



SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) v. British Columbia Investment Management Corp., 2019 SCC 63

APPEAL HEARD: May 13, 2019
JUDGMENT RENDERED: December 13, 2019
DOCKET: 38059

BETWEEN:

Attorney General of Canada
Appellant/Respondent on cross-appeal

and

British Columbia Investment Management Corporation
Respondent/Appellant on cross-appeal

and

Her Majesty The Queen in Right of the Province of British Columbia
Respondent/Respondent on cross-appeal

- and -

**Attorney General of Ontario and
Attorney General of Alberta**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 114)

Karakatsanis J. (Abella, Moldaver, Brown, Rowe and Martin JJ. concurring)

REASONS DISSENTING IN PART:
(paras. 115 to 171)

Wagner C.J.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

CANADA (A.G.) v. B.C. INVEST. MANAGEMENT CORP.

Attorney General of Canada

Appellant/Respondent on cross-appeal

v.

British Columbia Investment Management Corporation

*Respondent/Appellant
on cross-appeal*

and

**Her Majesty The Queen in Right of the
Province of British Columbia**

Respondent/Respondent on cross-appeal

and

**Attorney General of Ontario and
Attorney General of Alberta**

Intervenors

**Indexed as: Canada (Attorney General) v.
British Columbia Investment Management Corp.**

2019 SCC 63

File No.: 38059.

2019: May 13; 2019: December 13.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Intergovernmental immunity from taxation — Goods and services tax — Scope of intergovernmental immunity — Provincial Crown corporation created by legislature to provide investment management services to province's public sector pension plans and other Crown entities — Whether provincial Crown corporation required to collect and remit federal GST on costs it incurs in making investments in pooled investment portfolios — Whether provincial Crown corporation entitled to constitutional immunity from taxation — Constitution Act, 1867, s. 125 — Excise Tax Act, R.S.C. 1985, c. E-15, Part IX.

Taxation — Goods and services tax — Federal-provincial reciprocal taxation agreement — Whether agreements entered into by federal and provincial governments to pay the other's sales taxes are binding on other Crown entities — Whether agreements have legal effect of removing immunity from taxation that would otherwise be enjoyed by Crown agent.

In 1999, the legislature of British Columbia (the Province) created the British Columbia Investment Management Corporation (BCI) to provide investment management services to the Province's public sector pension plans and other Crown entities through the *Public Sector Pension Plans Act (PSPPA)*. On its creation, BCI

assumed ownership and management of the investment assets held in pooled investment portfolios (Portfolios), which formerly were held and managed by the Province's Minister of Finance. At the same time, the Province modernized its public sector pensions by creating a joint trusteeship structure, to allow both pension plan members and their employers to participate in the management of the public sector pension plans. These changes were intended to create a degree of separation between the government and the management of its investment funds and the public sector pensions.

By virtue of two separate agreements, the Province and Canada have agreed to pay the other's sales taxes in certain circumstances. Under the Reciprocal Taxation Agreement (RTA), Canada agreed to pay certain provincial taxes and fees and the Province agreed to pay the taxes imposed under the federal *Excise Tax Act*, Part IX (*ETA*). Provincial entities listed in Schedule A of the RTA could apply for a rebate of any GST paid. BCI was added to Schedule A in 1999 but removed in 2003. Under the Comprehensive Integrated Tax Coordination Agreement (CITCA), the Province and Canada agreed to pay HST on supplies purchased by their respective governments and agents. The CITCA was in effect until 2013, when the Province withdrew from the HST regime and returned to the GST/PST model.

Following BCI's removal from Schedule A of the RTA in 2003, Canada Revenue Agency (CRA) began to question whether BCI was entitled to claim immunity from GST in respect of the expenses it incurred in managing the Portfolios.

In December 2013, BCI filed a petition in the Supreme Court of British Columbia, seeking declarations that as a statutory Crown agent, BCI is immune from taxation in respect of the assets it holds in the Portfolios, and is not bound by either the RTA or the CITCA or the payment obligations found in those agreements.

Canada sought to strike BCI's petition, arguing that the dispute should be heard by the Tax Court of Canada, not the Supreme Court of British Columbia but its motion was dismissed. The chambers judge held that the Supreme Court of British Columbia had jurisdiction to hear the petition, that BCI, as a statutory Crown agent, enjoys immunity under s. 125 of the *Constitution Act, 1867*, which states that no lands or property belonging to Canada or any Province shall be liable to taxation, and that BCI is bound by the taxation agreements. The Court of Appeal agreed. Canada appeals the holding that BCI is immune from taxation and BCI cross-appeals with respect to the binding nature of the agreements.

Held (Wagner C.J. dissenting in part): The appeal and cross-appeal should be dismissed.

Per Abella, Moldaver, **Karakatsanis**, Brown, Rowe and Martin JJ.: The chambers judge did not err in exercising his jurisdiction to decide BCI's petition. Both the scope and the timing of BCI's petition supports the chambers judge's characterization of BCI's claim and its decision to exercise its jurisdiction. In deciding whether to exercise its jurisdiction, a court must determine the essential nature of the claim. In this case, the chambers judge determined that the core of BCI's

petition was not an attack on the GST assessments but rather Canada's ability to tax BCI in the first place. He also concluded that the constitutional immunity and intergovernmental agreements issues were linked — if the immunity claim was successful, the agreements were the only way BCI could be required to pay GST. There is no reversible error in this analysis. The issues raised in BCI's petition go beyond the assessment of tax under the *ETA*, this case is about the rights, obligations, and duties of a Crown agent, under the Constitution and at common law. Furthermore, although challenges to the correctness of a tax assessment under the *ETA* fall within the exclusive jurisdiction of the Tax Court, at the time BCI filed its petition, the reassessments issued in 2015 had not yet been issued so the Tax Court had no jurisdiction over the dispute.

The *ETA*'s mechanism for imposing GST on the Portfolios would result in Crown property being subject to taxation. Therefore, s. 125 of the *Constitution Act, 1867*, renders the relevant provisions of Part IX of the *ETA* inapplicable in respect of the Portfolios. Part IX of the *ETA* governs the payment, collection and remittance of the federal GST (and HST, where applicable). Every recipient of a taxable supply must pay GST on the consideration paid for the supply. Suppliers registered under the *ETA* are required to collect GST and periodically remit it to the federal government. BCI uses two different structures to manage the assets placed with it for investment: investments are either held in the Portfolios or as segregated funds, separate and apart from the assets of the Portfolios. There is no dispute that the investment management services BCI provides outside the context of the Portfolios (i.e. in managing the

segregated funds) are taxable supplies for GST purposes. However, for the Portfolios, BCI recovers the costs of managing them from the income realized on the assets held in the Portfolios and does not collect GST on these amounts. Thus, the issue under the *ETA* does not relate to the nature of BCI's investment management activities but rather involves whether the Portfolios can be considered a "recipient" of a taxable supply under the *ETA*.

Section 123(1) of the *ETA* defines a "recipient" with reference to either the person who is liable to pay consideration for a supply of services or, if no consideration is payable, the person to whom a service is rendered. To fall within this definition, a recipient must also be a person. At common law, only natural persons and corporations have legal personalities; a trust does not. To capture transactions involving a wide range of entities, the *ETA* defines "person" and confers upon a trust a separate, artificial legal identity for tax purposes. The combined effects under the *ETA* is to impose GST collection, remittance and payment obligations on trusts and trustees in certain circumstances. For the purposes of determining whether BCI enjoys constitutional immunity, it is assumed that the Portfolios are "a trust" within the meaning of Part IX of the *ETA*. On this assumption, BCI would hold the Portfolio assets in trust for the benefit of the unit holders.

