SCC File No. 38059

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant
(Appellant/Respondent on Cross-Appeal)

-and-

BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

Respondent
(Respondent/Appellant on Cross-Appeal)

-and-

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

Respondent
(Respondent/Respondent on Cross-Appeal)

-and-

ATTORNEY GENERAL OF ONTARIO and
ATTORNEY GENERAL OF ALBERTA

Interveners

FACTUM OF THE RESPONDENT ON CROSS-APPEAL, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This case is about the duties of an agent of the Crown. Specifically, it is about a Crown agent's obligation to obey its principal (the Crown) by abiding by the terms of an agreement to which its principal has made it subject.

2. Consistent with long-standing practice, the Government of British Columbia ("Province") and the Government of Canada ("Canada") entered into the Reciprocal Taxation Agreement ("RTA")[1] and the Comprehensive Integrated Tax Coordination Agreement ("CITCA")[2] (collectively, the "Agreements"). Under the Agreements, each party agreed to pay the other the amount it would pay if the other party's taxation statutes applied to it. Under the Agreements, Canada would rebate most of the amounts paid to it by the Province. Both the Province and Canada explicitly agreed that the Agreements would bind both them and their agents. The Agreements do not purport to bind any other parties.

3. The Province's Minister of Finance (the "Minister") was authorized by the *Ministry of Intergovernmental Relations Act* ("MIRA")[3] and orders in council issued pursuant to MIRA[4] (the "OICs") to enter into the Agreements.

4. The British Columbia Investment Management Corporation ("bcIMC") claims Crown immunity as the Province's agent but denies that the Province, its principal, can require bcIMC as its agent to act in accordance with the Agreements. First, bcIMC says that, despite their explicit wording, the Agreements do not even bind the Province. Because they do not bind the Province, they cannot bind bcIMC. Second, bcIMC says that, although the Agreements were entered into pursuant to MIRA and the OICs, the Province cannot require bcIMC, its agent, to abide by the Agreements without further, specific legislation.

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[1] Affidavit of Paul Flanagan ("Flanagan Affidavit"), Exhibit "O", RTA (Appellant's Record ("AR"), Vol VI, Tab 22, p 94).

[2] Amended Petition, CITCA (AR, Vol II, Tab 7, p 45).

[3] *Ministry of Intergovernmental Relations Act*, RSBC 1996, c 303, s 4.

[4] Amended Petition, BC OIC 661/2009 (AR, Vol II, Tab 7, p 44); Affidavit #3 of David Woodward ("Woodward #3"), Exhibit "B", BC OIC 485/2010 (AR, Vol X, Tab 24, p 24).

5. These claims are both without merit, as found by both the British Columbia Supreme Court[5] and a unanimous panel of the Court of Appeal for British Columbia ("Court of Appeal").[6] The Agreements create binding obligations on Canada and the Province. bcIMC, the Province's agent, is required to abide by the Agreements to which the Province has made it subject.

B. Statement of Facts

6. The Province agrees with the facts set out in paragraphs 6-9, 12-13, 18, and 24-25 of Canada's factum in its appeal and submits that these are facts germane to the cross-appeal. The Province also agrees with the statements in paragraphs 20-22 of bcIMC's factum with respect to the nature and history of the Agreements. For ease of reference, the Province also states below the facts it submits are germane to this cross-appeal.

7. bcIMC is a corporation created by statute in 1999 that has the power and capacity of a natural person of full capacity.[7]

8. bcIMC has one share which is held by the Minister on behalf of the government.[8]

9. bcIMC is expressly made an agent of the Province (the "Province's agent") by its constating statute.[9]

10. bcIMC was established to carry on a trust business and investment management services as provided under the *Public Sector Pension Plans Act* (the "PSPPA").[10]

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[5] *British Columbia Investment Management Corporation v Canada (Attorney General)*, 2016 BCSC 1803, para 167 ("BCSC Reasons") (AR, Vol I, Tab 1).

[6] *British Columbia Investment Management Corporation v Canada (Attorney General)*, 2018 BCCA 47, paras 155 and 156 ("BCCA Reasons") (AR, Vol I, Tab 2).

[7] *Public Sector Pension Plans Act*, SBC 1999, c 44 ("PSPPA"), s 16(3); BCSC Reasons, paras 7, 11, 14 (AR, Vol I, Tab 1); BCCA Reasons, para 4 (AR, Vol I, Tab 2).

[8] PSPPA, s 17; BCCA Reasons, para. 6 (AR, Vol I, Tab 2).

[9] PSPPA, s 16(5); BCSC Reasons, para 14 (AR, Vol I, Tab 1); BCCA Reasons, para 101 (AR, Vol I, Tab 2).

[10] PSPPA, s 16(1); BCSC Reasons, para 7 (AR, Vol I, Tab 1); BCCA Reasons, para 4 (AR, Vol I, Tab 2).

11. bcIMC was created to perform functions that were previously performed directly by the Minister. Prior to the creation of bcIMC, the Minister established and operated pooled investment portfolios in which various monies were combined in common for the purpose of investment by means of investment units of participation in a pooled investment portfolio under Part 5 of the *Financial Administration Act*.[11]

12. bcIMC has the same powers, functions and duties in the provision of funds management services for funds placed with it as the Minister had with respect to funds placed with the Minister under Part 5 of the *Financial Administration Act* before bcIMC was created.[12]

13. Section 4 of MIRA provides that:

> With the approval of the Lieutenant Governor in Council, the minister on behalf of the government may enter into agreements with the government of Canada, the government of a province or an agent of the government of Canada or a province.[13]

14. In accordance with section 4 of MIRA, the Lieutenant Governor in Council approved the Minister's entering into the Agreements through the OICs. OIC 485/2010 provides:

> …the Lieutenant Governor, by and with the advice and consent of the Executive Council orders that approval is given to the Minister of Finance to enter into the Reciprocal Taxation Agreement (Canada – British Columbia) between the government of Canada and the government of British Columbia substantially in the form attached to this order.[14]

15. Versions of the RTA have been in place since before bcIMC's formation in 1999.[15]

16. The Agreements provide that the Province and its agents will pay an amount equal to the GST that would be payable if the *Excise Tax Act* applied to it. They further provide that entities listed in Schedule A to the RTA are eligible for a rebate of GST paid.[16]

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[11] *Financial Administration Act*, as it read April 1, 1999, RSBC 1996, c 138, Part 5; BCSC Reasons, paras 10, 11, 12, 106 and 135 (AR, Vol I, Tab 1); BCCA Reasons, para 5 (AR, Vol I, Tab 2).

