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

Applicant
(Appellant and Respondent on Cross Appeal)

and

BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

Respondent
(Respondent and Appellant on Cross Appeal)

and

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

Respondent
(Respondent and Respondent on Cross Appeal)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL AND CONDITIONAL APPLICATION FOR LEAVE TO CROSS APPEAL OF THE RESPONDENT, BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

(Pursuant to Rules 27 and 29 of the *Rules of the Supreme Court of Canada*)

Counsel for the Respondent, British Columbia Investment Management Corporation

CRAIG A.B. FERRIS, Q.C.
GORDON B. BRANDT
LAWSON LUNDELL LLP
1600 – 925 West Georgia Street
Vancouver, BC V6C 3L2

Tel: (604) 685-3456
Fax: (604) 669-1620
Email: cferris@lawsonlundell.com
gbrandt@lawsonlundell.com

Agent for the Respondent, British Columbia Investment Management Corporation

MICHAEL J. SOBKIN

Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Counsel for the Applicant, Attorney General of Canada

MICHAEL TAYLOR
SELENA SIT
ATTORNEY GENERAL OF CANADA
Department of Justice
British Columbia Region
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Tel: (604) 775-6014/(604) 775-7505
Fax: (604) 666-2216
Email: michael.taylor@justice.gc.ca
selena.sit@justice.gc.ca

Agent for the Applicant, Attorney General of Canada

CHRISTOPHER RUPAR
DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Civil Litigation Branch
50 O'Connor Street, 5th Floor
Ottawa, Ontario K1A 0H8

Fax: (613) 670-6290
Email: christopher.rupar@justice.gc.ca

Counsel for the Respondent, Her Majesty the Queen in Right of the Province of British Columbia

VERONICA L. JACKSON
SOINTULA KIRKPATRICK
MINISTRY OF JUSTICE
Legal Services Branch
P.O. Box 9289 Stn Prov Gvt
400 – 1675 Douglas Street
Victoria, BC V8W 9J7

Tel: (250) 356-8822/(250) 356-8845
Fax: (250) 387-0700
Email: veronica.jackson@gov.bc.ca
sointula.kirkpatrick@gov.bc.ca

Agent for the Respondent, Her Majesty the Queen in Right of the Province of British Columbia

NADIA EFFENDI

BORDEN LADNER GERVAIS LLP
Suite 1300 – 100 Queen Street
Ottawa, Ontario K1P 1J9

Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

TABLE OF CONTENTS

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The proposed appeal, at its core, seeks to challenge the determination made by the courts below that the assets held and managed by the respondent British Columbia Investment Management Corporation ("**bcIMC**") in pooled investment portfolios belong to it. The courts below concluded that because those assets belong to bcIMC, a Crown agent immune from federal taxation, the *Excise Tax Act*, R.S.C. 1985 c. E-15 ("***ETA***"),[1] cannot impose tax on bcIMC's management of the assets by reason of s. 125 of the *Constitution Act, 1867*.

2. No principles of constitutional or statutory law are disputed in this case, only their application in the unique context of assets managed by bcIMC under its particular constating legislation. No issue of public importance arises from the application of settled principles in this context.

3. Canada's application rests on the assertions, rejected in the courts below, that there is some "recipient" of bcIMC's investment management services that is not identified in the constating legislation and that is not the Crown, and that "recipient" somehow has an interest in the pooled investment portfolios. Having rejected these propositions (which are findings of fact or mixed fact and law), the courts proceeded to apply settled and uncontroversial principles of Crown immunity.

4. On the facts found, and contrary to what Canada argues, the British Columbia courts have done no more than confirm that Crown immunity applies to an express Crown agent and to property held by that agent.

5. The errors Canada substantively alleges, respecting ownership of the assets bcIMC holds in pooled investment portfolios, are on matters that are subject to deference, being issues of fact or at most of mixed fact and law. No potential basis for reversing the conclusions below is raised in Canada's application. In any event, the result of further consideration

[1] *Excise Tax Act*, R.S.C. 1985 c. E-15.

would be confined to the particular and specific statutory scheme under which bcIMC operates. The conclusions drawn would be of no assistance to anyone other than these parties.[2]

6. There is also no issue of public importance arising from the British Columbia courts taking jurisdiction and issuing declaratory relief. In the context of a dispute that engages constitutional considerations and overlaps with issues acknowledged to fall outside the jurisdiction of the Tax Court of Canada (the "**Tax Court**"), the courts below were quite correct in exercising their unchallenged jurisdiction to hear this case.

B. FACTS

1. bcIMC under the *Public Sector Pension Plans Act*

(a) Background

7. bcIMC is a corporation created in 1999 by the *Public Sector Pension Plans Act*, S.B.C. 1999, c. 44 (the "***PSPPA***").[3]

8. Pursuant to the *PSPPA*, bcIMC: (a) has the power and capacity of a natural person of full capacity; (b) is a trust company authorized to carry out trust business and investment management services; and (c) is an agent of government, and as an agent of government, is not liable for taxation except as the government is liable for taxation.[4]

9. The capital of bcIMC is one share, which is held by the Minister of Finance on behalf of the government. bcIMC is governed by its board of directors.[5]

---

[2] As referenced in the Reasons for Judgment of the Court of Appeal, 2018 BCCA 47 ("**BCCA Reasons**"), Application Record Tab 5, para. 87, Crown immunity has been recognized for managers of public service pension funds in other provinces. However, the funds management structures in other provinces do not parallel bcIMC's structure.

[3] *Public Sector Pension Plans Act*, S.B.C. 1999, c. 44; BCCA Reasons, para. 4; Reasons for Judgment of the British Columbia Supreme Court, 2016 BCSC 1803 ("**BCSC Reasons**"), Application Record Tab 2, para. 7.

[4] *PSPPA*, ss. 16(1), (3), (5), (6); BCSC Reasons, paras. 7, 14.

[5] *PSPPA*, ss. 17, 19.

10. The purpose of bcIMC is to provide funds management services, including the making of investments and loans, for "funds" placed with it.[6] Funds, as defined in the *PSPPA*, means money and securities placed with bcIMC by persons who have authority to invest specific categories of public funds, including public sector pension funds.[7]

11. bcIMC was established as part of a restructuring of the provincial public sector pension system.[8]

12. The function at issue in this litigation is bcIMC's management of assets held in pooled investment portfolios (the "**Portfolios**"). Prior to bcIMC's incorporation, the Provincial Minister of Finance held in trust and managed the assets in the Portfolios. Pursuant to s. 18.1 of the *PSPPA*, the same Portfolios were continued under the *PSPPA*, and bcIMC was obligated to continue to hold, in trust, the assets previously held under or in a Portfolio by the Minister of Finance or the chief investment officer.[9] The same Portfolios are ones to which Canada now seeks to apply the *ETA*.