Applying the *ETA* to BCI and the Portfolios is further complicated by the fact that BCI is a provincial Crown agent. Intergovernmental immunity from taxation grants each level of government operational space to govern without interference and

seeks to maintain the federal-provincial distribution of property set out in the *Constitution Act, 1867*. Section 125 grants constitutional immunity from taxation when two requirements are met. First, the pith and substance of the impugned charge must constitute “taxation” within the meaning of ss. 91(3) or 92(2) of the *Constitution Act, 1867*. Second, the subject matter of the tax must be property belonging to the federal Crown in the case of a tax imposed by the provincial legislature and to the provincial Crown in the case of a tax imposed by Parliament. Where these two prerequisites are met, s. 125 applies and renders otherwise valid taxation provisions inapplicable in respect of Crown property.

In the instant case, there is no question that the federal GST falls squarely within the meaning of “taxation” in s. 91(3) of the *Constitution Act, 1867*, and that, as a statutory Crown agent, BCI enjoys the same constitutional immunity in respect of its property as the provincial Crown does. When the Crown holds property in trust, s. 125 of the *Constitution, 1867*, protects only the Crown’s interest in trust property from taxation. A private beneficial interest can therefore be taxed when the Crown holds legal title. However, if the tax is imposed on the Crown’s interest in the property, then constitutional immunity applies. In this case, the *ETA* uses a legal fiction to require a trust to pay tax on taxable services provided to it by its trustee. However, when the trustee is a provincial Crown agent, this mechanism runs afoul of s. 125 because it imposes tax on property legally owned by the Crown. The *ETA* does not impose GST on a distinct private beneficial ownership interest in this case. Therefore, the *ETA* is constitutionally inapplicable to the Portfolios.

BCI is subject to the RTA and the CITCA. In light of their clear wording, the agreements resemble private law contracts and were intended to create legally binding obligations for Canada and the Province. The *PSPPA* establishes that BCI's tax immunities and obligations follow those of the Province. Because the language of this provision is broad enough to include obligations voluntarily assumed by the Province, BCI is generally subject to the obligations set out in the agreements to the same extent that the Province would be. However, the nature of any specific obligations under the agreements is beyond the scope of this appeal.

Per Wagner C.J. (dissenting in part): There is agreement with the majority that the Supreme Court of British Columbia appropriately assumed jurisdiction over this litigation and that BCI is bound by the relevant intergovernmental taxation agreements between British Columbia and Canada. However, there is disagreement on the issue of immunity under s. 125 of the *Constitution Act, 1867*. BCI's legal title to the taxed property is insufficient to make it property "belonging to" the Province, as s. 125 requires, because the property was entrusted to BCI by private parties to hold and manage for their sole benefit in exchange for payment. The property is liable to taxation only because the private pension boards chose to make it the mechanism of payment for the services they received from BCI. Extending immunity under s. 125 in these circumstances does not protect the constitutional values of federalism and democracy that s. 125 exists to promote. Instead, it overshoots those purposes by giving private parties the benefit of an immunity from taxation to which they are not entitled, protecting the Province

from adverse contractual consequences, and providing BCI with an unjustified commercial advantage.

The unit holders are the beneficiaries of the funds BCI holds in trust. The investment management services that BCI provides for the Portfolios ultimately benefit the unit holders. It is the unit holders that are entitled to the income and capital gains generated by the Portfolios while they exist, and it is the unit holders that are entitled to the net proceeds on termination of the Portfolios. Neither BCI nor the Province has the ability or right to appropriate Portfolio assets. The only benefit BCI derives from the Portfolios is the recouping of its operating costs and capital expenditures from the funds therein, which reduces the value of the units and the ultimate return realized by the unit holders. The Province's involvement with the public sector pension plans is purely contractual. The pension boards, which form the bulk of the unit holders, are private parties. The real impact of the tax is borne by the private unit holders because BCI provides the services relating to the Portfolios for the benefit of the unit holders alone. Only the pension boards' choice to pay BCI indirectly by permitting it to take its payment from the trust makes the Portfolios the recipients under the *ETA* of the services that BCI provides. Had BCI and the pension boards agreed that BCI would bill the boards directly for its services instead of taking its payment from the Portfolios, the boards would have been the recipients under the *ETA* and would thus have been liable to pay GST.

Private parties cannot rely on s. 125 of the *Constitution Act, 1867*, to immunize themselves from paying tax on investment management services they receive from a Crown corporation. The interpretation of s. 125 should not overshoot the purposes of federalism and democracy. It is clear that Parliament can require private purchasers of provincial services to pay GST in respect of those services without running afoul of s. 125. Further, s. 125 is not intended to immunize the Crown from contractual consequences or other adverse commercial effects that it may bear as a result of the taxation of a private party. The commercial and contractual interests of the Crown cannot be favoured at the expense of those of private parties. In the instant case, the property does not belong to the Crown and is thus not immune under s. 125. Section 125 does not immunize property that private parties have placed with the Crown to hold in trust for their sole benefit from a tax on services that they have contracted to receive from the Crown in respect of that property. The property in substance belongs not to the Crown but to the private parties, and the Crown's legal title as trustee does not trigger the immunity. Extending the immunity here would overshoot s. 125's purposes by extending immunity to private parties' interests, relying on adverse contractual consequences for the Crown to extend the immunity, and rendering the Crown's assets more commercially attractive by making them a tax haven for private parties.

Extending the immunity would not advance s. 125's purposes. It would not advance s. 125's objective of preventing one level of government from appropriating the property of the other, or the fruits of that property, to its own use.

Further, holding that immunity does not apply in these circumstances would not undermine the Province's decision to allow BCI to hold the Portfolio assets in trust. Instead, it would merely impose appropriate tax consequences on a mode of payment for services chosen by BCI and its private clients. Nothing in the *PSPPA* or trust law requires the mode of payment that is said to give rise to s. 125 immunity. The *PSPPA* makes direct payment from the trust funds only one of multiple possible payment options available and also permits BCI to bill its clients directly for services rendered. Providing immunity is not necessary to protect the Province's operational space to govern. Moreover, requiring the Portfolios to pay GST would not put them at risk. BCI and the pension boards remain free to ensure that the GST is not paid from the trust funds by agreeing that the boards will pay BCI directly for its services, an option that is both provided for by the legislature and used by BCI and the boards for the segregated funds. Finally, applying immunity does not advance the constitutional value of democracy because this case is not about Parliament deciding how taxes levied by the Province should be spent. The Province has already decided how it should spend its tax revenues. It authorized the payment of tax funds to private pension boards in order to meet its contractual obligations to compensate provincial employees. Once the Province paid those funds to the private pension boards, they ceased to be public funds and became subject to the contractual terms of the joint trust agreements. The services at issue are thus provided by BCI to private parties that agreed to pay for those services. All Canada is trying to do is ensure that those private parties pay GST on those services.

Cases Cited

By Karakatsanis J.

