbia, to western Canada and the western United States. BC Hydro does not do any outside marketing of its surplus electricity; rather, it transfers its surplus energy to Powerex at the British Columbia-U.S. border. Pet. App. 24a. BC Hydro is directed, by its sole shareholder, the Province, "through Powerex, [to]

continue to be an active participant in extra-provincial energy trading markets." Shareholder's Letter of Expectations between The Minister Energy and Mines (as Representative of the Shareholder, the Government of British Columbia) and the Chair of the British Columbia Hydro and Power Authority, Feb. 2004, *available at* http://www.gov.bc.ca/cas/down/.

Indeed, as the district court noted, BC Hydro does not possess an export permit from FERC, and is prohibited by the National Energy Board from exporting power to the United States for money. Pet. App. 24a. The only way BC Hydro's surplus energy can be marketed outside the Province is via Powerex. Thus, Powerex works closely with BC Hydro to deliver electricity to the United States. BC Hydro's system of dams and reservoirs allows Powerex to purchase electricity on the open market during non-peak hours when prices are low and sell its own electricity supplies during peak hours. Wendy Stueck, *U.S. gives Powerex 'exoneration,'* THE GLOBE AND MAIL, at 2, Nov. 1, 2003, *available at* Westlaw, CanadaNP; see also Pet. App. 28a-29a ("[h]our-to-hour coordination takes place between the BC Hydro operations shift engineer and the Powerex Real Time trader"). Powerex's purchases also supplement the BC Hydro system to serve domestic customers in years when rain and snow-melt inflows into BC Hydro's reservoirs are low.

Other duties carried out by Powerex underline its essentially public nature and undermine the Ninth Circuit's dismissal of Powerex as just another for-profit company. The Province has assigned Powerex its rights and obligations under the Columbia River Treaty and the Skagit River Treaty, international treaty arrangements between Canada and the United States for the effective utilization of the water resources of both nations. Pet. App. 53a-57a; see also *id.* at 61a, 138a. Specifically, the Province and BC Hydro assigned to Powerex their rights and interests under the Columbia River Treaty in the "Canadian Entitlement," Canada's half-share of surplus power produced on the

Columbia River. *Id.* at. 55a. The Province and BC Hydro also assigned to Powerex the Province's responsibilities under the Skagit River Treaty concerning the transmission of power from the Province to Seattle. *Id.* at 56a-57a.

The Province has often used Powerex to carry out other public purposes. In the early 1990s the Province approved Powerex as the vehicle through which to create a domestic power exchange operation, which was intended to promote an efficient domestic market for private power. Pet. App. 54a. In addition, in 1997 the Province passed legislation giving the Provincial Government authority to define the terms under which Powerex would supply power to Provincial businesses, to "help ensure that British Columbia's electric power resources contribute to the creation and retention of jobs in British Columbia and to regional economic development." Power for Jobs Development Act, S.B.C., ch. 51, §2 (1997); see also Pet. App. 55a-56a, 193a.

- Powerex is subject to Provincial supervision.

Numerous undisputed facts further demonstrate the degree to which the Province, BC Hydro, and Powerex are intertwined. Powerex is subject to numerous statutory restraints. As a government corporation, Powerex is subject to any regulations and directives passed by the Provincial Treasury Board applicable to government corporations. See, *e.g.*, FAA, R.S.B.C., ch. 138, § 4.1 (in relation to capital expenditures). The Province can also impose restrictions on the circumstances under which Powerex can, for example, enter banking arrangements, lend or borrow money, or give guarantees and indemnities. *Id.* § 75(1)(a); see also *id.* § 79.3 (government corporations prohibited from entering into commodity derivative transactions unless permitted by a Treasury Board regulation and subject to any conditions imposed by such a regulation).