13. bcIMC's function in managing the assets in the Portfolios is a continuation of the Minister of Finance's role. The *PSPPA* provides that bcIMC has the same powers, functions and duties previously held by the Minister of Finance under the *Financial Administration Act*, R.S.B.C. 1996, c. 138, as it read on April 1, 1999.[10]

14. The majority of the funds placed with bcIMC for investment are in respect of British Columbia's public sector pension plans, the Teachers' Pension Plan, College Pension Plan, Public Service Pension Plan, Municipal Pension Plan, and in respect of the Workers' Compensation Board (collectively, the "**Plans**").[11] In addition, the Province

---

[6] *PSPPA*, s. 18(2).
[7] *PSPPA*, ss. 15, "funds", 18(1) (incorporating definitions from *Financial Administration Act*, R.S.B.C. 1996, c. 138), 18(3).
[8] BCCA Reasons, para. 4.
[9] *PSPPA*, s. 18.1; *Pooled Investment Portfolios Regulation*, B.C. Reg. 447/99 (*PSPPA*), s. 3.
[10] BCSC Reasons, paras. 12, 135; *PSPPA*, s. 18(4).
[11] BCCA Reasons, para. 8; BCSC Reasons, para. 8.

invests various other public monies, including funds from the consolidated revenue fund, with bcIMC.[12]

(b) The Portfolios

15. The *PSPPA*'s *Pooled Investment Portfolios Regulation*, B.C. Reg. 447/99 (the "***Regulation***") is the post-1999 successor to the regulation by the same name previously enacted under the *Financial Administration Act*. It sets out the ownership and structure of the Portfolios.

16. With respect to ownership of the assets in the Portfolios, the *Regulation* provides:

(a) All the assets in the Portfolios are held in trust by bcIMC;

(b) The investments of a Portfolio must be identified separately from other property of bcIMC; and

(c) Ownership in any asset in a Portfolio must not be attributed to a "participating fund" (*i.e.*, a fund from which money or securities are placed with bcIMC).[13]

17. Persons who place money and securities with bcIMC are issued units of Portfolios (the "**Units**"). The value of the Units is based on the underlying net assets in the Portfolios. Such persons have a right to be paid money equal to the value of the Units each holds, but not to the Portfolios or to the assets in the Portfolios themselves.[14]

18. The *PSPPA* provides that bcIMC's chief investment officer (the "**CIO**") is alone empowered to make all investment decisions concerning the assets in the Portfolios and, in his or her discretion, to delegate responsibility for such decisions to others. None of the participating funds, including the Province, may have any input into specific investment decisions. bcIMC's board of directors has the authority to approve investment policies in respect of the assets in the Portfolios, but is statutorily precluded from any involvement

---

[12] Amended Petition filed May 28, 2014, Tab C.1, paras. 6-8; Affidavit No. 1 of Stewart Newton filed April 20, 2016, Tab C.3, paras. 5-9, Exhibit "A".
[13] *Regulation*, s. 4(1), (3), (4), s. 1, "participating fund".
[14] BCSC Reasons, para. 8; BCCA Reasons, para. 12; *Regulation*, s. 4(4), 5.

in investment decisions of bcIMC. The position of CIO continues a role previously performed within the Ministry of Finance.[15]

19. When the Minister of Finance managed the Portfolios, the Minister was statutorily authorized to recover the costs and expenses associated with managing the Portfolios from the assets held in the Portfolios. The *PSPPA* expressly continued this power and statutorily mandated the method of recovering costs and expenses when bcIMC assumed this function effective January 1, 2000.[16]

20. The Minister of Finance did not collect or remit Goods and Services Tax ("**GST**") in respect of the recovery of costs and expenses from assets held in the Portfolios. When the Portfolios were continued under the *PSPPA*, bcIMC continued the same method employed by the Minister of recovering its costs and expenses from the assets in the Portfolios.[17]

21. Canada concedes that bcIMC alone holds legal title to the assets in the Portfolios and that the *PSPPA* and *Regulation* do not identify any beneficial owner.[18] In short, bcIMC owns and manages the assets in the Portfolios and it recovers its management costs from those assets.

2. Procedural History

(a) Petition and Preliminary Applications

22. Prior to any field work commencing on an audit Canada had commenced, and nearly two years before any assessment being issued, bcIMC filed its Petition in the British Columbia Supreme Court ("**BCSC**") on December 20, 2013.[19]

---

[15] *Regulation*, s. 4(2); *PSPPA*, s. 20(1)(d)(iv), 20(5) and 21.
[16] BCSC Reasons, para. 13; *PSPPA*, s. 18(4).
[17] BCSC Reasons, para. 13.
[18] Applicant's Memorandum of Argument ("**Applicant's Memorandum**"), para. 12.
[19] BCCA Reasons, paras. 32, 38. The Petition was amended on May 28, 2014 to strike the word "including" from paragraph 1(a) of Part 1, Orders Sought. See Tab C.1. Unless otherwise noted, references to the "Petition" in this Memorandum of Argument describe the pleading as amended.

23. In the Petition, bcIMC sought declarations that:

(a) In respect of the assets it holds in the Portfolios, it is immune from taxation by Canada under the *ETA*; and

(b) Two intergovernmental tax agreements (the "**Agreements**") are not binding upon it, and are ineffective to alter or derogate from its immunity from taxation.[20]

24. On May 9, 2014, Canada filed a Notice of Application seeking to strike the Petition on jurisdictional grounds and on the ground that the Petition disclosed no reasonable cause of action. British Columbia supported Canada's application. In a judgment delivered June 20, 2014, the BCSC dismissed the application.[21]

25. Canada appealed the order dismissing its application to strike.[22] In a judgment delivered August 12, 2015, the British Columbia Court of Appeal unanimously dismissed Canada's appeal.[23]

(b) Notices of Assessment Issued

26. On October 30, 2015, almost two years after proceedings were commenced in the BCSC, Canada Revenue Agency (the "**CRA**") provided bcIMC with a letter proposing to assess bcIMC in the total amount of $40,498,754.94 in relation to the Portfolios for the audit period (April 1, 2010 to March 31, 2013), exclusive of interest and penalties. The working papers attached to the proposal letter (*i.e.*, the auditor's papers setting out the

---

[20] Amended Petition, Tab C.1, Part 1.

[21] *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2014 BCSC 1296.

[22] Canada and British Columbia were unsuccessful in obtaining a stay of the Petition proceedings pending the hearing of the appeal: *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2014 BCSC 1744.