[12] PSPPA, s 18(4); BCSC Reasons, paras 12, 106, 135 (AR, Vol I, Tab 1); BCCA Reasons, para 5 (AR, Vol I, Tab 2).

[13] MIRA, s 4.

[14] Woodward #3, Exhibit "B", BC OIC 485/2010 (AR, Vol X, Tab 24, p 24).

[15] BCSC Reasons, para 23 (AR, Vol I, Tab 1).

17. At the time of its formation, bcIMC was listed in Schedule A to the RTA. Effective April 1, 2003, bcIMC was removed from Schedule A on the basis that the inclusion of the term "Public Sector Pension Trust Accounts" on Schedule A entitled bcIMC to a rebate of amounts it paid pursuant to the RTA.[17]

18. bcIMC has long been aware that the Province requires bcIMC, as its agent, to abide by the terms of the Agreements. The filing of bcIMC's Petition in 2013 was the culmination of a decade long dispute over whether bcIMC was required to pay tax on the management services it performed. bcIMC "commenced this proceeding after years of unsuccessful discussions" with respect to their obligations.[18]

PART II – QUESTIONS IN ISSUE

19. With respect to the questions bcIMC puts in issue, the Province says:

    i. bcIMC is not a "third party". It is the Province's agent, created as such by its constating statute. As such it is closely connected to the Province. It has all the duties of an agent along with the immunities and privileges associated with being a Crown agent. As the Province's agent, bcIMC is obliged to obey the instructions of the Province. Accordingly, bcIMC is obliged to abide by the Agreements because the Province has made clear in the Agreements that it intends its agents to abide by them. Specific legislation binding bcIMC to the terms of the Agreements is unnecessary.

    ii. If specific legislation were necessary to require bcIMC to abide by the Agreements, it can be found in s. 16(6) of the PSPPA, which ties bcIMC's taxation, as an agent, to that of the Province.

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[16] BCSC Reasons, para 22 (AR, Vol I, Tab 1); Flanagan Affidavit, Exhibit "O", RTA, (AR, Vol VI, Tab 22, p 94); Amended Petition, CITCA, (AR, Vol II, Tab 7, p 45).

[17] BCSC Reasons, para 23 (AR, Vol I, Tab 1); Amended Petition, para 17 (AR, Vol II, Tab 7, p 22); Affidavit #1 of Doug Pearce ("Pearce Affidavit"), para 2 (AR, Vol III, Tab 17, p 31).

[18] BCSC Reasons, para 9 (AR, Vol I, Tab 1).

PART III: ARGUMENT

A. Standard of Review

20. The question of whether the Agreements are legally binding turns on whether the parties intended to be bound by them. Administrative contracts (agreements between governments) are fundamentally the same as ordinary contracts. Both involve a meeting of the minds and an intention to be bound and create legal effects. They can result in enforceable obligations where that is the intention of the parties.[19]

21. Accordingly, determining whether the Agreements are binding is a question of mixed fact and law.[20] As such, the standard of review is generally palpable and overriding error unless a discrete question of law can be extracted from the decision or where an issue of significance beyond the interest of the parties can be identified. Where such a discrete question of law can be extracted or where there is a question of significance beyond the interests of the parties, the applicable standard to apply is correctness.[21]

22. The Province says that the standard of review to apply to whether the Court of Appeal applied the correct test to determine whether the Agreements were binding on the Province and Canada is correctness. However, the Province says that the standard to be applied to the findings of fact made by the British Columbia Supreme Court in determining the intentions of the parties to be bound are subject to review on a standard of palpable and overriding error.[22]

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[19] René Dussault & Louis Borgeat, *Administrative Law: A Treatise*, 2d ed, translated by Murray Rankin (Toronto: Carswell, 1985) vol 1, p 470 (Book of Authorities on Cross-Appeal of the Respondent, Her Majesty the Queen in right of the Province of British Columbia ("XBOA"), Tab 6; *Canada (Attorney General) v Saskatchewan Water Corp.*, [1992] 4 WWR 712, 1991 CanLII 3951 (Sask CA), at paras 13, 17, and 66; BCCA Reasons, paras 118-119 and 142 (AR, Vol I, Tab 2), citing *South Australia v Commonwealth*, [1961-1962) 108 CLR 130, 35 ALJR 460 (Austl HC) [*South Australia*] (XBOA, Tab 1).

[20] *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633 at para 50.

[21] *Sattva*, *supra* note 20 at paras 50-52; *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 35 at para 8 [*Housen*].

[22] BCCA Reasons, paras 142-151 (AR, Vol I, Tab 2); *Housen*, *supra* note 21 at para 10.

23. The Province says that the question of whether bcIMC is bound by the Agreements raises questions of law and the standard of review is correctness.[23]

B. The Agreements are binding on the Province and Canada

The Province has the legal capacity to contract and did so in this case

24. The Province inherently possesses all of the common law private rights of an individual of full age and capacity, including the right to contract. No statutory authority is required for the Province to enter into binding agreements.[24]

25. Although the Province has the inherent right to contract just as any individual does, MIRA[25] prescribes an additional requirement where the Province wishes to enter into an agreement with another emanation of the Crown, whether that is Canada, another province, an agent of Canada, or an agent of the government of a province. For such an agreement, the approval of the Lieutenant Governor in Council is a condition precedent.