Considered: *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004; *Quirt v. The Queen* (1891), 19 S.C.R. 510; **referred to:** *British Columbia Investment Management Corp. v. Canada (Attorney General)*, 2014 BCSC 1296, [2014] G.S.T.C. 93, aff'd 2015 BCCA 373, 80 B.C.L.R. (5th) 316; *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Johnson v. Minister of National Revenue*, 2015 FCA 51, 469 N.R. 326; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557; *Sorbara v. Canada (Attorney General)*, 2009 ONCA 506, 98 O.R. (3d) 673; *Aboriginal Federated Alliance Inc. v. Canada Customs and Revenue Agency*, 2002 ABCA 104, 303 A.R. 304; *Smith v. Canada*, 2006 BCCA 237, 61 B.C.L.R. (4th) 231; *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793; *Pintendre Autos Inc. v. The Queen*, 2003 TCC 818, 2004 D.T.C. 2596; *Whitford v. The Queen*, 2008 TCC 359, 2008 G.T.C. 638; *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551; *Province of Bombay v.*

City of Bombay, [1947] A.C. 58; *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225; *Nova Scotia Power Inc. v. Canada*, 2004 SCC 51, [2004] 3 S.C.R. 53; *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915; *Backman v. Canada*, 2001 SCC 10, [2001] 1 S.C.R. 367; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Attorney-General of British Columbia v. Esquimalt and Nanaimo R. Co.*, [1950] 1 D.L.R. 305; *De Mond v. The Queen* (1999), 99 D.T.C. 893; *C.I. Mutual Funds Inc. v. Canada*, [1997] G.S.T.C. 84, var'd [1999] 2 F.C. 613; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134; *City of Halifax v. Halifax Harbour Commissioners*, [1935] S.C.R. 215; *Re Canadian Broadcasting Corp. Assessment*, [1938] 4 D.L.R. 591, aff'd [1938] 4 D.L.R. 764; *Calgary & Edmonton Land Co. v. Attorney-General of Alberta* (1911), 45 S.C.R. 170; *Smith v. Rur. Mun. of Vermillion Hills* (1916), 30 D.L.R. 83; *City of Vancouver v. Attorney-General of Canada*, [1944] S.C.R. 23; *Phillips and Taylor v. City of Sault Ste. Marie*, [1954] S.C.R. 404; *Rural Municipality of Vermillion Hills v. Smith* (1913), 6 Sask. L.R. 366; *Regina v. County of Wellington* (1890), 17 O.A.R. 421;

Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373; *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; *South Australia v. The Commonwealth*, [1962] HCA 10, 108 C.L.R. 130; *Toronto District School Board v. R.*, 2009 TCC 39, [2009] G.S.T.C. 6; *Ottawa Hospital Corp. v. R.*, 2010 TCC 53, [2010] G.S.T.C. 15.

By Wagner C.J. (dissenting in part)

Valard Construction Ltd. v. Bird Construction Co., 2018 SCC 8, [2018] 1 S.C.R. 224; *Ehrcke v. Public Service Pension Board of Trustees*, 2004 BCSC 757, 32 B.C.L.R. (4th) 388; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134; *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004; *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236; *Calgary & Edmonton Land Co. v. Attorney-General of Alberta* (1911), 45 S.C.R. 170; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *City of Vancouver v. Attorney-General of Canada*, [1944] S.C.R. 23; *Phillips and Taylor v. City of Sault Ste. Marie*, [1954] S.C.R. 404; *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795; *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567; *R. v. Penunsi*, 2019 SCC 39; *Trident Holdings Ltd. v. Danand*

Investments Ltd. (1988), 64 O.R. (2d) 65; *De Mond v. The Queen* (1999), 99 D.T.C. 893; *Smith v. Rural Municipality of Vermilion Hills* (1914), 49 S.C.R. 563, aff'd (1916), 30 D.L.R. 83; *Quirt v. The Queen* (1891), 19 S.C.R. 510; *Regina v. County of Wellington* (1889), 17 O.R. 615; *Regina v. County of Wellington* (1890), 17 O.A.R. 421.

Statutes and Regulations Cited

Comprehensive Integrated Tax Coordination Agreement Between the Government of Canada and the Government of British Columbia, arts. 1, 38 to 41, 42, 51, 65.

Constitution Act, 1867, Part VIII, ss. 91(3), 92(2), 125.

Constitution Act, 1982, s. 52(1).

Excise Tax Act, R.S.C. 1985, c. E-15, Part IX, ss. 122, 123(1), 165, 221(1), 225(1), 228(1), (2), 267.1(5), 306, 309(1).

Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8, ss. 32, 33.

Financial Administration Act, R.S.B.C. 1996, c. 138, s. 43.

Financial Administration Act, S.B.C. 1981, c. 15, s. 36.

Funds Investment and Management Agreement Between British Columbia Investment Management Corporation and the Teachers' Pension Board of Trustees, ss. 1.1.22, 2.1, 2.2, 2.4.3, 5.1, 8, 8.2, 9.1.2, 12.1.1, Sch. A, ss. 2, 2 to 4, 5.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 104(1).

Interpretation Act, R.S.B.C. 1996, c. 238, ss. 14(1), 29.

Interpretation Act, R.S.C. 1985, c. I-21, ss. 8.1, 17.

Ministry of Intergovernmental Relations Act, R.S.B.C. 1996, c. 303, s. 4.

Pooled Investment Portfolios Regulation, B.C. Reg. 447/99, ss. 1, 2, 4, 5, 6(2), 10(1), (2), (3), (4), (5), 11, 14.

Pooled Investment Portfolios Regulation, B.C. Reg. 84/86, ss. 3, 4, 11.

Public Sector Pension Plans Act, S.B.C. 1999, c. 44, Part 3, ss. 15, 16(5), (6), 17, 18(2), (3), (4), 18.1, 20, 21(2)(b), 24(1), 25.1.

Public Service Pension Plan Joint Trust Agreement, recitals C(c), (d), preamble, arts. 3, 7.2, 7.3, 10.3, 13.

Reciprocal Taxation Agreement (Canada — British Columbia), preamble, arts. 1, 3, 4, 6(d), 9, 15, Sch. A.

Tax Court of Canada Act, R.S.C. 1985, c. T-2, s. 12(1).

Authors Cited

Bale, Gordon. “Reciprocal Tax Immunity in a Federation — Section 125 of the Constitution Act, 1867 and the Proposed Federal Tax on Exported Natural Gas” (1983), 61 *Can. Bar. Rev.* 652.

Bankes, Nigel. “Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia” (1991), 29 *Alta. L. Rev.* 792.

British Columbia. Legislative Assembly. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, No. 25, 3rd Sess., 36th Parl., July 14, 1999, p. 14409.

Canada. Canada Revenue Agency. *GST/HST Policy Statement P-015: Treatment of Bare Trusts under the Excise Tax Act*, July 20, 1992 (online: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/p-015/treatment-bare-trusts-under-excise-tax-act.html>; archived version: https://scc-csc.ca/cso-dce/2019SCC-CSC63_1_eng.pdf).

Canada. Canada Revenue Agency. *GST/HST Technical Information Bulletin B-068: Bare Trusts*, January 20, 1993 (online: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/b-068/bare-trusts.html>; archived version: https://scc-csc.ca/cso-dce/2019SCC-CSC63_2_eng.pdf).

Culat, Didier. “Coveting Thy Neighbour's Beer: Intergovernmental Agreements Dispute Settlement and Interprovincial Trade Barriers” (1992), 33 *C. de D.* 617.

Cullity, Maurice C. “Legal Issues Arising Out of the Use of Business Trusts in Canada”, in Timothy G. Youdan, ed., *Equity, Fiduciaries and Trusts*. Toronto: Carswell, 1989, 181.