[23] *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2015 BCCA 373.

basis for the intended assessment) relied on the Agreements as a part of the basis for assessing bcIMC.[24]

27. On November 30, 2015, the CRA issued Notices of Assessment to bcIMC, consistent with the October 30, 2015 proposal letter, including with respect to reliance on the Agreements.[25]

(c) Chambers Decision

28. In reasons released September 30, 2016, the chambers judge addressed three issues: jurisdiction, the merits of bcIMC's immunity claim, and the merits of bcIMC's claim in relation to the Agreements.

29. With respect to jurisdiction, the chambers judge concluded that the BCSC and the Tax Court have concurrent jurisdiction over the immunity claim (which is now conceded by Canada), and that the claim in relation to the Agreements is exclusively within the jurisdiction of the BCSC.[26]

30. With respect to the immunity claim, the chambers judge found that the assets in the Portfolios belong to bcIMC; the *PSPPA*'s statutory trust does not separate bcIMC from those assets. To recognize some other ownership interest would "change the trust into something it is not". Canada accordingly could not tax the investment management services, whether by application of the "deemed trust" provisions of the *ETA* or otherwise. To do so would defeat the Province's constitutional immunity from taxation.[27]

31. The chambers judge accordingly granted the declaration sought in respect of the immunity claim, finding bcIMC immune from taxation in respect of the assets it holds in the Portfolios.[28]

---

[24] BCSC Reasons, para. 35; Affidavit No. 3 of David Woodward filed April 19, 2016, Tab C.2, Exhibit "A".
[25] BCSC Reasons, para. 35.
[26] BCSC Reasons, paras. 93, 98; see also: BCCA Reasons, para. 50.
[27] BCSC Reasons, paras. 128-133.
[28] BCSC Reasons, para. 137.

32. With respect to bcIMC's claim regarding the Agreements, the chambers judge appears to have assumed that the Agreements were binding as between the parties to them (*i.e.*, Canada and British Columbia), and were not mere political agreements. No analysis was set out in this regard. The chambers judge found that bcIMC was bound by the Agreements by virtue of s. 16(6) of the *PSPPA*, which provides that bcIMC "is not liable for taxation except as the government is liable for taxation". Relying on that provision, the Court concluded that because the Province was liable for taxation under the Agreements, so too was bcIMC.[29]

(d) Appeal Decision

33. Canada appealed the declaration granting bcIMC's immunity claim on jurisdictional grounds and on the substantive merits; bcIMC cross appealed the declaration respecting the Agreements.

34. In unanimous Reasons for Judgment released February 7, 2018, the Court dismissed both the appeal and cross appeal.

35. On the appeal, Canada conceded that the immunity claim fell within the concurrent jurisdiction of the BCSC (having argued below that the Tax Court had exclusive jurisdiction).[30] However, Canada argued that the chambers judge erred in taking jurisdiction by failing to give sufficient weight to the "primacy of the challenge to the assessment in this case".[31] The Court of Appeal accorded deference to the decision of the chambers judge in the exercise of his discretion to decide the Petition.[32]

36. In addressing the immunity claim, the Court characterized the issue to be considered as follows:

> [104] … in this case, the challenge to immunity does not rest upon a challenge to the status of bcIMC but, rather, upon the question whether bcIMC, and its principal, the Crown, can be said

[29] PSPPA, s. 16(6); BCSC Reasons, para. 165.
[30] BCCA Reasons, paras. 45, 50.
[31] BCCA Reasons, para. 60.
[32] BCCA Reasons, para. 67.

> to be the recipient of the services provided by bcIMC in managing the pooled funds, or whether private interests received the services.

37. The Court concluded that, in managing the Portfolios, bcIMC did not provide services to any private interests. In particular, the Court held that in the specific context of the *PSPPA*, the statutory trust did not identify any private beneficiary of the Portfolios. As bcIMC was immune from taxation by Canada under s. 125 of the *Constitution Act, 1867*, no interpretation of the *ETA* could result in tax applying to bcIMC's management of the Portfolios.[33]

38. The Court did not fail to recognize that a private beneficial interest in property held legally by the Crown may be subject to tax. The Court expressly affirmed this principle, acknowledging that imposing GST on a private beneficial interest is not barred by s. 125.[34] Rather, as was found by the chambers judge and affirmed on appeal, there was no such private beneficial interest in the Portfolios based on the unique statutory scheme.

39. With respect to bcIMC's cross-appeal, the Court affirmed the chambers judge's conclusion that the Agreements were binding on bcIMC.[35]

---

[33] BCCA Reasons, paras. 109-114.
[34] BCCA Reasons, para. 107.
[35] BCCA Reasons, paras. 151-156.

PART II – QUESTIONS IN ISSUE

40. The questions as proposed by Canada are:

(a) Whether the Province's immunity to federal taxation under s. 125 of the *Constitution Act, 1867* extends to assets held in trust by bcIMC in pooled investment portfolios under the *PSPPA* and *Regulation*;

(b) The scope of the Province's immunity to the application of the *ETA* when it makes taxable supplies of services in a similar manner as a private, commercial supplier; and

(c) Whether the provincial superior court properly exercised its discretion to exercise its residual constitutional jurisdiction by entertaining a claim that has the direct or indirect effect of invalidating federal tax assessments when those assessments are under appeal in the statutory appeal process created by Parliament, which culminates in an appeal to the Tax Court, which court has the necessary jurisdiction to decide the constitutional issue.

41. In keeping with the sequence of argument in the courts below, bcIMC will address the jurisdictional question first, followed by Canada's proposed questions (a) and (b), which are addressed together.

PART III – ARGUMENT

A. JURISDICTION

42. The chambers judge's exercise of discretion to take jurisdiction and decide this matter was based on careful consideration of the unique circumstances of this case. No issue of concern arises respecting the integrity of the federal tax appeal system.

43. Indeed, it is apparent that Canada simply seeks to revisit the courts' application of the relevant factors below. In particular:

(a) Canada asserts that the chambers judge gave "no weight" to the presence of the assessments, when this factor was expressly considered below;[36]

(b) Canada characterizes the conclusion below that this proceeding is not primarily an attack on an assessment as "unreasonable", disregarding that the Petition was filed almost two years before an assessment was issued when bcIMC had no other way to bring this controversy to the courts for adjudication;[37]

(c) Canada asserts that no consideration was given to the effect on the Tax Court's process, when the courts below expressly considered that that process had not been engaged when the Petition was filed, that the Petition related to the very applicability of that process, and that the constitutional issues do not engage the Tax Court's expertise as do assessment cases generally; and[38]

(d) Canada characterizes the Agreement aspect of the dispute as "bootstrapping" the superior court's jurisdiction, contrary to the conclusions below that the immunity and Agreement issues were inter-dependant, arising from the same underlying dispute, and that only the BCSC had jurisdiction over both claims.[39]

---

[36] Applicant's Memorandum, para. 61; BCSC Reasons, paras. 96-97, BCCA Reasons, para. 67.
[37] Applicant's Memorandum, para. 62; BCSC Reasons, paras. 54, 169-171.
[38] Applicant's Memorandum, para. 61; BCSC Reasons, para. 95-96; BCCA Reasons, para. 67.
[39] Applicant's Memorandum, para. 64; BCSC Reasons, paras. 98-99, 171; BCCA Reasons, para. 67.