Powerex is also subject to financial disclosure obligations that are inapplicable to private sector companies. As a wholly

owned subsidiary of BC Hydro, Powerex's financial information must be included in BC Hydro's statutorily mandated financial disclosures. Financial Information Regulation, B.C. Reg. 371/93, § 1 (1993); see also Budget Transparency and Accountability Act, R.S.B.C., ch. 23, §§ 13, 16 (2000) ("BTAA") (Powerex's activities are included in BC Hydro's service plans and service plan reports required to be made public by the responsible Provincial government minister each fiscal year). In addition, Powerex's books can be examined and reported on by the Province. FAA, R.S.B.C., ch. 138, § 8(2)(c)(ii); Financial Information Act, R.S.B.C., ch. 140, § 4 (1996); BTAA, R.S.B.C., ch. 23, § 20. Powerex's auditor is appointed in accordance with a plan approved by a committee of the Provincial Legislative Assembly. Auditor General Act, R.S.B.C., ch. 2, § 10 (2003). In addition, the Auditor General, an officer of the Provincial Legislature, may, in certain circumstances, be required to report to the Provincial Legislative Assembly on aspects of Powerex's financial operations, including whether Powerex is "operating economically, efficiently and effectively." *Id.* § 11(8).

The Province also imposes employment policies on Powerex. The Province's Lieutenant Governor in Council directly appoints BC Hydro's board of directors, which in turn appoints the Powerex board. Pet. App. 58a-59a. The Province and BC Hydro exercise a high degree of supervisory power over Powerex through a host of management controls, including Provincial authority to approve the appointment of any outside directors to Powerex's board. In addition, the Province supervises Powerex by establishing a BC Hydro risk management committee to outline the criteria for all Powerex transactions and recommend approval of trades falling outside those criteria; the Assistant Deputy Minister of the Provincial Treasury, an employee of the Province's Ministry of Finance, participates in the committee. See *id.* at 28a, 59a. Powerex must also comply with Provincial guidelines for public employee compensation. Pet. 23.

- Powerex holds special status under Canadian law.

Powerex enjoys special privileges under Canadian law. Unlike private companies, Powerex does not have to pay federal and Provincial taxes; its profits are exempt. Constitution Act, 1867, 30 & 31 Vict., ch. 3, *reprinted in* R.S.C. 1985, App. II, No. 5, § 125 ("No Lands or Property belonging to Canada or any Province shall be liable to Taxation") (Pet. App. 161a); see also Pet. App. 58a. In addition, Powerex's commercial arrangements are often supported by BC Hydro guarantees, thus allowing Powerex to benefit from BC Hydro's credit rating. Pet. App. 59a. As a government corporation, Powerex can receive loans from the Province's Ministry of Finance, and is also eligible to have its debt obligations assumed by the Provincial government. FAA, R.S.B.C., ch. 138, §§ 53, 56.3. Powerex also qualifies under Provincial law to receive insurance and risk management services from the Ministry of Finance. *Id.* § 30. Finally, the Province guarantees the pension benefits of Powerex employees. Pet. 23. The advantages Powerex enjoys by virtue of its relationship to the Province establish that the Ninth Circuit was plainly wrong when it concluded that Powerex did not benefit from any "financial support" from the Province or "special privileges or obligations under Canadian law." Pet. App. 16a.

The Province is actively involved in Powerex's finances, demonstrating the degree to which the Province supervises BC Hydro and Powerex. Powerex's profits are not "private" profits *per se*; rather, they are consolidated with the profits of BC Hydro. See, *e.g.*, BC Hydro, *2005 Annual Report*, at 89 (June 29, 2005) ("The consolidated financial statements include the accounts of BC Hydro and its principal wholly owned operating subsidiar[y] Powerex Corp"). The Province directs BC Hydro as to the method for the payment of income to the Province, which includes the consolidation of net income from Powerex. See Special Directive No. HC1 to the British Columbia Hydro and Power Authority, Order of the Lieutenant Governor in

Council No. 1125, § 3 (Nov. 27, 2003). Under the Budget Transparency and Accountability Act, applicable to Powerex as a "government organization," Powerex's actual and forecast revenues and expenses, along with those of BC Hydro, are consolidated into the Province's budget, quarterly reports, and financial statements. See BTAA, R.S.B.C., ch. 23, §§ 1, 5-6, 9-10.