- Hogg, Peter W., Patrick J. Monahan, and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011.
- Horsman, Karen, and Gareth Morley. *Government Liability: Law and Practice*. Toronto: Thomson Reuters, 2006 (loose-leaf updated 2016, release 24).
- Jacyk, David. “The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts” (2008), 56 *Can. Tax J.* 661.
- Kennett, Steven A. “Hard Law, Soft Law and Diplomacy: The Emerging Paradigm for Intergovernmental Cooperation in Environmental Assessment” (1993), 31 *Alta. L. Rev.* 644.
- La Forest, Gérard V. *Natural Resources and Public Property under the Canadian Constitution*. Toronto: University of Toronto Press, 1969.
- La Forest, Gérard V. *The Allocation of Taxing Power Under the Canadian Constitution*, 2nd ed. Toronto: Canadian Tax Foundation, 1981.
- Lewin on Trusts*, 19th ed. by Lynton Tucker, Nicholas Le Poidevin and James Brightwell. London: Sweet & Maxwell, 2015.
- Oosterhoff on Trusts: Text, Commentary and Materials*, 9th ed. by Albert H. Oosterhoff, Robert Chambers and Mitchell McInnes. Toronto: Carswell, 2019.
- Poirier, Johanne. “Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics” in J. Peter Meekison, Hamish Telford and Harvey Lazar, eds., *Canada: The State of the Federation 2002 — Reconsidering the Institutions of Canadian Federalism*. Montréal: McGill-Queen’s University Press, 2004, 425.
- Saunders, J. Owen. *Interjurisdictional Issues in Canadian Water Management*. Calgary: Canadian Institute of Resources Law, 1988.
- Value-Added Taxation in Canada: GST, HST, and QST*, 5th ed. Toronto: Wolters Kluwer, 2015.
- Waters’ Law of Trusts in Canada*, 4th ed. by Donovan W. M. Waters, Mark R. Gillen and Lionel D. Smith. Toronto: Carswell, 2012.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Smith, Willcock and Goepel JJ.A.), 2018 BCCA 47, 5 B.C.L.R. (6th) 237, 37 C.C.P.B. (2nd) 163, [2018] 7 W.W.R. 235, [2018] G.S.T.C.

11, [2018] B.C.J. No. 190 (QL), 2018 CarswellBC 227 (WL Can.), affirming a decision of Weatherill J., 2016 BCSC 1803, 90 B.C.L.R. (5th) 126, 28 C.C.P.B. (2nd) 169, 401 D.L.R. (4th) 729, [2017] 1 W.W.R. 589, [2016] G.S.T.C. 90, [2016] B.C.J. No. 2061 (QL), 2016 CarswellBC 2749 (WL Can.). Appeal and cross-appeal dismissed, Wagner C.J. dissenting in part.

Michael Taylor and *Ian Demers*, for the appellant/respondent on cross-appeal the Attorney General of Canada.

Craig A. B. Ferris, Q.C., Lisa A. Peters, Q.C., Gordon Brandt and *Michael Sobkin*, for the respondent/appellant on cross-appeal the British Columbia Investment Management Corporation.

Sointula Kirkpatrick and *David Poore*, for the respondent/respondent on cross-appeal Her Majesty The Queen in Right of the Province of British Columbia.

Padraic Ryan and *Robin K. Basu*, for the intervener the Attorney General of Ontario.

Written submissions only by *L. Christine Enns, Q.C.*, for the intervener the Attorney General of Alberta.

The judgment of Abella, Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. was delivered by

KARAKATSANIS J. —

[1] This appeal and cross-appeal consider when the activities of a provincial Crown corporation may be taxed by the federal government. It requires this Court to evaluate the scope of the intergovernmental immunity from taxation set out in s. 125 of the *Constitution Act, 1867*, and whether agreements entered into by two levels of government to pay the equivalent of “taxes” may be binding on other Crown entities.

[2] In 1999, the legislature of British Columbia created the British Columbia Investment Management Corporation (BCI) to provide investment management services to the province’s public sector pension plans and other Crown entities. On its creation, BCI assumed ownership and management of the investment assets held in pooled investment Portfolios. At the same time, the legislature modernized its public sector pensions by creating a joint trusteeship structure whereby employers and employees would assume greater control over the management of pension monies. Both of these changes were intended to create a degree of separation between the government and the management of its investment funds and the public sector pensions.

[3] The Attorney General of Canada submits that these structural changes require BCI to collect and remit federal Goods and Services Tax¹ (GST) on the costs it incurs in making investments in the Portfolios on behalf of the public sector pension boards and other Crown entities. Because the investment assets are beneficially owned by private entities (the pension boards), they are not provincial “property” and are not constitutionally immune from federal taxation. Even if BCI is constitutionally immune, it must nevertheless pay GST pursuant to reciprocal taxation agreements signed by the federal and provincial governments.

[4] BCI argues that the provisions of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (*ETA*), do not capture the investment management activities it provides. As a provincial Crown agent, it claims constitutional immunity from taxation with respect to the property that it legally owns, including the investment assets. And even if the *Province* is bound by the agreements, BCI is not a party to the agreements and is not subject to them.

[5] The Attorney General of British Columbia largely agrees with BCI, except on the applicability of the intergovernmental agreements, taking the position that the agreements apply to BCI.

[6] Like the courts below, I have concluded that the *ETA* cannot apply to BCI’s activities in managing the Portfolios because it is constitutionally immune

¹ This matter concerns both the federal GST as well as the Harmonized Sales Tax (HST) regime in force in British Columbia from 2010-2013; for simplicity, these reasons refer to GST only.

under s. 125. The *ETA* cannot impose GST on property legally owned by a Crown agent. Nevertheless, I also agree that both the Province and BCI are subject to the obligations set out in the intergovernmental agreements.

[7] I would dismiss the appeal and the cross-appeal.

I. Background

[8] This matter involves a myriad of statutory and contractual relationships. I begin by summarizing the statutory framework governing BCI, the nature of the intergovernmental agreements, and the events leading up to the present appeal and cross-appeal. After reviewing the approaches taken by the courts below, I consider the three substantive issues raised by the parties.

A. *General Statutory Framework and History*

(1) BCI and the Pooled Investment Portfolios

[9] BCI was established in 1999 by Part 3 of the *Public Sector Pension Plans Act*, S.B.C. 1999, c. 44 (*PSPPA*).² BCI's purpose is "to provide funds management services, including the making of investments and loans, for funds placed with [it]": s. 18(2). In fulfilling this purpose, BCI receives and invests monies on behalf of various authorized entities.

² The relevant statutory provisions cited throughout these reasons are reproduced in the Appendix.

[10] Prior to the enactment of the *PSPPA*, large sums of money, including the public sector pension fund, were held and managed by British Columbia's Minister of Finance through the office of the chief investment officer. Beginning in 1984, s. 36 of the *Financial Administration Act*, S.B.C. 1981, c. 15 (*FAA*),³ empowered the Minister to establish and operate "pooled investment portfolios" (Portfolios). The Portfolios' structure allowed the Minister to combine money from a variety of sources and invest it in a diversified group of assets. Originally, money held in a Portfolio could only be invested in low-risk debt securities. But in an effort to increase the rate of return of the Portfolios, the *FAA* was amended in 1989 to allow investment in a variety of financial instruments, including equities, options, and futures.

[11] The operation of the Portfolios was governed by the *Pooled Investment Portfolios Regulation*, B.C. Reg. 84/86. The Minister was responsible for investing, managing and controlling all of the assets of the Portfolios: s. 3(2).⁴ When money from a "fund" (e.g. the public sector pension fund) was placed with the Minister for investment in a Portfolio, the fund was issued units of participation in the Portfolio. Ownership of any investment assets purchased by the Minister was not attributable to any of the unit holders: s. 3(4).⁵ Rather, the value of a unit of participation reflected the fund's proportionate investment in the Portfolio: s. 4.⁶ However, all of the assets of a Portfolio were "held in trust by the minister" and had to be identified separately

³ Section 43 of the current *Financial Administration Act*, R.S.B.C. 1996, c. 138.

⁴ Section 4(2) in the updated *Pooled Investment Portfolios Regulation*, B.C. Reg. 447/99.

⁵ Now s. 4(4).

⁶ Now s. 5.

from the other property of the government: ss. 3(1) and 3(3).⁷ If the Minister decided to terminate a Portfolio, the net proceeds realized were to be distributed to the unit holders: s. 11.⁸

[12] In the early 1990s, concerns arose over potential conflicts of interest because the Minister supervised investment in companies with ties to British Columbia and made policy decisions which could affect their profitability. At the same time, the provincial and municipal governments, the province's four public sector pension plans and the major public sector unions discussed at length how to modernize British Columbia's pension legislation. These events culminated in the introduction of the *PSPPA*, which established the framework for joint trusteeship of the public sector pension plans.