44. Disagreement with the weighing of factors relevant to an exercise of discretion does not give rise to any issue of public importance. It is the role of the provincial appellate courts to address appeals on such matters, which function the Court of Appeal properly discharged in this case.

45. Furthermore, it is not the case, as Canada suggests, that the jurisdiction of the Tax Court is "hollowed out" whenever a provincial superior court interprets a tax statute. Provincial superior courts are competent to and routinely do so – the Court's jurisdiction in this case was not confined to its "residual constitutional jurisdiction".[40]

46. The chambers judge's exercise of discretion to hear and decide this matter does not conflict with this Court's jurisprudence as Canada asserts.[41]

47. In *Canada v. Addison & Leyen Ltd.*, the Court concluded that the Minister of National Revenue's length of delay in issuing an assessment under the *Income Tax Act* could not ground judicial review in light of the Minister's discretion to assess a taxpayer "at any time". There was no dispute that the *Income Tax Act* applied to that taxpayer. In considering *Addison & Leyen* below, the Court of Appeal correctly concluded that its facts are "sufficiently distinct from those in the case at bar" as to be of little value in informing the Court's exercise of discretion here.[42]

48. *Reza v. Canada* and *Strickland v. Canada (Attorney General)* simply stand for the principle that, where a court is asked to decline jurisdiction, the role and expertise of alternative forums are relevant to the court's exercise of discretion. *Reza* and *Strickland* do not mandate a particular result. These factors were expressly considered below: the courts found that the Tax Court did not possess relative expertise (*i.e.*, in the determination of bcIMC's Crown immunity) and that the portion of the dispute relating to the Agreements fell outside the jurisdiction of the proposed alternative forum.[43]

---

[40] *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226.
[41] See: Applicant's Memorandum, paras. 57, 63, referencing *Canada v. Addison & Leyen Ltd.*, [2007] 2 S.C.R. 793; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Strickland v. Canada (Attorney General)*, [2015] 2 S.C.R. 713.
[42] BCCA Reasons, para. 54.
[43] BCCA Reasons, para. 67; BCSC Reasons, paras. 95, 98.

49. As a Crown agent seeking a declaration as to its status in respect of the Portfolios, bcIMC was in a position unique from other taxpayers. The BCSC's decision to hear and decide the matter does not risk any proliferation of litigation incidental to the appeal and assessment scheme. This is borne out by experience. In the single reported decision citing the chambers decision below, the BCSC had no difficulty distinguishing these unique factors from more routine matters properly within the jurisdiction of the Tax Court.[44]

50. For these reasons, no issue of public importance arises from the Court's decision to take jurisdiction over and decide this dispute.

B. CROWN IMMUNITY

51. Canada asserts that the Court of Appeal conflated the principle of constitutional immunity under s. 125 of the *Constitution Act, 1867* with the Crown's immunity from statute under s. 17 of the federal *Interpretation Act*.[45] Canada claims that, as a result of this confusion, the Court of Appeal erroneously "applied the statutory immunity principle" to permit bcIMC to evade its obligations as a supplier of services.[46]

52. This argument is incorrect for several reasons. First, it was Canada's substantive position below that the *ETA*'s taxation provisions applied to the Portfolios as recipients of services. bcIMC's obligations as a supplier were not engaged.[47] As Canada concedes at para. 55 of the Applicant's Memorandum, the Court of Appeal's decision did not involve any determination as to bcIMC's obligations, or immunity, as a supplier.

53. Secondly, this argument misstates the basis for the decisions below, which concluded that bcIMC, in respect of the assets in the Portfolios, is immune from taxation under s. 125 of the *Constitution Act, 1867*. bcIMC's immunity arising from statute did not form the foundation of these decisions.

---

[44] *Scotia Mortgage Corporation v. Gladu*, 2017 BCSC 1182 at paras. 34-36.

[45] Section 17 of the *Interpretation Act*, R.S.C. 1985, c. I-21, provides that no enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives, except as mentioned or referred to in the enactment.

[46] Applicant's Memorandum, para. 48.

[47] See *e.g.*, BCCA Reasons, paras. 75, 77.

54. For the reasons set out in the next section, no error and no issue of public importance arises from the courts' determination as to bcIMC's constitutional immunity.

(a) Constitutional Immunity from Taxation

55. Section 125 of the *Constitution Act, 1867* provides as follows:

> No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

56. Crown agents are entitled to immunity arising from s. 125 when holding property within their statutory mandate.[48]

57. Canada argues that the Court of Appeal declined to follow prior decisions of this Court in recognizing bcIMC's constitutional immunity in respect of the Portfolios. In so doing, Canada disregards the clear findings made below respecting bcIMC's ownership and management of the Portfolios, which distinguishes those cases from the one at bar.

58. The courts below found that the assets in the Portfolios are property belonging to bcIMC, are held and managed under bcIMC's statutory mandate, and that the *PSPPA*'s statutory trust does not impair the Portfolios' Crown status as it does not identify any separate beneficial interest.[49] Based upon these conclusions of fact or mixed fact and law, the decisions below represent a straightforward application of s. 125.

59. The decisions Canada holds up as inconsistent with the foregoing, *Calgary & Edmonton Land Co. v. Alberta (Attorney General)* (1911), 45 S.C.R. 170, and *Smith v. Vermillion Hills (Rural Municipality)*, [1916] A.C. 569 (J.C.P.C.), were properly distinguished on their facts by the Court of Appeal.[50]

60. In *Calgary & Edmonton Land Co.* the whole beneficial interest of the subject property had passed to the Calgary and Edmonton Land Company, with the Crown remaining as bare trustee only. That beneficial interest was taxable. In *Vermillion Hills*, a privately

---

[48] *Westbank First Nation v. British Columbia Hydro & Power Authority*, [1999] 3 S.C.R. 134 at 138.
[49] BCSC Reasons, paras. 8, 130-136; BCCA Reasons, paras. 109, 113.
[50] *Calgary & Edmonton Land Co. v. Alberta (Attorney-General)* (1911), 45 S.C.R. 170; *Smith v. Vermillion Hills (Rural Municipality)*, [1916] A.C. 569 (J.C.P.C.).

held leasehold interest was found liable to municipal taxation, that interest being distinct from the underlying federal ownership of the property.[51]

61. The Court of Appeal held that those decisions were inapplicable. In contrast to bcIMC's ownership of the Portfolios, those cases involved taxation of an interest distinct from the Crown's.[52] This conclusion involved no misapplication of principle.