26. The Minister entered into the Agreements on behalf of the Province with the approval of the Lieutenant Governor in Council in compliance with MIRA. There is no dispute that the Province's entry into each of the Agreements was a valid administrative act of the executive branch of government.[26]

Canada and the Province intended to be bound by the Agreements

27. Intergovernmental agreements fall on a spectrum running from merely political declarations to agreements creating legal relations which are enforceable and in the realm of contract law. In determining whether an agreement creates legally enforceable commitments, the

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[23] *Housen*, *supra* note 21 at para 8.

[24] Karen Horsman & Gareth Morley, eds, *Government Liability Law and Practice* (ebook) (Toronto: Thomson Reuters Canada Limited, 2017) at 1.30.10 [Horsman] (XBOA, Tab 5); *Pharmaceutical Manufacturers Assn. of Canada v BC (Attorney General of)* (1996), 135 DLR (4th) 587, 1996 CanLII 3597 (BCSC) at paras 89-90 (cited to CanLII), aff'd 1997 CanLII 4597 (BCCA) at paras 27-28, leave to appeal denied [1997] SCCA No 529.

[25] MIRA, s 4.

[26] Amended Petition, BC OIC 661-2009 (AR, Vol II, Tab 7, p 44); Woodward #3, Exhibit "B", BC OIC 485/2010 (AR, Vol X, Tab 24, p 24).

fundamental issue is whether the parties intended to create specific, legally binding obligations.[27]

28. The Agreements were entered into pursuant to s. 4 of MIRA. They required and received approval by the Lieutenant Governor based on the advice and consent of the Executive Council, showing a formal and serious intention on the part of the Province to be bound.

29. Similarly, Canada entered into the Agreements pursuant to s. 32 of the *Federal Provincial Fiscal Arrangements Act* (the "FPFAA"), which authorizes the federal Minister of Finance to enter into Reciprocal Taxation Agreements.[28]

30. The Court of Appeal identified numerous provisions of the Agreements that contemplate binding rights and entitlements of and between the parties that were not "aspirational" in their wording. These provisions evince the parties' intention to be bound by the Agreements:[29]

    i. Article 3 of the RTA provides an explicit statement of the parties' intention to be bound:

> 3. This agreement is binding on Canada, the Province and their respective agents.[30]

    ii. Articles 5 and 6 of the RTA contain specific, detailed obligations to be performed by each party. Those sections provide, *inter alia*:

> 5. Canada agrees:
>
> (a) to pay the Provincial Taxes or Fees in accordance with the provincial laws, as if these laws were applicable to it;
> (b) to collect and remit the Provincial Taxes or Fees in respect of the sale of property or services by Canada in accordance with the provincial laws, as if these laws were applicable to it;

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[27] BCCA Reasons, para 142 (AR, Vol I, Tab 2), citing *South Australia, supra* note 19.

[28] *Federal-Provincial Fiscal Arrangements Act*, RSC 1985, c. F-8, s 32 [FPFAA].

[29] BCCA Reasons, paras 142-147 (AR, Vol I, Tab 2).

[30] Flanagan Affidavit, Exhibit "O", RTA, Article 3 (AR, Vol VI, Tab 22, p 98); BCCA Reasons, para 146 (AR, Vol I, Tab 2); see also Amended Petition, CITCA, Articles 42 and 51 (AR, Vol II, Tab 7, pp 55, 57).

(c) to pay any other amounts on account of the Provincial Taxes or Fees collectible and remittable in accordance with this agreement that Canada failed to collect or remit to the Province; and
(d) to pay interest, but not penalties, in respect of any Provincial Taxes or Fees collectible by Canada in accordance with this agreement.

6. The Province agrees:

(a) to pay, subject to paragraph (b), any Federal Tax in accordance with the [*Excise Tax Act*], as if that Act were applicable to it;
(b) to pay any tax imposed or levied under Part III of the [*Excise Tax Act*] on goods imported by the Province, to the same extent as Canada pays that tax on any importation of goods;
(c) not to apply for, nor claim the benefit of, any refund of tax paid under Part III of the [*Excise Tax Act*], or any payment in respect of such tax for which provision is made in section 68.19 of the [*Excise Tax Act*], and that no refund or payment in respect of tax paid under that Part can be granted under that section to an importer, transferee, manufacturer, producer, wholesaler, jobber or other dealer;
(d) to pay, subject to clauses 6(e) and 7(1) the [GST/HST] in accordance with the [*Excise Tax Act*];…
(g) to pay any other amounts on account of any tax imposed or levied under the [*Excise Tax Act*] collectible and remittable under that Act in accordance with this agreement, that it failed to collect or remit to Canada; and
(h) to pay interest, but not penalties, in respect of any tax imposed or levied under the [*Excise Tax Act*] collectible by the Province in accordance with this agreement.[31]

iii. Article 11 of the RTA provides that Canada and the Province will introduce any legislative measures they deem necessary to give effect to the RTA. However, neither it nor the CITCA is a description of intended legislation. The RTA and CITCA are not agreements specifically to introduce certain legislation at a later date, nor is further legislation identified as being necessary to give effect to the RTA.[32]

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[31] Flanagan Affidavit, Exhibit "O", RTA, Articles 5 and 6 (AR, Vol VI, Tab 22, pp 98-99); BCCA Reasons, paras 143 and 144 (AR, Vol I, Tab 2); see also Amended Petition, CITCA, Part XIV (AR, Vol II, Tab 7, pp 55 and 107).