[13] The purpose of joint trusteeship was to allow both pension plan members and their employers to participate in the management of the public sector pension plans. The *PSPPA* created infrastructure necessary to support the newly created boards of trustees of the pension plans. This included two new Crown entities: (1) the British Columbia Pension Corporation, tasked with providing administration services to the boards of trustees; and (2) BCI. BCI is a statutory agent of the government and the Minister of Finance is its only shareholder: ss. 16(5) and 17. At the second reading of the bill, the Minister of Finance explained the *PSPPA*'s goals:

⁷ Now ss. 4(1) and 4(3).

⁸ Now s. 14.

The second purpose of the bill is to provide an option for joint trusteeship of pension plans. Joint trusteeship is based on the premise that plan members should share in the responsibility for and control over the pension plans in which they participate. . . .

The bill provides for the possibility of transferring full responsibility for the operation of each of the public sector pension plans to a board of pension trustees, which would have equal representation from plan members and plan employers. The transfer of this responsibility will result in the pension plans being operated at arm's length from government. . . .

. . .

. . . An arm's-length relationship to government is necessary, since the pension trustees must have the unfettered ability to determine the quality and timeliness of the service provided to plan members in order to carry out their responsibilities.

. . . The British Columbia Investment Management Corporation will be the successor organization to the office of the chief investment officer. It will provide investment management services to the public sector pension plans and other non-pension clients. [Emphasis added.] (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, No. 25, 3rd Sess., 36th Parl., July 14, 1999, at p.14409 (Hon. J. MacPhail))

[14] With the enactment of the *PSPPA*, BCI assumed the investment management responsibilities which formerly belonged to the Minister. According to s. 18(4), BCI “has the same powers, functions and duties in the provision of funds management services for funds placed with it . . . as the Minister of Finance would have if the funds had been placed with that minister under Part 5 of the *Financial Administration Act* as it read on April 1, 1999”. As part of this transfer of responsibilities, the previously established Portfolios were continued under the *PSPPA*: s. 18.1. The unit holders continued to hold the same units as they did before and all assets of a Portfolio previously held by the Minister continued to be held by

BCI. Under the updated *Pooled Investment Portfolios Regulation*, B.C. Reg. 447/99 (Regulation), the Portfolios operate in substantially the same manner as when the Minister managed them.

[15] In 2013, BCI was the fourth largest pension fund manager in Canada, managing \$102.8 billion in gross assets for 39 institutional clients. A significant portion of these funds are managed on behalf of British Columbia's four public sector pension plans. BCI uses two different structures to manage the assets placed with it for investment. Investments are either held in the Portfolios or as segregated funds, separate and apart from the assets of the Portfolios. Only the Portfolios are at issue in this appeal.

[16] Section 20(2)(d) of the *PSPPA* requires BCI's board of directors to "have in place an equitable fee system based on the user pay principle". Section 24(1) stipulates that BCI must recover its operating costs from one of three sources:

- (a) amounts charged to the funds for operating costs and capital expenditures necessarily incurred by the investment management corporation on behalf of the funds it manages;
- (b) amounts charged to persons, organizations and other clients for services provided by the investment management corporation;
- (c) income accruing from investments made by the investment management corporation on its own behalf.

For investments held in segregated funds, BCI charges investment management fees to its clients and collects and remits GST on these amounts. But for the Portfolios,

BCI recovers the costs of managing them from the income realized on the assets held in the Portfolios and does not collect GST on these amounts. This aligns with the previous practice of the Minister, who recovered management costs from the assets of the Portfolios and did not collect or remit GST.

(2) Intergovernmental Tax Agreements

[17] By virtue of two separate agreements (the Agreements), the governments of British Columbia and Canada agreed to pay the other's sales taxes in certain circumstances. The relevant Reciprocal Taxation Agreement (RTA), versions of which have been in place since before BCI was formed in 1999, came into effect in July 2010. Under the RTA, Canada agrees to pay certain provincial taxes and fees and the Province agrees to pay the taxes imposed under the federal *ETA*. Provincial entities listed in Schedule A of the RTA may apply for a rebate of any GST paid — these entities would pay GST on their purchases of goods and services but would be entitled to a rebate of those amounts. BCI was added to Schedule A in November 1999 but was removed in April 2003.

[18] In November 2009, British Columbia and Canada also entered into the Comprehensive Integrated Tax Coordination Agreement (CITCA). This agreement was part of the Province's decision to replace the provincial sales tax and the federal GST with a Harmonized Sales Tax regime. Under the CITCA, the Province and Canada agreed to pay HST on supplies purchased by their respective governments and agents. Similar to the RTA, the CITCA sets out a "pay and rebate" scheme

whereby amounts of HST paid by provincial entities that would otherwise be constitutionally immune are rebated. The CITCA allows the Province to determine whether any rebate is paid either to the government entity that paid the tax or to the Province directly. The CITCA was in effect until April 2013, when the Province withdrew from the HST regime and returned to a GST/PST model.

(3) BCI's Petition for Declaratory Relief

[19] Following BCI's removal from Schedule A of the RTA in 2003, Canada Revenue Agency (CRA) began to question whether BCI was entitled to claim immunity from GST in respect of the expenses it incurred in managing the Portfolios. From 2006 onwards, BCI, the Province and Canada engaged in discussions about BCI's GST status with respect to its management of the Portfolios.

[20] Unable to reach an agreement, CRA opened a "supplier compliance" audit file in September 2013, covering the GST reporting periods of April 1, 2010 to March 31, 2013. The audit began in January 2014.

[21] On December 20, 2013, BCI filed the petition that gave rise to this matter in the Supreme Court of British Columbia, seeking the following declarations:

- a) as a statutory Crown agent, BCI is immune from taxation in respect of the assets it holds in the Portfolios; and

- b) BCI is not bound by either the RTA or the CITCA or the payment obligations found in those agreements.

[22] Canada sought to strike BCI's petition, arguing that the dispute should be heard by the Tax Court of Canada, not the Supreme Court of British Columbia. Wong J. dismissed the motion, concluding that BCI's pleadings raised a "plausible argument which ought to be heard": *British Columbia Investment Management Corp. v. Canada (Attorney General)*, 2014 BCSC 1296, [2014] G.S.T.C. 93, at paras. 5-7. Wong J.'s ruling was affirmed on appeal: 2015 BCCA 373, 80 B.C.L.R. (5th) 316.

[23] In November 2015, the Minister of National Revenue issued notices of reassessment to BCI. BCI was assessed as owing \$40,498,754.94 of GST and HST, plus interest and penalties, in respect of taxable supplies provided to the Portfolios. In February 2016, BCI filed notices of objection to the reassessments without prejudice to its position that the Portfolios are immune from taxation, preserving its rights to challenge the assessments under the *ETA*'s appeal provisions.

[24] BCI's petition was heard by Weatherill J. in April and June of 2016.

B. *Supreme Court of British Columbia*, 2016 BCSC 1803, 90 B.C.L.R. (5th) 126 (*Weatherill J.*)

[25] Weatherill J. first held that he had jurisdiction to decide the petition. He then proceeded to issue the following declaratory order:

Although by virtue of being a provincial Crown agent [BCI] is immune from taxation by Canada under the *ETA* in respect of assets it holds in pooled investment portfolios pursuant to the *Pooled Investment Portfolios Regulation*, B.C. Reg 447/99, it is nevertheless bound by the provisions of the RTA and CITCA respecting those assets. [para. 173]

[26] With respect to jurisdiction, Weatherill J. observed that while the Tax Court had concurrent jurisdiction over the immunity issue, it would not have jurisdiction to determine whether the Agreements bind BCI. Because the two issues are linked and the dispute had been going on for 10 years, judicial economy and fairness militated in favour of deciding the issues together.