62. What then remains of Canada's argument respecting constitutional immunity is the assertion that the Court of Appeal erred in failing to recognize that a "*de facto* beneficial interest" remains vested in pension plan members, and that interest is liable for taxation as it does not enjoy constitutional immunity.[53]

63. Canada identifies no basis on which recognized constitutional principles have been disregarded or misapplied. Canada identifies no authority for the proposition that a "*de facto* beneficial interest" is known to law in any form. An applicant does not demonstrate an issue of public importance by the mere assertion of some novel theory of law unsupported by any authority or analysis.

64. Nor is there any foundation for Canada's assertion that a residual non-Crown interest remains in money and securities placed with bcIMC.[54] The *PSPPA* and *Regulation* create a specific structure by which bcIMC hold assets in a statutory trust, providing, among other things, that participating funds have no ownership interest in any of the assets in the Portfolios. It is uncontroversial that legislation may modify the common law, including the law of trusts. In *First Vancouver Finance v. M.R.N.*, [2002] 2 S.C.R. 720, the Court explained as follows in the context of a deemed statutory trust arising under the *Income Tax Act* for source deductions not remitted within the time required:

> 34. … since the trust is a deemed statutory trust, it is not governed by common law requirements, and, in this regard, the ongoing acquisition of trust property does not present a conceptual difficulty. I emphasize that it is open to Parliament to characterize

[51] BCCA Reasons, paras.107-108.
[52] BCCA Reasons, para. 109.
[53] Applicant's Memorandum, para. 41.
[54] Applicant's Memorandum, para. 39.

> the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law.[55]

65. In the present context, the *PSPPA* and *Regulation* have created a statutory trust with no identified beneficiary. Indeed, there could be no certainty of trust *res* attracting any beneficial interest given that "Ownership in any asset in a portfolio must not be attributed to a participating fund."[56]

66. Having concluded that bcIMC enjoys constitutional immunity in respect of the assets in the Portfolios, the Court held that the provisions of the *ETA*, however characterized, could not apply to reduce the scope of that immunity.[57] That conclusion does not evidence any confusion as to the relationship between bcIMC's constitutional immunity from taxation and its statutory immunity under s. 17 of the *Interpretation Act*.

67. In any event, as set out below and as was argued below, bcIMC's immunity from statute presents an independent, dispositive basis for bcIMC's immunity from GST/Harmonized Sales Tax ("**HST**") that does not require resort to s. 125.

(b) Statutory Immunity

68. Section 17 of the federal *Interpretation Act* codifies the principle that the Crown is immune from statute unless an enactment specifies otherwise.

69. Section 122 of the *ETA* is the only relevant provision in that statute's Part IX, "Goods and Services Tax", that expressly references Her Majesty as contemplated by s. 17 of the *Interpretation Act*. Whereas s. 122(1)(a) provides that Part IX is binding on Her Majesty in right of Canada, s. 122(1)(b) provides that Part IX is only binding "on Her Majesty in right of a province in respect of obligations as a supplier to collect and to remit tax in respect of taxable supplies made by Her Majesty in right of the province".[58]

70. This case is not about bcIMC supplying taxable supplies to a third party. No taxable supply can arise in the context of the Portfolios unless certain provisions of the *ETA* are

---

[55] *First Vancouver Finance v. M.R.N.*, [2002] 2 S.C.R. 720 at para. 34.
[56] *Regulation*, s. 4(4).
[57] BCCA Reasons, para. 114.
[58] *ETA*, s. 122.

applied to create a distinction between bcIMC as trustee and the Portfolios as trust property. However, in contrast to s. 122(1)(b), those provisions are not stated to be applicable to Her Majesty and therefore do not apply to bcIMC, including in respect of the Portfolios.

71. Those provisions – the *ETA*'s "deemed trust" provisions – were relied on by Canada in the courts below. Canada argued that ss. 123(1) and 267.1(5)(a) of the *ETA* had the effect of creating a separate legal person, the trust, which could be liable as a "recipient" of services provided by bcIMC.[59] In other words, Canada relied upon a distinction created by the *ETA* to assert that a transaction had occurred.

72. No such distinction exists at common law. At common law, a trust is not a legal person and property held in trust does not have legal personality. Acts performed on behalf of the trust are performed by the trustee. Indeed, Canada acknowledged in the Court of Appeal that absent application of the *ETA*'s "deemed trust" provisions, there is no separation of bcIMC from the Portfolios and no transaction that could attract taxation obligations.[60]

73. As bcIMC argued, and as the Court found, the Portfolios are property belonging to bcIMC. Therefore, in order to apply the "deemed trust" provisions to create and then tax a "transaction" in this context, it would be necessary to apply those provisions to bcIMC. However, as the "deemed trust" provisions are not stated as applying to the Crown, s. 17 of the *Interpretation Act* makes them inapplicable to bcIMC.

74. For these reasons, the impact of s. 17 of the *Interpretation* Act is such that no transaction arises when bcIMC manages the assets in the Portfolios. In these circumstances, the Portfolios cannot be liable for tax as "recipients" of services. As no supply has occurred, there is no tax obligation for bcIMC to collect and remit.

75. Canada, incorrectly, argues this application as though a taxable transaction was found to have arisen but bcIMC had somehow escaped its obligations to collect and remit the tax. This is simply wrong. No such finding was made and no such transactions occurred. On

---

[59] BCCA Reasons, para. 74.
[60] BCCA Reasons, para. 110.

consideration of the conclusions that were drawn by the courts below, no issue of public importance arises with respect to bcIMC's statutory obligations to collect and remit tax. Canada's stated concerns with respect to the consistent application of the GST are simply not engaged.

(c) Proposed Commercial Supplier Comparison

76. Finally, and in response to Canada's position that a matter of public importance could arise by comparing bcIMC to a private commercial supplier, this is simply not the case.[61] This is not a position that was advanced below; no evidence was developed or findings made that could support such an argument. There is no factual foundation on which to adjudicate such an issue and bcIMC does not accept that private investment managers could or do provide "identical services".[62]

77. Furthermore, in managing the assets in the Portfolios, bcIMC acts within a valid statutory mandate and the competence of the Province to set up, in the manner it determines fit, an investment management corporation to manage funds placed with it by public sector pension plans and other sources is unchallenged.

78. For the foregoing reasons, there is no issue of public importance arising from the conclusion that bcIMC's Crown immunity extends to the Portfolios. No constitutional principle has been put in dispute by the decisions below, there has been no departure from the long established s. 125 jurisprudence, and no potential issue of broader application has been identified.