[32] Flanagan Affidavit, Exhibit "O", RTA, Article 11 (AR, Vol VI, Tab 22, p 102); BCCA Reasons, para 145 (AR, Vol I, Tab 2).

iv. Article 15 provides that the RTA is binding for a specific term (there are provisions in Article 13 for notice and renewal of the term) and specifically refers to the continued applicability of "rights or obligations which may have accrued" prior to the RTA ceasing to have effect.[33]

31. At paragraphs 160-161 of its factum, bcIMC criticizes the Court of Appeal's reliance on the *South Australia*[34] case in support of the proposition that agreements between governments are on a "spectrum" between those that are merely "political" and those to which the Crown is bound. Yet at paragraph 162, bcIMC endorses the idea of a "continuum" of government contracts that has, at one end, purely aspirational or political agreements and, at the other end, agreements in which the parties express their intention to honour their commitments to be bound and include dispute resolution mechanisms.

32. The authorities indicate there is such a spectrum. The Court of Appeal was correct in its finding that the Agreements fall clearly on the end of the spectrum of agreements using language evincing an intention to be bound.[35]

33. bcIMC says that the Agreements are not binding on the Province and Canada and, therefore, do not bind bcIMC, because they do not contain binding dispute resolution mechanisms.[36] The authorities indicate that the presence of a binding dispute resolution mechanism in an administrative agreement is a consideration but not a necessary pre-condition to a finding that a government agreement is binding on the parties.[37]

The Province's and Canada's intention to be bound is evidenced by access to dispute resolution mechanisms internal and external to the Agreements

34. In any event, both Agreements contain detailed dispute resolution mechanisms that are appropriate to a binding intergovernmental agreement. The Agreements contemplate that

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[33] Flanagan Affidavit, Exhibit "O", RTA, Article 15 (AR, Vol VI, Tab 22, p 103); BCCA Reasons, para 147 (AR, Vol I, Tab 2); see also Amended Petition, CITCA, Article 50 (AR, Vol II, Tab 7, pp 56 and 108).

[34] *South Australia*, *supra* note 19.

[35] BCCA Reasons, para 142 (AR, Vol I, Tab 2).

[36] bcIMC's factum, paras 165-170.

[37] BCCA Reasons, para 148 (AR, Vol I, Tab 2).

disputes will, ultimately, be resolved by negotiation and discussion between Canada and the Province. However, they provide for reference of disputes to third parties for assistance in such resolution.[38]

35. The dispute resolution mechanisms chosen by Canada and the Province indicate their intention to be bound. The absence of binding resolution by a third party decision-maker does not indicate otherwise. Rather, it reflects a desire by two sovereign governments to work together collaboratively to resolve their differences. This is consistent with the best principles of cooperative federalism.[39]

36. The chosen dispute resolution mechanisms also reflect the unique nature of agreements between emanations of the Crown. The courts are restrained in the remedies that can be ordered when the Crown is found to have breached a contract to which it is a party. Relief by way of specific performance or injunctions, which may be available where a private party has breached their contractual commitments, must not be ordered against the Crown. Instead, the court may make an order declaring the rights of the parties.[40]

37. Governments can be expected to obey declaratory orders. There is no practical need for the coercive aspects of injunctive relief to ensure compliance, particularly when both parties' actions and intentions are characterized by the honour of the Crown.[41]

38. In addition, the Province can refer any matter to the Court of Appeal or to the Supreme Court for hearing and consideration, should it feel it is necessary and advisable to do so. Likewise, Canada may refer important questions to this Court for hearing and consideration.[42]

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[38] Flanagan Affidavit, Exhibit "O", RTA, Article 9 (AR, Vol VI, Tab 22, p 100); Amended Petition, CITCA, Part XIV (AR, Vol II, Tab 7, pp 55 and 107).

[39] *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693 at para 17; *Vander Zalm v British Columbia (Minister of Finance)*, 2010 BCSC 1320 (CanLII), 32 DLR (4th) 43 at paras 35-38; Didier Culat, "Coveting thy Neighbour's Beer: Intergovernmental Agreements Dispute Settlement and Interprovincial Trade Barriers" (1992) 33 C. de D. 617 at 620 (XBOA, Tab 3).

[40] *Crown Proceeding Act*, RSBC 1996, c 89, s 11(2)(b).

[41] Robert J Sharpe, *Injunctions and Specific Performance*, loose-leaf (updated 2016, release 25) (Toronto: Canada Law Book, 1992) ch 3 at para 3.1110 (XBOA, Tab 7); *Mahé v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69 at 392; *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at para 65.

39. Finally, as noted by the Court of Appeal, under s. 19 of the *Federal Courts Act* ("FCA"),[43] where provincial governments agree, the Federal Court has jurisdiction over federal-provincial and interprovincial controversies. Pursuant to s. 1 of the *Federal Courts Jurisdiction Act*, the Province has submitted to the jurisdiction of the Federal Court in cases of controversies between it and Canada.[44]

> "Governments may thus litigate...to resolve disputes arising under agreements."[45]

40. The dispute resolution mechanisms in the Agreements and otherwise available to Canada and the Province are appropriate for an agreement between two sovereign governments who intend to be bound to the terms of their agreements.

The Province can be "liable" under the Agreements

41. Beginning at paragraph 151 of its factum, bcIMC argues that the Province is not "liable" under the Agreements, in the context of the liability contemplated under s. 16(6) of the PSPPA. Since, under s. 16(6), bcIMC is only "liable" to taxation to the extent the Province is, s. 16(6) cannot make bcIMC liable if there is no liability to the Province.

42. bcIMC argues that the Province is not "liable" under the Agreements because a contract to which the Crown is a party can be negated by subsequent legislation. This, bcIMC argues, means the Crown is never liable under contract (unless the contract is constitutionalized). This proposition is unsupportable. It is true that the legislature can, through legislation, negate a contract to which the Crown is a party. For that matter, the legislature can also negate a private contract, contrary to the distinction that bcIMC draws between Crown and private contracts. Also, the Crown cannot, through contract, bind a future legislature to comply with a Crown contract. However, none of this means that the Crown cannot be liable

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[42] *Constitutional Question Act*, RSBC 1996, c 68, s 1; *Supreme Court Act*, RSC 1985, c S-26, s 53(2).