The integration of BC Hydro's and Powerex's profits has been a great boon to British Columbian taxpayers, as Powerex's profits are a significant contribution to Provincial coffers. In 2000-01, Powerex helped BC Hydro achieve almost $4.5 billion in revenue, which made up 69% of BC Hydro's total revenue for the 2001 fiscal year. Scott Simpson, *Market fired Powerex bonanza*, VANCOUVER SUN, at 1, May 18, 2002, *available at* Westlaw, PapersCan.

Any business losses incurred by Powerex as a result of liabilities will ultimately be suffered by the Province's taxpayers, who are, in the end, the owners of BC Hydro and Powerex. For instance, as the sole shareholder of BC Hydro, the Province recorded a potential $820 million liability on its books in 2003 to account for the string of lawsuits in California against Powerex. Michael McCullough, *Olympics brings cheer to otherwise troubled year*, VANCOUVER SUN, at 3, Dec. 31, 2003, *available at* Westlaw, PapersCan. Powerex's legal costs are likewise absorbed by BC Hydro and, ultimately, the Province. As of 2003, BC Hydro and Powerex had expensed approximately $25 million in legal costs incurred in defending Powerex against the lawsuits. BC Hydro, *2003 Annual Report*, at 95 (July 21, 2003).

As this overwhelming evidence shows, the Ninth Circuit's refusal to grant "organ" status under the FSIA to Powerex was based on a mischaracterization of the entity and a misunderstanding of its treatment under Canadian laws, as well as the adoption of a flawed legal test in conflict with other circuits.

II. This Case Is a Particularly Good Vehicle to Resolve the Circuit Conflict, and Correct the Ninth Circuit's Error, Because the Alternative is to Allow an Especially Serious Affront to U.S.-Canada Relations

A. The litigation out of which this petition arises brings to mind Aesop's fable of the farmer and the snake, which teaches that "the greatest kindness will not bind the ungrateful." For helping to keep the lights on in California during the State's 2000-01 energy crisis, the Province and BC Hydro are rewarded with a string of lawsuits and accusations that Powerex engaged in Enron-style market manipulation tactics, charges that the U.S. Federal Energy Regulatory Commission has rejected. *Powerex Corp.*, 106 F.E.R.C. P 63,019, 2004 WL 346501, at *65157 (Feb. 24, 2004). It is small wonder that plaintiffs are eager to get those accusations in front of state court rather than federal court.

There is already a strong feeling in British Columbia that the Province is being punished for its assistance to California during the 2000-01 blackouts, when the State's overburdened and poorly managed energy infrastructure resulted in skyrocketing electricity prices. In the wake of the blackouts and California's recriminations, Doug Little, then vice-president of marketing and trade policy for Powerex, said that California "[has] made it a very difficult place to do business. Because of that we're assessing the extent of our transactional relationship with these companies." Don Whiteley, *Relationship rift between Powerex and U.S. customers is bad news for California*, VANCOUVER SUN, at 1, May 25, 2005, *available at* Westlaw, PapersCan. BC Hydro's manager of communications, Elisha Moreno, has publicly stated that the string of lawsuits against Powerex in California has made the State a "much less desirable place to do business. * * * It's a situation where you re-evaluate whether or not it's a good business decision to work with someone who is going to continue to paint you with that black brush." Derrick Penner, *BC Hydro branch sued for $1 billion*, VANCOUVER SUN, at 1-2, May

19, 2005 (internal quotation marks omitted), *available at* Westlaw, PapersCan.

Feeling themselves the scapegoat for California's mismanagement of its own power system, BC Hydro and Powerex have taken steps to manage increased risks associated with dealing with certain California entities. Powerex has declined several invitations to bid on providing peaking electrical power supply to California this summer and next. Whiteley, *supra*, at 1, 3. BC Hydro and Powerex have also declined to participate in a recent emergency power supply simulation exercise run by California. *Id.* at 1. As Mr. Little explained, these steps are "a way of sending a message to these companies that we're certainly not happy with their actions." *Id.* at 1. Worse, in addition to the perception in Canada that California is ungrateful for its assistance in the blackout, the State still owes the Province about $280 million for that power. *Id.* at 2.