[61] Applicant's Memorandum, paras. 34(b), 51, 54.
[62] Applicant's Memorandum, para. 54.

PART IV – SUBMISSION RESPECTING COSTS

79. bcIMC seeks costs in the event the application for leave to appeal is dismissed. Alternatively, if leave is granted, then costs should be in the cause.

PART V – ORDER SOUGHT

80. bcIMC seeks an order dismissing the application for leave to appeal with costs.

CONDITIONAL APPLICATION FOR LEAVE TO CROSS APPEAL

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

81. In the event Canada's application is granted, bcIMC seeks leave to cross appeal the declaration issued below that the Agreements are binding on bcIMC.

82. The decisions below, in their treatment of the Agreements issue, serve to highlight the prevailing uncertainty regarding both: (a) circumstances in which intergovernmental agreements are legally enforceable; and (b) how such agreements may be made binding on third parties. Given the importance of intergovernmental agreements in relations between orders of government, and their effects on third parties, this Court should take the opportunity to clarify the law in these areas in the event it decides to grant leave to appeal on Canada's application.

83. On the first issue, this Court has previously recognized that intergovernmental agreements are distinct from ordinary contracts and may or may not be enforceable. However, no framework has been adopted for ascertaining enforceability. The Court of Appeal's decision, borrowing from Australian case law, has introduced a novel and problematic approach into Canadian law. That approach does not provide clear guidance to assess enforceability or clear theoretical grounding. In this case, it has had the effect of recognizing legal obligations where Canada and British Columbia addressed but expressly chose not to include a binding dispute resolution provision in their agreements.

84. With respect to how third parties, including Crown agents, may be bound, the decisions below represent a conclusion, not found in this Court's extant jurisprudence or in the academic commentary, that an intergovernmental agreement may bind a third party without any express legislative provision implementing the agreement. This, in effect, represents a significant incursion by the executive on the rights of third parties.

B. FACTS

85. bcIMC relies on the facts set out above in its Response to the Application for Leave to Appeal. Set out in this section are the additional facts relevant to the questions in issue identified on this conditional cross appeal application.

1. The Agreements

86. The Agreements in issue are two tax agreements between Canada and British Columbia: the Reciprocal Taxation Agreement (the "**RTA**") and the Comprehensive Integrated Tax Coordination Agreement (the "**CITCA**").[63]

87. The RTA, stated to be effective as of July 1, 2010, provides for Canada and British Columbia to pay each other's sales taxes and other specific taxes on goods and services in certain circumstances.[64] Under the RTA, British Columbia agreed to pay GST/HST, with provincial entities listed on the RTA's Schedule "A" entitled to a rebate of tax paid.[65]

88. The CITCA, which is relevant to the period November 30, 2009 to April 1, 2013, was a step in the implementation of the HST in British Columbia.[66] It ceased to be effective when British Columbia withdrew from the HST regime and returned to a GST/Provincial Sales Tax model.[67] Like the RTA, the CITCA provides for a "pay and rebate" scheme whereby Canada and the Province agree to pay HST on the purchase of taxable goods and services, with provincial entities listed on Schedule "A" to the RTA entitled to a rebate.[68]

---

[63] RTA, Amended Petition, Tab C.1, Appendix "A"; CITCA, Amended Petition, Tab C.1, Appendix "B".
[64] BCSC Reasons, paras. 15-16.
[65] BCSC Reasons, para. 17.
[66] BCSC Reasons, para. 19.
[67] BCCA Reasons, para. 21.
[68] BCSC Reasons, para. 22.

89. The Agreements were each authorized by Order in Council stating that "approval is given to the Minister of Finance" to enter into the agreement.[69] The Agreements have not been implemented by legislation into the law of British Columbia.[70]

90. While the Agreements each purport to bind the agents of the Province to obligations thereunder, the only parties to the Agreements are Canada and British Columbia.[71]

91. Neither provides for a binding dispute resolution mechanism:

(a) Section 9 of the RTA provides that the parties may refer a dispute to a board appointed by the parties to review the issue and prepare a report. The parties are at liberty to approve or reject the board's recommendations;[72]

(b) Part XIV of the CITCA provides that "[b]est efforts will be exercised by federal and provincial officials to reach consensus in respect of issues arising in respect of matters governed by this Agreement". Unresolved disputes are to be referred to the relevant federal and provincial ministers, who may, in turn, refer the issue to a third party "for consideration and advice".[73]

92. The Agreements reflect the long-standing joint understanding between Canada and British Columbia that they are immune from payment of each other's taxes.[74] Each of the Agreements expressly provides that, by entering into the agreement, the parties are not

---

[69] O.I.C. 485/2010, Tab C.2, Exhibit "B" (RTA); O.I.C. 661/2009, Tab C.1, Appendix B.
[70] While British Columbia enacted the *Consumption Tax Rebate and Transition Act*, S.B.C. 2010 c. 5, to implement the HST, the provisions of the CITCA itself were not implemented by way of legislation in British Columbia.
[71] RTA, s. 3, Amended Petition, Tab C.1, Appendix "A"; CITCA, s. 51, Amended Petition, Tab C.1, Appendix "B".
[72] BCCA Reasons, para. 29; RTA, s. 9, Amended Petition, Tab C.1, Appendix "A".
[73] BCCA Reasons, para. 30; CITCA, Part XIV, Amended Petition, Tab C.1, Appendix "B".
[74] BCSC Reasons, paras. 16, 156.

deemed to have surrendered, abandoned or impaired any of their respective constitutional powers, rights, privileges or authorities.[75]

2. The Dispute

93. The applicability of the Agreements to bcIMC formed part of a decade-long dispute between Canada and the Province respecting bcIMC's obligation to pay GST/HST in respect of the Portfolios.[76]

94. Although Canada had maintained that the Agreements formed a basis for assessing bcIMC under the *ETA*, it resiled from this position when revised working papers were issued prior to the hearing of the Petition.[77] Thus, while Canada no longer asserts it can assess bcIMC under the Agreements, it relies on the Agreements as an alternative position if bcIMC is immune from taxation under the *ETA*. Canada asserts in this regard that bcIMC is contractually bound, by virtue of the Province's commitments in the Agreements, to pay "tax" on receipt of taxable supplies.

95. A further issue, not raised in the Petition, arises if the Agreements are applicable to bcIMC: whether bcIMC, in respect of the Portfolios, is entitled to a rebate under the listing for "Public Sector Pension Trust Accounts" on Schedule "A" to the RTA. This question was not placed before the courts below, which did not rule on whether the Agreements ultimately impose liability on bcIMC for amounts in lieu of tax, which Canada refers to in its argument as "tax".[78]

---

[75] RTA, s. 4, Amended Petition, Tab C.1, Appendix "A"; CITCA, s. 65, Amended Petition, Tab C.1, Appendix "B".
[76] BCSC Reasons, para. 25.
[77] BCSC Reasons, paras. 36, 96.
[78] BCCA Reasons, para. 127.