[27] The chambers judge then held that BCI, as a statutory agent mandated to manage the Portfolios, enjoys the same tax immunity under s. 125 as the Province does. Because the *PSPPA* states that BCI legally owns the Portfolio assets, the *ETA* trust provisions “cannot change the trust into something it is not”: paras. 132-133. When the *PSPPA* was enacted, BCI “simply stepped into the Minister of Finance’s shoes”: para. 135. Finally, Weatherill J. concluded that s. 16(6) of the *PSPPA* places a specific obligation on BCI to pay the same tax as the province pays, including the tax due under the Agreements.

[28] Canada appealed the holding that BCI is immune from taxation and BCI cross-appealed with respect to the binding nature of the Agreements.

C. *Court of Appeal for British Columbia, 2018 BCCA 47, 5 B.C.L.R. (6th) 237 (Smith, Willcock and Goepel J.J.A.)*

[29] The Court of Appeal for British Columbia dismissed Canada's appeal and BCI's cross-appeal. Writing for the court, Willcock J.A. held that there was no reason to interfere with Weatherill J.'s decision to take jurisdiction and consider the claim for declaratory relief.

[30] On the question of constitutional immunity, Willcock J.A. pointed out that as an agent of the Crown, BCI itself is immune from taxation. Thus, the question is whether a non-Crown entity receives services when BCI manages the Portfolios. While a tax that applies to a private, beneficial interest in property legally owned by the Crown is not barred by s. 125, two distinguishing factors arise in this case. First, there is no clear beneficial interest in the Portfolios that is distinct from BCI's legal interest. Second, absent the *ETA* deeming rules, there would be no taxable transaction as BCI would be both supplying and receiving the services as trustee. In Willcock J.A.'s view, the *ETA* deeming rules cannot apply to the statutory trust because a federal statute cannot reduce the scope of provincial immunity from taxation.

[31] Willcock J.A. also agreed that the Agreements are binding on BCI. While some intergovernmental agreements are merely political, the RTA and CITCA were intended to create mutually binding obligations. Section 16(6) of the *PSPPA* establishes that the extent of BCI's immunity from taxation is no greater than that of the provincial Crown. The phrase "liability to taxation" is broad enough to capture the contractual liability assumed by the Province under the RTA (para. 155).

II. Analysis

[32] My analysis proceeds as follows. First, I conclude that the chambers judge did not err in exercising his jurisdiction. Next, I consider the operation of the *ETA* and determine that s. 125 renders the *ETA* inapplicable with respect to the costs BCI recovers from the Portfolios. Finally, I conclude that the Agreements are binding on the Province and BCI is subject to the obligations set out in them by virtue of s. 16(6) of the *PSPPA*.

A. *A Superior Court's Discretion to Decline Jurisdiction in Favour of the Tax Court*

[33] Before the chambers judge, the Attorney General of Canada argued that the constitutional immunity claim fell within the exclusive jurisdiction of the Tax Court. But on appeal, the parties accepted that the superior court had inherent jurisdiction over all aspects of BCI's petition.

[34] Nevertheless, Canada submits that the chambers judge erred when he chose to *exercise* his jurisdiction. In doing so, he usurped the jurisdiction of the Tax Court and effectively determined BCI's challenge to the reassessments. In Canada's view, a superior court should decline to exercise its jurisdiction when another court with expertise in the core issues of a claim has concurrent jurisdiction. Canada also submits that the chambers judge erred in considering the judicial economy of deciding the immunity and Agreements issues together. Because CRA did not rely on the Agreements in reassessing BCI, the petition is premature.

[35] The parties agree that the chambers judge's discretionary decision to exercise his jurisdiction is entitled to deference. Unless the chambers judge misdirected himself or came to a decision that is so clearly wrong that it resulted in an injustice, a reviewing court should not interfere: *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205, at para. 36; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 95; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 83; see also *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at para. 95; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 43.

[36] In deciding whether to exercise its jurisdiction, a court must determine the essential nature of the claim. A superior court may decline to exercise its jurisdiction if it concludes a party is using "artful pleading" to bring a claim in an inappropriate forum: *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at paras. 25-27; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 78. However, a party is also entitled to make genuine strategic choices about how to pursue a claim. If the pleadings disclose a reasonable basis for pursuing a valid claim in a provincial superior court, the party advancing the claim is generally entitled to pursue it: *Windsor (City)*, at para. 27; *TeleZone*, at para. 76.

[37] Any challenge to the correctness of a tax assessment under the *ETA* falls within the exclusive jurisdiction of the Tax Court: *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12(1); *ETA*, ss. 306, 309(1); see *Johnson v. Minister of National Revenue*, 2015 FCA 51, 469 N.R. 326, at paras. 21-23, citing *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 554, at para. 82; *Sorbara v. Canada (Attorney General)*, 2009 ONCA 506, 98 O.R. (3d) 673, at paras. 7-11; see generally *Aboriginal Federated Alliance Inc. v. Canada Customs and Revenue Agency*, 2002 ABCA 104, 303 A.R. 304, at paras. 16-18; *Smith v. Canada*, 2006 BCCA 237, 61 B.C.L.R. (4th) 231.

[38] Even where a claim does not challenge an assessment, a superior court may decline to exercise its jurisdiction in recognition of the specialization of the Tax Court: *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793, at para. 11; see also D. Jacyk, “The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts” (2008), 56 *Can. Tax J.* 661, at pp. 685-86. In *Addison*, this Court cautioned against allowing “incidental litigation” to circumvent the tax appeal mechanisms established by Parliament: para. 11. But this does not mean an otherwise valid claim cannot proceed in superior court simply because it may impact a Tax Court proceeding.

[39] In this case, the chambers judge determined that the core of BCI’s petition was not an attack on the GST assessments but rather Canada’s ability to tax BCI in the first place. He also concluded that the constitutional immunity and

Agreements issues were linked — if the immunity claim was successful, the Agreements were the only way BCI could be required to pay GST.

[40] Like the Court of Appeal, I see no reversible error in the chambers judge's analysis. Both the scope and the timing of the petition support the chambers judge's characterization of BCI's claim and his decision to exercise his jurisdiction.

[41] First, the issues raised in BCI's petition go beyond the assessment of tax under the *ETA*. Fundamentally, this case is about the rights, obligations and duties of a Crown agent, under the Constitution and at common law. While BCI may have raised constitutional immunity during a Tax Court appeal, the petition concerns Canada's taxation authority over BCI more generally. BCI's status under the Agreements is also undoubtedly a live issue between the parties. While other disputes related to their operation may arise, declaratory relief — which the Tax Court cannot grant (see *Pintendre Autos Inc. v. The Queen*, 2003 TCC 818, 2004 D.T.C. 2596, at para. 43; *Whitford v. The Queen*, 2008 TCC 359, 2008 G.T.C. 638, at paras. 13-14) — would provide the answer to a long-standing disagreement about whether BCI is subject to the Agreements.

[42] Second, at the time BCI filed its petition, the reassessments had not yet been issued (indeed the audit had not yet begun) so the Tax Court had no jurisdiction over the dispute: *Tax Court of Canada Act*, s. 12(1); *ETA*, ss. 306, 309(1). I recognize that an assessment was issued before the petition was heard. But this does not change the fact that BCI filed its petition in the only forum capable of dealing with it at the

time. The history of this dispute also predates CRA's decision to audit BCI. BCI's entitlement to constitutional immunity and its status under the Agreements has been disputed since at least 2006. In my view, the chambers judge did not err in concluding that judicial economy favoured resolving both issues together.