B. Allowing this lawsuit to proceed before a state court, when Powerex is so clearly a sovereign entity entitled to remove the case to federal court, would have far-reaching negative ramifications for cross-border trade. As petitioner notes, the volume of trade between Canada and the United States is astounding. In 2000-2001, Canada's energy exports to the United States totaled $70 billion.[4] Between 2001 and 2003, California alone imported $2.7 billion worth of energy from Canada. Canadian Embassy, *State Trade Fact Sheets 2004*, *available at* http:

[4] Foreign & International Trade, Embassy of Canada, *Canada-United States: The World's Largest Trading Relationship* (Apr. 2004), *available at* http://www.dfait-maeci.gc.ca/; Foreign & International Trade, Embassy of Canada, *Canada-United States: The World's Largest Trading Relationship* (Sept. 2002), *available at* http://www.dfait-maeci.gc.ca/; Foreign & International Trade, Embassy of Canada, *Canada-United States: The World's Largest Trading Relationship* (Aug. 2001), *available at* http://www.dfait-maeci.gc.ca/.

//www.dfait-maeci.gc.ca; Canadian Embassy, *State Trade Fact Sheets 2003*, *available at* http://www.dfait-maeci.gc.ca; Canadian Embassy, *State Trade Fact Sheets 2002*, *available at* http://www.dfait-maeci.gc.ca. Other Ninth Circuit States are, like California, heavily reliant on Canadian energy exports, including energy purchases by Alaska of $87 million, Idaho $54 million, and Oregon $336 million, from 2001-2003. *Ibid*. Montana and Washington bought staggering amounts of energy from Canada in the same time period, at nearly $4 billion and $15 billion, respectively. *Ibid*. Energy alone accounted for 70-80% of Montana's imports from Canada in those years. *Ibid*.

Canadian companies are the major providers of electricity to large regions of the United States, among them the Pacific Northwest, California, the Upper Midwest, New England, and New York. *Ibid.* Given its large hydroelectric reserves, the Province is well situated to supply electric power to the United States. BC Hydro, *Our System*, *at* http://www.bchydro.com. BC Hydro is linked in to an electrical grid that serves the Pacific Northwest and California, reaching as far as Mexico, and has also been actively involved in the development of a Western regional transmission organization, designed to cover States in the U.S. Northwest, British Columbia, and Alberta. C.D. HOWE INSTITUTE COMMENTARY at 18-20.

Province-owned utilities dominate the U.S.-Canada electricity trade, the three largest of which are Ontario Power Generation, Hydro-Québec and BC Hydro. Dep't of Energy, Energy Information Administration, *Country Analysis Briefs: Canada* (Feb. 2005), *available at* http://www.eia.doe.gov. Sales of energy from Canadian Crown corporations to the United States have been brisk. From 2000 to 2004, BC Hydro – through its subsidiary Powerex – exported nearly $9 billion of energy products to

the United States.[5] In the same time period, energy exports to the United States from three Canadian Crown corporations (Hydro-Québec, New Brunswick Power Corp., and Manitoba Hydro-Electric Board) totaled more than $11 billion.[6]

The test adopted below substantially broadens the range of state court lawsuits that can now be brought against unsuspecting foreign states. Under that interpretation of the FSIA, Canadian Crown corporations, including the substantial electricity authorities, are now vulnerable to state court litigation. The chilling effect that the Ninth Circuit's decision will have on Canada-United States trade relations should be of great concern, particularly given the potential negative impact on the active electricity trade between the two countries, and the high degree to which the United States is dependent on foreign electricity exports. As the Canadian Electricity Association has observed:

> The reliability of the electricity system is a fundamental international concern and cannot be properly addressed

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[5] BC Hydro, *2004 Annual Report*, at 124 (June 14, 2004); BC Hydro, *2003 Annual Report*, at 127 (July 21, 2003); BC Hydro, *2002 Annual Report*, at 45 (July 11, 2002); BC Hydro, *2001 Annual Report*, at 67 (June 2001).