[43] BCCA Reasons, para 148 (AR, Vol I, Tab 2), citing Steven A. Kennett, "Hard Law, Soft Law and Diplomacy: The Emerging Paradigm for Intergovernmental Cooperation in Environmental Assessment" (1993) 31 Alta L Rev 644 at 654-56 [Hard Law, Soft Law] (XBOA, Tab 9); *Federal Courts Act*, RSC 1985, c F-7, s 19.

[44] *Federal Courts Jurisdiction Act*, RSBC 1996, c 135, s 1.

[45] Hard Law, Soft Law, *supra* note 43.

under a contract. The Crown can and does routinely enter into binding contracts. Until and unless there is a change in the law negating the contract, the contract is enforceable. That the law applicable to a contract could change in the future does not make the contract unenforceable today. Such contracts are capable of being, and regularly are, enforced. The Crown is "liable" under such contracts.

43. bcIMC notes that both the federal and provincial *Financial Administration Acts* contain provisions whereby any agreement providing for the payment of money by the government is deemed to contain a provision that the obligation to pay is contingent on there being an appropriation of money in that year pursuant to which such payment can be made. These provisions do not make Crown contracts unenforceable. They reflect the constitutional requirement for the legislature to approve government spending on a yearly basis. With respect to these Agreements, bcIMC does not point to any evidence suggesting that there were no applicable appropriations in the applicable period.

44. bcIMC appears to argue that the only sort of contract under which the Crown could be "liable" is one that is enshrined in the constitution, since the legislature would not be able to negate such a contract. This proposition does not comprehend the general impracticality and unreality of governments' having to constitutionalize intergovernmental and other agreements. The day to day or even year to year operation of cooperative federalism, or government itself, would grind to a halt if every agreement had to be enshrined in the constitution. This proposition also cannot be reconciled with the accepted proposition that the Crown has the rights of a natural person to enter into contracts.[46] The Crown can bind itself in contract and, subject to future changes in the law, such contracts are enforceable against the Crown.

45. As the Court of Appeal noted, "Canada and the Province intended to be bound by the RTA and this agreement is, in fact, binding upon them. Further, in my view, bcIMC is bound by the agreements."[47]

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[46] Horsman, *supra* note 24.

[47] BCCA Reasons, para 151 (AR, Vol I, Tab 2).

C. bcIMC, the Province's agent, must abide by the Agreements

bcIMC is not a third party: it is a statutory agent of the Province

46. At paragraphs 112-139 of its factum, bcIMC argues that the Crown cannot bind third parties in contract where the contract is not enshrined in the constitution or incorporated into legislation.

47. The Province does not take issue with the proposition that the Crown could not, by mere agreement with another government, impose legally binding obligations on independent persons with no connection to the Crown.

48. However, the question in this case is not whether the Province can bind such third parties but whether it can require its agent, bcIMC, to abide by the terms of the Agreements. By their terms, Canada and the Province agree that the Agreements will bind them and their agents.[48] They do not purport to bind anyone else.

49. None of the cases or authorities referred to in paragraphs 112-139 stand for the proposition that the Crown requires specific legislation to require its agent to abide by an agreement. Except for the cases involving the Canadian Broadcasting Corporation ("CBC") (discussed below), the cases and authorities referred to in those paragraphs stand for the proposition that the Crown needs legislation to bind third parties (non-agents) to an agreement.

50. At paragraph 132 of its factum, in arguing that statutory implementation of the Agreements is necessary to bind it, bcIMC points to s. 34 of the FPFAA which statutorily binds federal Crown corporations listed on a Schedule to the *Act* to the Agreements. The Province agrees that that provision binds those corporations. The Province notes that a number of the corporations listed on the Schedule are specifically stated not to be agents of the federal Crown.[49] The Province agrees that specific legislation is required to bind such non-agents.

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[48] Flanagan Affidavit, Exhibit "O", RTA, Article 3 (AR, Vol VI, Tab 22, p 98); Amended Petition, CITCA, Article 51 (AR, Vol II, Tab 7, p 57).

[49] FPFAA, s 34 and Schedule I; *Pilotage Act*, RSC 1985, c P-14, ss 1-9 and Schedule**.** The *Pilotage Act* specifically states that a Pilotage Authority is not an agent of Her Majesty. The Pilotage Authorities appear on Schedule I to the FPFAA.

51. At paragraph 133 of its factum, bcIMC cites two cases involving the CBC, where s. 34 of the FPFAA was engaged, in support of the proposition that such provisions will be applied strictly. These cases do not address a statutory Crown agent's duty to obey its principal and do not stand for the proposition that a statutory Crown agent cannot be compelled to abide by an agreement in the absence of specific statutory authority.[50]

52. At paragraph 140 of its factum, bcIMC, for the first time, addresses the question of bcIMC's duty as an agent to obey the Crown, its principal, by abiding by the terms of the Agreements. In this single paragraph, bcIMC dismisses the proposition simply by saying this proposition has "no support in the jurisprudence or commentary".

53. This is incorrect. The duty to obey its principal has been described as a fundamental, and even the primary, duty of an agent. An agent is obliged to obey and carry out the instructions of the principal. An agent must perform its undertakings in accordance with the instructions of the principal.[51]

54. The duty to obey its principal and carry out the principal's lawful instructions is as applicable in the context of a statutory Crown agent as it is to an agency relationship in the private sphere. Both case law and commentary support this proposition.[52]

55. bcIMC is a statutory agent of the Province.[53]

56. Designation of bcIMC as an agent of the Province does not simply give bcIMC a certain status. Agency is a legal relationship that imposes significant obligations on the agent. As an agent of the Province, in performing all of its activities, bcIMC is acting as an instrument

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[50] *Canadian Broadcasting Corp. v Newfoundland (Minister of Finance)* (1993), 112 Nfld & PEIR 255, 1993 CanLII 8366 (Nfld SCTD); *Canadian Broadcasting Corp. v Nova Scotia (Tax Review Board)* (1991), 79 DLR (4th) 700, 1991 CanLII 8294 (NSSC AD).