B. *Part IX of the Excise Tax Act and Constitutional Immunity From Taxation*

[43] The courts below focussed primarily on BCI's claim to constitutional immunity and did not consider the operation of the *ETA* in detail. Obviously, such analysis would likely lie at the centre of any Tax Court proceedings challenging the reassessments. The record is also incomplete — it identifies only some of the Portfolio unit holders and contains only some of the Funds Investment and Management Agreements between BCI and a unit holder. Further, it is not strictly necessary to examine how the *ETA* operates in order to determine whether constitutional immunity applies. However, some discussion will assist in addressing arguments made by the parties and understanding the mechanism by which Canada argues that the costs BCI recovers from the Portfolios are taxable.

(1) Applying Part IX of the *Excise Tax Act* to a Statutory Trust

[44] Part IX of the *ETA* governs the payment, collection and remittance of the federal GST (and HST, where applicable). According to s. 165, every recipient of a “taxable supply” must pay GST on the consideration paid for the supply. Various other rules define the types of commercial activities that constitute a taxable supply.

Suppliers registered under the *ETA* are required to collect GST and periodically remit it to the federal government: ss. 221(1), 225(1), 228(1) and 228(2).

[45] There is no dispute that the investment management services BCI provides outside the context of the Portfolios (i.e. in managing the segregated funds) are taxable supplies for GST purposes. Thus, the issue under the *ETA* does not relate to the nature of BCI's investment management activities but rather involves whether the Portfolios can be considered a "recipient" of a taxable supply.

[46] Section 123(1) of the *ETA* defines a "recipient" with reference to either the person who is liable to pay consideration for a supply of services or, if no consideration is payable, the person to whom a service is rendered. However, to fall within this definition, a recipient must also be a "person." At common law, only natural persons and corporations have legal personalities; a trust does not: *Waters' Law of Trusts in Canada* (4th ed. 2012), by D.W. M. Waters, M.R. Gillen and L.D. Smith, at pp. 614-12. To capture transactions involving a wide range of entities, s. 123(1) broadly defines "person" as "an individual, a partnership, a corporation, the estate of a deceased individual, a trust, or a body that is a society, union, club, association, commission or other organization of any kind" (emphasis added). The definition of "person" in s. 123(1) thus confers upon a trust "a separate, artificial legal identity for tax purposes": *Value-Added Taxation in Canada: GST, HST, and QST* (5th ed. 2015), at ¶12,030.

[47] Section 267.1(5) contains further trust rules, which deem a trustee's activities to have been done by the trust and, in certain circumstances, deem a trustee to have supplied services to the trust:

Activities of a trustee

(5) For the purposes of this Part, where a person acts as trustee of a trust,

(a) anything done by the person in the person's capacity as trustee of the trust is deemed to have been done by the trust and not by the person; and

(b) notwithstanding paragraph (a), where the person is not an officer of the trust, the person is deemed to supply a service to the trust of acting as a trustee of the trust and any amount to which the person is entitled for acting in that capacity that is included in computing, for the purposes of the *Income Tax Act*, the person's income or, where the person is an individual, the person's income from a business, is deemed to be consideration for that supply.

The combined effect of ss. 123(1) and 267.1(5) is to impose GST collection, remittance and payment obligations on trusts and trustees in certain circumstances.

[48] Applying the *ETA* to BCI and the Portfolios is further complicated by the fact that BCI is a provincial Crown agent. According to a long-standing rule of statutory interpretation, the Crown is not bound by statute except by express words or necessary implication: *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, at pp. 556-57, citing *Province of Bombay v. City of Bombay*, [1947] A.C. 58 (P.C.); see also P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at

pp. 397-406. For federal enactments,⁹ this rule is codified in s. 17 of the *Interpretation Act*, R.S.C. 1985, c. I-21:

Her Majesty not bound or affected unless stated

17 No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

The Crown's immunity from statute extends to both the Crown in right of a province as well as Crown agents, when the agent acts within the scope of its statutory purposes: *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, at p. 274; *Eldorado Nuclear*, at pp. 565-66.

[49] In this case, s. 16(5) of the *PSPPA* declares BCI to be an agent of the government. Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, defines "government" as Her Majesty in right of British Columbia, such that an agent of the government is an agent of the provincial Crown. Section 18(2) of the *PSPPA* states that BCI's purpose is to manage the funds placed with it for investment. Thus, BCI enjoys the benefit of Crown statutory immunity when it manages the Portfolios: see *Nova Scotia Power Inc. v. Canada*, 2004 SCC 51, [2004] 3 S.C.R. 53, at paras. 13-18.

⁹ In British Columbia, the situation is reversed; a provincial legislative enactment is binding on the government "[u]nless it specifically provides otherwise": *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 14(1).

[50] For a statute to be binding on the Crown, the Crown's immunity from statute must be "clearly lifted": *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184, at para. 20. Section 122 of the *ETA* expressly sets out the Crown's obligations in relation to the GST rules found in Part IX:

Application

122 This Part is binding

(a) on Her Majesty in right of Canada; and

(b) 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.

While Part IX applies in its entirety to the federal Crown, the provincial Crown's obligations are limited to *collecting and remitting* GST. The provincial Crown must therefore collect and remit GST when it makes taxable supplies to private parties: *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 (*GST Reference*), at pp. 478-81.

[51] The parties disagree about whether the language of the *ETA* captures BCI's activities in managing the Portfolios.

[52] Canada submits that there are no statutory impediments to requiring BCI to collect and remit GST on the costs it recovers from the Portfolios. Canada's analysis proceeds in two steps. First, ss. 123(1) and 267.1(5)(a) operate to separate the statutory trust from BCI (the trustee) for tax purposes. Thus, when BCI provides

investment management services to the Portfolios, a taxable transaction occurs. Second, when the Province created BCI to provide investment management services, it “cast itself as a service provider through its agent”. As such, BCI is required by s. 122(b) of the *ETA* to collect and remit GST on the investment management services it supplies to the Portfolios (A.F., at para. 60).

[53] There are two potential obstacles to Canada’s approach to the Portfolios. First, the respondents submit that because the *ETA* does not expressly state that ss. 123(1) and 267.1(5) apply to the provincial Crown, those provisions do not operate with respect to the Portfolios. Second, it is not clear that the Portfolios are “a trust” within the meaning of ss. 123(1) and 267.1(5). If not, the Portfolios are not persons for the purposes of the *ETA* and cannot be liable to pay GST as the recipient of services. If this is the case, no taxable transaction exists as BCI would simply be managing the assets it legally owns, rather than supplying a service to another “person”. I consider each of these potential hurdles in turn.

(a) *Do Sections 123(1) and 267.1(5) of the ETA Apply to BCI?*

[54] Turning first to the applicability of ss. 123(1) and 267.1(5) to BCI, I disagree with the respondents that these provisions do not apply to the provincial Crown. While s. 122(b) states that only collection and remittance obligations are imposed on the provincial Crown, it may be necessary to refer to ss. 123(1) and 267.1(5) to determine the scope of these obligations. For example, s. 221(1) imposes an obligation to collect GST on “[e]very person who makes a taxable supply”. The

only way to understand the provincial Crown’s obligations under this provision is by referring to the definitions of “person” and “taxable supply” in s. 123(1). Section 122(b) also states that the provincial Crown’s obligations arise from “[t]his Part” (Part IX) as a whole. There is no need to list specifically every provision that may apply to the provincial Crown in determining its obligations as a supplier.

[55] The central question in this appeal — whether the taxing mechanism created by the *ETA* has the effect of requiring a province or its agent to *pay* tax out of its property — is properly viewed as a matter of characterization under s. 125 of the *Constitution Act, 1867*. The *ETA* makes the recipient of services, not the supplier, liable to pay GST: *GST Reference*, at p. 480. In this case, Canada argues that the property held in trust is receiving services from BCI. Thus, if the Portfolio assets are not characterized as property of the Crown for the purposes of s. 125, then they do not enjoy statutory immunity under the *ETA* either. In such a case, the provincial Crown’s obligations would be limited to collecting and remitting GST for services provided to that private property, as expressly required by s. 122(b).