3. Decisions Below

(a) Chambers Decision

96. As noted above, bcIMC in the Petition sought declarations that the Agreements are not binding upon it, and are ineffective to alter or derogate from its immunity from taxation (the "**Agreements Claim**").

97. After first finding that bcIMC was immune from taxation under the *ETA*, the chambers judge found that the Agreements Claim was "ripe" and in need of resolution, having been part of a concrete dispute extending over a decade.[79] The chambers judge accordingly proceeded to consider the Agreements Claim on its merits.

98. bcIMC advanced two substantive arguments in support of the Agreements Claim: (a) the Agreements are not binding, in a contractual sense, on even the signatories thereto; and (b) even if binding on their signatories, the Agreements are not binding on bcIMC, a third party, because they had not been implemented by legislation.

99. The chambers judge addressed only the second of these arguments. He appears to have assumed, implicitly, that the Agreements create contractual obligations as between Canada and British Columbia.

100. The chambers judge accepted that "specific legislative authority", beyond mere authorization of the Agreements, was required to bind bcIMC to them. He found such legislation in s.16(6) of the *PSPPA*, which provides as follows:

> **British Columbia Investment Management Corporation established**
>
> 16 …

[79] BCSC Reasons, paras. 159.

> (6) The investment management corporation, as an agent of the government, is not liable for taxation except as the government is liable for taxation.[80]

101. Accordingly, on the basis that s. 16(6) of the *PSPPA* constituted legislative implementation of the Agreements on bcIMC, the chambers judge issued a declaration that bcIMC was bound by the provisions of the Agreements in respect of the assets held in the Portfolios.[81]

(b) Appeal Decision

102. On appeal, the Court considered whether the Agreements were binding as between the parties and whether they had been made binding on bcIMC.

103. On the first issue, the Court accepted that intergovernmental agreements are "generally unenforceable", including because of the principle that the Sovereign cannot contract with herself. However, relying on *South Australia v. Commonwealth* (1962), 108 C.L.R. 130 (Austl. H.C.),[82] the Court found that an exception arises where "the agreement bears the hallmarks of a legally binding contract".[83] The Court adopted an analysis based on a "spectrum" between agreements that are merely (unenforceable) political declarations and those intended to create legal relations. Where any particular agreement falls on the spectrum was held to depend on the circumstances of the case and whether the parties intended to be legally bound.[84]

104. The Court found that the Agreements bear the hallmarks of agreements intended to create legally binding obligations in view of the following considerations:

(a) Use of language contemplating rights and entitlements, as opposed to "aspirational" language;

---

[80] BCSC Reasons, paras. 166; *PSPPA*, s. 16(6).
[81] BCSC Reasons, para. 159.
[82] *South Australia v. Commonwealth* (1962), 108 C.L.R. 130 (Austl. H.C.)
[83] BCCA Reasons, paras. 129.
[84] BCCA Reasons, paras. 129, 142.

(b) While the Agreements contemplated further legislative measures to give effect to them, they are not descriptions of intended legislation;

(c) Use of language revealing an intention to be bound; and

(d) An express binding dispute resolution mechanism is not essential for an intergovernmental agreement to be binding, including because enforcement is available by statute – here under s. 19 of the *Federal Courts Act*, 1985, c. F-7, and s. 1(1)(a) of the *Federal Courts Jurisdiction Act*, R.S.B.C. 1996, c. 135.[85]

105. The Court accordingly concluded that Canada and the Province intended to be bound by the Agreements and, as a result, they are binding upon those parties.[86]

106. Addressing the second issue, whether the Agreements are binding on bcIMC, the Court expressly refrained from pronouncing on whether legislative implementation was necessary. The Court's analysis proceeded on the assumption, for the purpose of bcIMC's argument, that such legislation was necessary.[87]

107. In its analysis, the Court accepted the finding below that s. 16(6) of the *PSPPA* binds bcIMC to the Agreements' obligations. The Court reasoned that although s. 16(6) was not an express provision implementing the Agreements' obligations on bcIMC, an express provision was not necessary. It was sufficient, the Court found, that the "plain meaning" of s. 16(6) bound bcIMC "to all obligations to pay taxes assumed by the Province".[88]

108. The Court therefore affirmed the declarations, made at first instance, that the Agreements are binding on bcIMC in respect of the Portfolios.

---

[85] BCCA Reasons, paras. 143-150.
[86] BCCA Reasons, para. 151.
[87] BCCA Reasons, para. 153.
[88] BCCA Reasons, para. 153-154.

PART II – QUESTIONS IN ISSUE

109. The proposed conditional cross appeal raises the following issues of national and public importance:

(a) In what circumstances do intergovernmental agreements give rise to enforceable contractual obligations binding the parties thereto?

(b) What is required to bind third parties to provisions of an intergovernmental agreement?

PART III – ARGUMENT

A. ENFORCEABILITY OF INTERGOVERNMENTAL AGREEMENTS ON THE PARTIES THERETO

110. Intergovernmental agreements have become an indispensable tool in the work of co-operative federalism. Their subject matter extends to virtually all areas of public policy affecting, among other norms, the constitutional division of powers.[89]

111. Despite their ubiquity, the legal status of intergovernmental agreements (including the extent of judicial oversight) remains largely unclarified in Canadian law. As Johanne Poirier has noted, the jurisprudence in this area is surprisingly limited, given the frequency of the practice.[90]

112. Indeed, when addressing intergovernmental agreements, this Court has gone no further than noting that such agreements are distinct from ordinary contracts and may be binding upon the parties without further implementation.[91] The Court has not adopted any framework for ascertaining the enforceability or justiciability of such agreements.

113. In adopting an analysis based on the *South Australia* case, locating the agreement along a "spectrum", the Court of Appeal has introduced a novel and problematic approach into Canadian law. While reference to a "spectrum" may correctly describe the range of intergovernmental agreements, as a legal approach it is ill-suited to determining enforceability given that an agreement either will or will not be enforceable. The Court of Appeal has provided no guidance as to where along this "spectrum" an agreement must fall in order to be legally binding.[92]

---

[89] *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557, (per LeBel and Deschamps JJ. dissenting, but not on this point), para. 85; See also: Bankes, Nigel. "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991), *29 Alta. L. Rev. 792* at 795.

[90] Poirier, Johanne. Une Source paradoxale du droit constitutionnel Canadian: les ententes intergouvernementales, (2009), *Revue québécoise de droit constitutionnel 1* at 18.

[91] See: *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] 3 S.C.R. 309 at para. 11.