[51] Gerald Fridman, *Canadian Agency Law*, 2d ed (Markham: LexisNexis Canada Inc., 2012), at s 4.17, p 102 [Fridman] (XBOA, Tab 4); CED (Ont 4th), vol 2, title VI.I at § 124 (XBOA, Tab 2).

[52] Fridman, *supra* note 51 at s 4.17; *Greater Winnipeg Cablevision Ltd. v Manitoba (Public Utilities Board)* (1983), 149 DLR (3d) 668, 1983 CanLII 2825 (Man CA) [*Greater Winnipeg Cablevision*].

[53] PSPPA, s 16(5).

of the Province. For policy reasons, the Crown is choosing to undertake its governmental activity through an agent rather than undertake the activity directly. [54]

57. It is because bcIMC is doing the Crown's work, as agent, that it enjoys the same immunities, including immunity from taxation, as the Crown itself so long as it is acting within the scope of its agency. [55] The choice of government to undertake its governmental activities must be protected as if the government itself was acting.

58. Because bcIMC is doing the Crown's work, as agent, it is bound by its principal to conduct its activities in a particular way.

59. Because bcIMC is doing the Crown's work, as agent, it cannot be considered a "third party" or the "citizenry", as described in paragraph 139 of bcIMC's factum.

60. A statutory Crown agent's duties are the same as an agent in private law. However, in private law, the agent's obligations arise under the contract between agent and principal. The agent is at liberty to negotiate the terms and scope of her duties as agent. The agent can refuse to agree to conduct her duties on the terms proposed by the prospective principal and the private law agent can end the contract pursuant to which the agency arises. However, once agreeing to those terms the agent must obey the principal's instructions:

> [An] agent, having been given definite instructions and agreeing to the terms of the instructions and the manner in which the instructions are to be carried out, he has to follow them strictly. [56]

61. The duties of a statutory Crown agent such as bcIMC are imposed by its constating statute, not by contract. bcIMC is bound to perform its duties in accordance with the PSPPA, including acting as the Province's agent. It has no choice in its duties. Its obligation to obey the instructions of its principal is compelled by law and is in no way dependent on its agreement to do so. So long as instructions from its principal, the Crown, are not in conflict

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[54] Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed. (Toronto: Thomson Reuters Limited, 2011), pp 464-465 (Book of Authorities of the Respondent, Her Majesty the Queen in right of the Province of British Columbia ("RBA"), Tab 8).

[55] *Nova Scotia Power Inc. v Her Majesty the Queen*, 2004 SCC 51, [2004] 3 SCR 53 at paras 14-18; *R v Eldorado Nuclear Ltd.*, [1983] 2 SCR 551, 4 DLR (4th) 193.

[56] *Metropolitan Toronto Pension Plan v Aetna Life Assurance Co. of Canada* (1992), 98 DLR (4th) 582, 1992 CanLII 8618 (ONSC) at para 30.

with, or inconsistent with, the other provisions of the PSPPA, such instructions must be followed. The Province's directions to bcIMC to remit GST and obtain a rebate thereof, in accordance with the Agreements, do not conflict with, and are not inconsistent with, bcIMC's other duties under the PSPPA. Accordingly, as the Province's agent, bcIMC must follow such instructions and abide by the Agreements.

Specific legislation requiring bcIMC to abide by the Agreements is not necessary

62. The Province is able to require bcIMC to abide by the Agreements because bcIMC is the Province's statutory agent and the Agreements specifically bind the Province's agents. A statutory Crown agent has a duty to abide by agreements to which its principal has made it subject.[57]

63. In *Greater Winnipeg Cablevision Ltd. v Public Utilities Board*,[58] the government of Manitoba entered into an agreement with Canada.[59] Under the agreement, Manitoba agreed with Canada to allow persons contracting with Manitoba Telephone System (MTS), an agent of the Manitoba Crown (referred to in the agreement as the "Agency"), to bring disputes with MTS before the Manitoba Public Utility Board for adjudication. To implement the agreement, pursuant to a statutory power to direct the Board in its activities, the Lieutenant Governor in Council issued an order in council directing the Board to hear disputes between MTS and those persons contracting with MTS. MTS argued that it was not bound by the OIC. Even though it was an agent of the Crown, MTS argued that, as a separate legal person it could only be compelled to attend hearings before the Board if it consented or pursuant to a statutory provision that specifically compelled it to attend (which did not exist). Like

[57] *Greater Winnipeg Cablevision*, *supra* note 52.

[58] *Greater Winnipeg Cablevision*, *supra* note 52.

[59] The Canada-Manitoba agreement was authorized by legislation similar to s 4 of British Columbia's MIRA and also required an order in council from the Lieutenant Governor in Council.

bcIMC, MTS relied on the decisions of this court in *Re Anti-Inflation Act*[60] and *Manitoba Government Employees Association v Manitoba*.[61]

64. MTS' argument was rejected by the Manitoba Court of Appeal. Writing for a unanimous court, Justice Matas said:

> I do not agree with this submission of MTS. MTS was made subject to duly authorized executive action by the combined effect of the statutory creation of MTS as an agent of Her Majesty in right of the province and the designation of MTS in the agreement as an agency of the province. The decisions in the *Man. Govt. Employees Assn v. Man.*, [1978] 1 S.C.R. 1123, 79 D.L.R. (3d) 1 and *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541 are not applicable to the circumstances of this case…
> [62]

65. Because of its agency, the circumstances of bcIMC differ from the circumstances in the *Anti-Inflation Act* case and the *Manitoba Government Employees* case. Like MTS in *Greater Winnipeg Cablevision*, bcIMC was made the Crown's agent by statute and was bound to certain obligations through an agreement entered into by its principal, the Crown, with Canada, which contract was duly authorized by statute and executive order. Like MTS, it is bcIMC's agency that makes it subject to the direction of the Crown.