[6] See Hydro-Québec, *Annual Report 2004*, at 107 (Mar. 31, 2005); Hydro-Québec, *Annual Report 2003*, at 105 (Mar. 31, 2004); Hydro-Québec, *Annual Report 2002*, at 97 (Mar. 31, 2003); Hydro-Québec, *Annual Report 2001*, at 91 (Mar. 31, 2002); New Brunswick Power Corp., *2003/04 Annual Report*, at 47 (June 30, 2004); New Brunswick Power Corp., *2002/03 Annual Report*, at 44 (June 30, 2003); New Brunswick Power Corp., *2001/02 Annual Report*, at 45 (June 28, 2002); New Brunswick Power Corp., *2000/01 Annual Report*, at 45 (June 28, 2001); Manitoba Hydro-Electric Board, *53rd Annual Report*, at 87 (Aug. 11, 2004); Manitoba Hydro-Electric Board, *51st Annual Report*, at 51 (July 29, 2002); Manitoba Hydro-Electric Board, *50th Annual Report,* at 51 (July 31, 2001); see also Pet. 24.

> without the full engagement and cooperation of both Canada and the United States. Anything less could impede future cross-border trade and, more significantly, undermine the very reliability we all seek to guarantee.

Canadian Electricity Association, *Canadian Electricity and the Economy: The Integrated North American Electricity Market*, at 1 (March 2004), *available at* http://www.canelect.ca.

III. The Ninth Circuit's Decision Conflicts With the Non-Discrimination Provision of the North American Free Trade Agreement

Article 1102(1) of the North American Free Trade Agreement requires that member countries accord each other "treatment no less favorable than it accords, in like circumstances" to domestic investors. NAFTA Art. 1102(1), 32 I.L.M. at 639 (Pet. App. 147a). By treating substantially similar entities such as the Bonneville Power Administration and the Western Area Power Administration as sovereign entities while denying sovereign status to Powerex, the decision of the court below accords more favorable treatment to Powerex's American counterparts. If the Ninth Circuit had paid heed to the extensive governmental duties performed by Powerex, including its internal treaty obligations, it would have understood that Powerex is alike in shape, function, and form with the domestic entities. The decision below discriminates between functionally similar domestic and foreign investors, in violation of NAFTA.

IV. The Ninth Circuit's Decision on "Ownership" under the FSIA Conflicts with this Court's Decision in *Dole Food*

The Province agrees with the arguments in the petition and can therefore state its own views in abbreviated form.

Section 1603(b)(2) defines an "organ" of a foreign entity as including entities "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision

thereof." 28 U.S.C. § 1603(b)(2). *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 473-74 (2003), rejected the argument that particular "indirect subsidiaries" of a foreign state met the standard of ownership under Section 1603(b)(2).

In *Dole* the Court was faced with a foreign state wholly owning a company, which owned a majority of shares in another company, which owned a majority of shares in a third company, which owned a majority of shares in a fourth company. *Ibid.* This is not the situation here. *All* of Powerex's shares are held by a *single* shareholder, BC Hydro. BC Hydro is an agent of the Province (Hydro Act, R.S.B.C., ch. 212, § 3(1)), and its property is owned by the Province. *Westbank First Nation* v. *British Columbia Hydro & Power Auth.*, 154 D.L.R. (4th) 93, ¶¶ 12-13 (C.A. 1997) (property of BC Hydro is held as "the interest of the Crown in right of British Columbia and immune from taxation"), aff'd, 3 S.C.R. 134 (1999). As further proof that Powerex's property is property of the Province, Powerex is not subject to taxation. Constitution Act, 1867, R.S.C. 1985, § 125.

According to basic principles of corporate agency, BC Hydro, as the Province's agent, holds all of the shares in Powerex on behalf of the Province. As petitioner argues, 100% ownership of a company by a direct agent of a foreign government creates sovereign status under Section 1603(b)(2). Without addressing agency, the Ninth Circuit created a categorical rule that anything short of "actual" ownership by the foreign government alone fails to meet the standard under Section 1603(b)(2). Pet. App. 16a. Such a bright-line rule, which confers immunity on a foreign state but denies it to its corporate agents, would essentially render Section 1603(b)(2) ineffective and should not be allowed to stand.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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