[92] See: BCCA Reasons, para. 142

114. Furthermore, the Court of Appeal did not resolve the structural barrier identified by Karen Horsman and Gareth Morley in *Governmental Liability: Law and Practice*, that intergovernmental agreements are never technically contracts because of the principle that the Sovereign cannot contract with herself. While the Court of Appeal expressly accepted this principle, it also concluded, without explanation, that the appropriate intent and indicia create an "exception" to it. In so doing, the Court failed to grapple with the proposition that, absent agreement to a binding dispute resolution mechanism or legislative implementation, intergovernmental agreements are not legally binding. [93]

115. By concluding, through this reasoning, that the Agreements are enforceable as between the parties, the Court adopted an approach prone to uncertainty and failed to articulate any legal foundation on which enforceable legal obligations may arise between different parts of the Crown. That approach, in this case, had the effect of recognizing legally binding obligations despite Canada and British Columbia's express decision to only include non-binding dispute resolution mechanisms in their agreements. In our submission, absent a binding dispute resolution mechanism included in the Agreements or legislation adopting them, there cannot be binding legal obligations enforceable by a court of competent jurisdiction between different parts of the Crown.

116. The Court of Appeal's decision clearly highlights the need for further guidance in this area. In light of the importance of intergovernmental agreements in the Canadian legal and constitutional order, and their impact on third parties (as addressed below), this case presents a good opportunity to clarify the proper approach to enforceability in the event that Canada's leave application is granted.

B. BINDING THIRD PARTIES TO INTERGOVERNMENTAL AGREEMENTS

117. The enforceability of intergovernmental agreements raises particular concerns where, as here, the agreement purports to bind third parties. Third parties, including Crown agents,

---

[93] Horsman, Karen and Gareth Morley, eds. *Government Liability: Law and Practice*. Aurora, Ont.: Canada Law Book, 2007 (loose-leaf updated November 2017, release 27) at s. 2.20.40(3); *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] 3 S.C.R. 309 at para. 11.

require certainty as to their rights and obligations but do not have access to statutory processes (such as under s. 19 of *Federal Courts Act*, 1985, c. F-7) permitting "controversies" between orders of government to be addressed.[94]

118. The Court of Appeal's decision departs from the settled law that, in order to make an intergovernmental agreement binding on third parties, legislative implementation is required. In *Reference re Anti-Inflation Act*, the Court explained this requirement as follows:

> … what is at issue is the right of the Crown, although duly protected by an order in council, to bind its subjects in the Province to laws not enacted by the Legislature nor made applicable to such subjects by adoption under authorizing legislation. There is no principle in this country, as there is not in Great Britain, that the Crown may legislate by proclamation or order in council to bind citizens where it so acts without the support of a statute of the Legislature: see *Dicey*, Law of the Constitution (10th ed. 1959), pp. 50-54.
> …
>
> It is one thing for the Crown in right of a Province to contract for itself; it is a completely different thing for it to contract for the application to its inhabitants, and to labour organizations in the Province, of laws to govern their operations and relations without statutory authority to that end. This would be, in effect, to legislate in the guise of a contract.[95]
>
> [Emphasis added.]

119. In order to implement an intergovernmental agreement, an express statutory provision is required. Language along the lines of as "as if enacted in this Act" is necessary. Statutory authorization to enter into the agreement will not suffice.[96]

---

[94] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 19.
[95] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 433. See also: *M.G.E.A. v. Manitoba*, [1978] 1 S.C.R. 1123 at para. 22.
[96] *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557 (per LeBel and Deschamps JJ. dissenting, but not on this point), para. 86 citing Bankes, Nigel. "*Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia*" (1991), *29 Alta. L. Rev. 792* at 828.

120. The Court of Appeal failed to recognize or apply this requirement.

121. First, the Court of Appeal expressly demurred on the question of whether legislative implementation was required at all. On this point, the Court limited its analysis by "assuming" (without deciding) that legislation was necessary to bind bcIMC to the Agreements' obligations.[97]

122. The Court's failure to properly consider this requirement carried through into the next stage of its analysis. The Court concluded that the Agreements were binding on bcIMC by virtue of s. 16(6) of the *PSPPA*. Section 16(6) simply provides that bcIMC is "not liable for taxation except as the government is liable for taxation". It makes no reference to federal taxation, to the implementation of agreements, or to or how amounts payable by an agreement can amount to taxation. The Court of Appeal acknowledged that s. 16(6) was not an express provision binding bcIMC to the Agreements but found that an express provision was not necessary.[98]

123. This approach represents a significant departure from the established jurisprudence, and an extension of the executive's powers, in that it allows for third parties to be bound by intergovernmental agreements in the absence of legislative implementation. In contrast to the established law, it introduces uncertainty as to when and to what extent a third party has been bound by an agreement. For the reasons stated in *Reference re Anti-Inflation Act*, as set out above, the potential impacts on third parties, including Crown agents, are significant.

124. If this Court grants leave to Canada it should therefore take the opportunity presented by this case to clarify how intergovernmental agreements may be made binding on third parties.

---

[97] BCCA Reasons, para. 153.
[98] BCCA Reasons, para. 153-154.

PART IV – SUBMISSION RESPECTING COSTS

125. bcIMC seeks its costs of this conditional application for leave to cross appeal.

PART V – ORDER SOUGHT

126. As set out in the Response to the Application for Leave to Appeal, bcIMC seeks an order dismissing the application for leave to appeal with costs.

127. In the alternative, if the application for leave to appeal is granted, bcIMC seeks an order granting leave to cross appeal with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF MAY, 2018

_____

Craig A.B. Ferris, Q.C.
Gordon Brandt

Counsel for the Respondent,
British Columbia Investment Management Corporation

PART VI – TABLE OF AUTHORITIES

PART VII – STATUTORY PROVISIONS

	STATUTE	SECTION
1.	*Constitution Act, 1867*	s. 125
2.	*Consumption Tax Rebate and Transition Act*, S.B.C. 2010, c. 5	
3.	*Excise Tax Act*, R.S.C. 1985, c. E-15	ss. 122, 123(1), 267.1(5)(a)
4.	*Federal Courts Act*, R.S.C. 1985, c. F-7	s. 19
5.	*Federal Courts Jurisdiction Act*, R.S.B.C. 1996, c. 135	s. 1(1)(a)
6.	*Financial Administration Act*, R.S.B.C. 1996, c. 138	
7.	*Interpretation Act*, R.S.C. 1985, c. I-21	s. 17
8.	*Pooled Investment Portfolios Regulation*, B.C. Reg. 447/99	ss. 1, 3-5
9.	*Public Sector Pension Plans Act*, S.B.C. 1999, c.44	ss. 15-19, 20(1)(d)(iv), 20(5), 21