66. At footnote 139 of its factum, bcIMC states that there "is in any event no evidence in the case at bar that the Province instructed bcIMC to comply with the Agreements." On its formation, bcIMC was listed in Schedule A to the RTA. In 2003, it was removed on the basis that the inclusion of the term "Public Sector Pension Trust Accounts", listed on Schedule A, exempted bcIMC from paying the GST under the agreement. [63] Since then, as bcIMC points out at paragraphs 27 and 28 of its factum, it has been engaged in a 16 year long dispute about its obligations under the Agreements. The Agreements indicate they are binding on the

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[60] *Re Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (4th) 193.

[61] *Manitoba Govt. Employees Assn. v Govt. of Manitoba et al*, [1978] 1 SCR 1123, 1977 CanLII 198 [*Manitoba Government Employees*].

[62] *Greater Winnipeg Cablevision*, *supra* note 52 at para 23.

[63] Petition and Amended Petition, para 17 (AR, Vol II, Tabs 6 and 7, pp 8 and 22, respectively); Affidavit #1 of Doug Pearce ("Pearce Affidavit"), para 2 (AR, Vol III, Tab 17, pp 31-32); Flanagan Affidavit, Exhibit "O", RTA, Schedule A (AR, Vol VI, Tab 22, pp 105-107).

Crown's agents. It is clear that bcIMC knew about the Agreements and understood the Province's intention that bcIMC abide by their terms.[64]

Section 16(6) of the PSPPA contemplates that bcIMC will be liable under taxation agreements

67. The Court of Appeal did not accept bcIMC's argument that statutory authority was necessary to enable the Province to bind its agent, bcIMC. However, the Court of Appeal (and the British Columbia Supreme Court) found that there *was* statutory support for the Province's ability to bind bcIMC to the Agreements. Both courts found that s. 16(6) of the PSPPA provided such statutory support. Subsection 16(6) provides as follows:

> The investment management corporation, as an agent of the government, is not liable for taxation except as the government is liable for taxation.[65]

68. Justice Willcock, of the Court of Appeal, writing for a unanimous court, said:

> Assuming, for the purposes of this argument, that…legislation is necessary to bind bcIMC to the RTA obligations, I am of the view that the chambers judge did not err in finding that the PSPPA does so. As bcIMC points out, s. 16(6) [of the PSPPA] serves the purpose of establishing bcIMC's immunity from provincial taxation (because s. 14(1) of the BC *Interpretation Act* provides that enactments are binding on the government unless otherwise specified), it also is clearly intended to describe the extent of that immunity: it is no broader than that enjoyed by the Province.

Justice Willcock also said:

> I would also reject bcIMC's argument that s. 16(6) cannot encompass the obligations assumed under the RTA because it refers to "liability for taxation" rather than obligations voluntarily assumed. In my view, "liability for taxation" includes contractual liability to pay taxes which the Province has

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[64] Petition and Amended Petition, paras 14-18 (AR, Vol II, Tabs 6 and 7, pp 7-9 and 21-23, respectively); Pearce Affidavit, para 2 (AR, Vol III, Tab 17, pp 31-32); Affidavit #1 of David Woodward, para 2 (AR, Vol III, Tab 16, p 28); Affidavit #2 of David Woodward, paras 19-45 (AR, Vol III, Tab 19, pp 40-45); Woodward #3, paras 7-10 (AR, Vol X, Tab 24, pp 2-3); Flanagan Affidavit, Exhibit "O", RTA, Schedule A (AR, Vol VI, Tab 22, pp 105-107): the Public Sector Pension Trust Accounts are explicitly listed in Schedule A to the RTA.

[65] PSPPA, s 16(6).

> formally assumed under the RTA, an agreement effected by Orders in Council in compliance with MIRA.[66]

69. As the Court notes, pursuant to s. 14(1) of the British Columbia *Interpretation Act*[67] all statutes are applicable to the provincial government unless they indicate otherwise. Accordingly, all taxation statutes apply to the Crown except where the Crown is explicitly exempted. There are exemptions for the Crown in numerous taxation statutes.[68] The effect of s. 16(6) is to give bcIMC the same immunities and liabilities with respect to taxation that the Crown itself has.

70. Notably, s. 16(6) explicitly ties bcIMC's immunity from taxation to its status as an agent. If the intent was simply to establish bcIMC's liability, s. 16(6) could have been worded "the investment management corporation is not liable for taxation except as the government is liable for taxation." Based on the presumption that no words in a statutory provision are superfluous, the Province submits that the legislature specifically intended to tie bcIMC's obligation to pay tax to its status as an agent.[69]

71. Subsection 16(6) confirms that the Province's agent, bcIMC, stands in the same shoes as its principal, the Province, in its liability for taxation, whether as a function of provincial legislation or of the Agreements voluntarily entered into by the Province as an exercise of its authority authorized by MIRA. Further, the legislation makes it clear that this co-extensive liability or immunity is explicitly based on bcIMC's status as an agent.

72. In sum, the Province submits that bcIMC's arguments that section 16(6) cannot support the ability of the Province to bind bcIMC through the Agreements cannot be accepted and are not internally consistent. They must be rejected. As the Province's agent, bcIMC must abide by the Agreements.

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[66] BCCA Reasons, paras 153 and 155 (AR, Vol I, Tab 2).

[67] *Interpretation Act*, RSBC 1996, c 238, s 14(1).

[68] See, for example, s 396(1)(a) of the *Vancouver Charter*, SBC 1953 c 55.

[69] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexisCanada Inc., 2014), p 211 (XBOA, Tab 8).

PART IV – SUBMISSIONS ON COSTS

73. The Province submits that costs should be awarded in the cause, at all levels of court. The Province requests its costs in this Court and in the courts below.

PART V – ORDER SOUGHT

74. The Province asks that bcIMC's cross-appeal be dismissed. The judgment of the Court of Appeal should stand.

PART VI – SUBMISSIONS ON THE IMPACT OF ANY SEALING OR CONFIDENTIALITY ORDER

75. Not Applicable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of March 2019.

Per: _____
for Sointula Kirkpatrick
David R. Poore

PART VII – TABLE OF AUTHORITIES

CASELAW

No.	Authority	Paragraph Reference
1.	*Canada (Attorney General) v Saskatchewan Water Corp.*, [1992] 4 WWR 712, 1991 CanLII 3951 (Sask CA).	20
2.	*Canadian Broadcasting Corp. v Newfoundland (Minister of Finance)* (1993), 112 Nfld & PEIR 255, 1993 CanLII 8366 (Nfld SCTD).	51
3.	*Canadian Broadcasting Corp. v (Tax Review Board)* (1991), 79 DLR (4th) 700, 1991 CanLII 8294 (NSSC (AD).	51
4.	*Greater Winnipeg Cablevision Ltd. v Manitoba (Public Utilities Board)* (1983), 149 DLR (3d) 668, 1983 CanLII 2825 (Man CA).	54, 62, 63,64, 65
5.	*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.	21, 22, 23
6.	*Mahé v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69.	37
7.	*Manitoba Govt. Employees Assn. v Govt. of Manitoba et al*, [1978] 1 SCR 1123, 1977 CanLII 198.	63, 64, 65
8.	*Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623.	37
9.	*Metropolitan Toronto Pension Plan v Aetna Life Assurance Co. of Canada* (1992), 98 DLR (4th) 582, 1992 CanLII 8618 (ONSC).	60
10.	*Nova Scotia Power Inc. v Her Majesty the Queen*, 2004 SCC 51, [2004] 3 SCR 53.	57
11.	*Pharmaceutical Manufacturers Assn. of Canada v BC (Attorney General of)* (1996), 135 DLR (4th) 587, 1996 CanLII 3597 (BCSC), aff'd 1997 CanLII 4597 (BCCA), leave to appeal to SCC refused, [1997] SCCA No 529.	24
12.	*Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693.	35
13.	*R v Eldorado Nuclear Ltd.*, [1983] 2 SCR 551, 4 DLR (4th) 193.	57
14.	*Re Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452.	63, 64, 65

No.	Authority	Paragraph Reference
15.	*Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633.	21
16.	*South Australia v Commonwealth*, [1961-1962] 108 CLR 130, 35 ALJR 460 (Austl HC).	20, 27, 31
17.	*Vander Zalm v British Columbia (Minister of Finance)*, 2010 BCSC 1320 (CanLII), 324 DLR (4th) 43.	35

SECONDARY SOURCES

No.	Source	Paragraph Reference
1.	CED (Ont 4th), vol 2, title VI.I, § 124.	53
2.	Didier Culat, "Coveting thy Neighbour's Beer: Intergovernmental Agreements Dispute Settlement and Interprovincial Trade Barriers" (1992) 33 C de D, pp 617, 620, 621 only.	35
3.	Gerald Fridman, *Canadian Agency Law*, 2d ed (Markham: LexisNexis Canada Inc., 2012) s 4.17, p 102.	53, 54
4.	Karen Horsman & Gareth Morley, eds, *Government Liability Law and Practice* (ebook) (Toronto: Thomson Reuters Canada Limited, 2017), 1.30.10.	24, 44
5.	Peter W Hogg, Patrick J Monahan, & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Thomson Reuters Limited, 2011), pp 464-465.	56
6.	René Dussault & Louis Borgeat, *Administrative Law: A Treatise*, 2d ed, translated by Murray Rankin (Toronto: Carswell, 1985) Vol 1, p 470.	20
7.	Robert J Sharpe, *Injunctions and Specific Performance*, loose-leaf (updated 2016, release 25) (Toronto: Canada Law Book, 1992) ch 3, para 3.1110.	37
8.	Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexisCanada Inc., 2014), p 211.	70
9.	Steven A Kennett, "Hard Law, Soft Law and Diplomacy: The Emerging Paradigm for Intergovernmental Cooperation in	39

No.	Source	Paragraph Reference
	Environmental Assessment" (1993) 31 Alta L Rev 644.	

STATUTES, RULES, ETC.

No.	Statute, Rule, Etc.	Section, Rule, Etc.
1.	*Constitutional Question Act*, RSBC 1996, c 68.	s 1
2.	*Crown Proceeding Act*, RSBC 1996, c 89.	s 11(2)(b)
3.	*Federal Courts Act*, RSC 1985, c F-7.	(English) s 19 (French) s 19
4.	*Federal Courts Jurisdiction Act*, RSBC 1996, c 135.	s 1
5.	*Financial Administration Act*, as it read April 1, 1999, RSBC 1996, c 138.	Part 5
6.	*Federal – Provincial Fiscal Arrangements Act*, RSC 1985, c F-8.	(English) s 32, (French) s 32 (English) s 34, (French) s 34 (English) Schedule 1 (French) Schedule 1
7.	*Interpretation Act*, RSBC 1996 c 238.	s 14(1)
8.	*Ministry of Intergovernmental Relations Act*, RSBC 1996 c 303.	s 4
9.	*Pilotage Act*, RSC 1985, c P-14.	(English) ss 1-9 (French) ss 1-9 (English) Schedule (French) Schedule
10.	*Public Sector Pension Plans Act*, SBC 1999, c 44.	s 16 s 17

No.	Statute, Rule, Etc.	Section, Rule, Etc.
		s 18
11.	*Supreme Court Act*, RSC 1985, c S-26.	(English) s 53(2) (French) s 53(2)
12.	*Vancouver Charter*, SBC 1953, c 55.	s 396(1)(a)