(b) *Are the Portfolios “a Trust” for the Purposes of Part IX of the ETA?*

[56] The second question under the *ETA* is whether the Portfolios fall within the meaning of “a trust” in ss. 123(1) and 267.1(5). During oral arguments, counsel for Canada argued that even though the Portfolios do not appear to have all the qualities of a private law trust, they nonetheless are captured by the *ETA*. Counsel emphasized that because the *PSPPA* and the *Regulation* state that the Portfolio assets

are “held in trust,” the Portfolios must be treated as a trust for the purposes of the *ETA*.

[57] I disagree. The term “trust” is not defined in the *ETA*. Absent express direction to the contrary, undefined terms in a taxation statute must be interpreted according to their established and accepted legal meaning: *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915, at paras. 29-33; see also *Backman v. Canada*, 2001 SCC 10, [2001] 1 S.C.R. 367, at para. 17; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20. In the case of a federal statute like the *ETA*, s. 8.1 of the *Interpretation Act* provides that, “unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province’s rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied”. Since the *ETA* does not define the term “trust” and the concept of a trust undoubtedly forms part of the law of property and civil rights, reference must be made to the concept as it exists in British Columbia law. On this basis, unless the Portfolios would be considered a trust at private law, they cannot be a “person” within the meaning of s. 123(1).

[58] The fact that the word “trust” is used, either in a statute or in a legal document, does not mean that an arrangement necessarily constitutes a private law trust. At private law, a trust exists where there has been (1) an express or implied declaration of trust, with (2) an alienation of property to a trustee (3) to be held for a

specified beneficiary (alternatively, these requirements are described as the three “certainties” — certainty of intention, certainty of subject matter, and certainty of objects): *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 661, at p. 655; *Waters’ Law of Trusts in Canada*, at p.140.

[59] In *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, this Court considered whether a provincial statutory trust constituted “property held . . . in trust” for the purposes of s. 47(a) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3 (a predecessor to s. 67(1) of the current *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3). Despite the fact that the provincial statute stated that the property was deemed to be held “in trust,” McLachlin J. concluded that it was not a “true trust” because the property impressed with the trust was not identifiable (it lacked certainty of subject matter): pp. 34-36; see also *Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225.

[60] In other cases, courts have held that the Crown may assume trust-like obligations without creating a “true trust” in the private law sense: see *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, at paras. 72-79; *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at pp. 375, 378-79 and 386; *Attorney-General of British Columbia v. Esquimalt and Nanaimo R. Co.*, [1950] 1 D.L.R. 305 (P.C.), at p. 314; *Waters’ Law of Trusts in Canada*, at pp. 31-33; Hogg, Monahan and Wright, at pp. 370-72.

[61] Similarly, even where private parties purport to create a trust, those relationships may be scrutinized to determine their true nature for tax purposes. For example, a “bare trust” — where a trustee’s only obligation is to convey property to the beneficiary upon demand — is generally disregarded for tax purposes: see *De Mond v. The Queen* (1999), 99 D.T.C. 893 (T.C.C.); M. C. Cullity, “Legal Issues Arising Out of the Use of Business Trusts in Canada”, in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989), 181, at pp. 187-188; Canada Revenue Agency, *GST/HST Technical Information Bulletin B-068: Bare Trusts*, January 20, 1993 (online); Canada Revenue Agency, *GST/HST Policy Statement P-015: Treatment of Bare Trusts under the Excise Tax Act*, July 20, 1992 (online); *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 104(1).

[62] In the present case, it is not clear whether the *PSPPA* and the *Regulation* contain sufficient language to satisfy the three certainties. For example, the statutory framework does not identify a beneficiary for the Portfolio assets.

[63] Canada argues that the existence of a beneficiary is implied by the words “held in trust” in s. 4(1) of the *Regulation*. In its view, a trust relationship cannot exist unless an entity other than BCI holds beneficial title to the Portfolio assets. Canada further submits that the statutory framework makes clear that neither the Crown nor BCI is the beneficial owner of the assets. Canada also describes the Portfolios as “conceptually similar to a mutual fund trust”, a recognized form of a common law trust which appears to be taxable under the *ETA*: A.F., at para. 78; *Waters’ Law of*

Trusts in Canada, at pp. 578-602; *C.I. Mutual Funds Inc. v. Canada*, [1997] G.S.T.C. 84 (T.C.C.), at pp. 84-20 to 84-21, var'd [1999] 2 F.C. 613 (C.A.).

[64] The problem with these arguments is that Canada interprets the legislature's use of the words "held in trust" as necessarily requiring the existence of a private law trust relationship. However, a statutory trust is not bound by ordinary trust principles: *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, at para. 34. It may well be that the Province modelled the Portfolios after a private law structure. And it would certainly be open to the Province to bind BCI to a trust relationship in the private law sense. However, such a conclusion requires an evaluation of whether the three certainties are met, not simply a reference to the phrase "held in trust."

[65] To summarize, in order for the Portfolios to fall within the meaning of "a trust" in Part IX of the *ETA*, they must meet the common law requirements. If the Portfolios are not common law trusts, and they are not captured by any other provision of the *ETA*, then BCI is simply managing the assets it owns and no taxable transaction exists. Whether a private law trust exists here is beyond the scope of this appeal. The shared assumption of the parties in this appeal was that the Portfolios were a "trust" for the purposes of *ETA*. Therefore, no submissions were made as to this specific issue. Given the incomplete record as well as my conclusion that s. 125 of the *Constitution Act, 1867*, immunizes the Portfolios from taxation, it is unnecessary to decide the issue in this case. Nevertheless, for the purpose of

determining the main issue in this appeal — whether BCI enjoys constitutional immunity — I will proceed as if the Portfolios are “a trust” within the meaning of Part IX of the *ETA*. On this assumption, BCI would hold the Portfolio assets in trust for the benefit of the unit holders.

(2) Section 125: Constitutional Immunity From Taxation

[66] Section 125 of the *Constitution Act, 1867*, states:

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

[67] Section 125 exists “to prevent one level of government from appropriating to its own use the property of the other, or the fruits of that property”: *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at p. 1078. Intergovernmental immunity from taxation grants each level of government operational space to govern without interference. It also prevents one group of elected representatives from dictating how another legislative body should allocate the financial resources under its control: *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, at paras. 17-19. In addition, s. 125 seeks to maintain the federal-provincial distribution of property set out in the *Constitution Act, 1867*: G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), at pp. 182-83.

[68] Section 125 grants constitutional immunity from taxation when two requirements are met. First, the pith and substance of the impugned charge must constitute “taxation” within the meaning of ss. 91(3) or 92(2) of the *Constitution Act, 1867*. Regulatory charges or user fees fall outside the scope of s. 125: *Westbank*, at para. 31; *Exported Natural Gas*, at p. 1068. Second, the subject matter of the tax must be property belonging to the federal Crown in the case of a tax imposed by the provincial legislature and to the provincial Crown in the case of a tax imposed by Parliament: *Exported Natural Gas*, at pp. 1078-79. Where these two prerequisites are met, s. 125 applies and renders otherwise valid taxation provisions inapplicable in respect of Crown property: *Constitution Act, 1982*, s. 52(1); *Exported Natural Gas*, at p. 1067.

[69] For the reasons that follow, I conclude that the *ETA*’s mechanism for imposing GST on the Portfolios would result in Crown property being subject to taxation. Therefore, s. 125 of the *Constitution Act, 1867*, renders the relevant provisions of Part IX of the *ETA* inapplicable in respect of the Portfolios.

[70] There is no question that the federal GST falls squarely within the meaning of “taxation” in s. 91(3) of the *Constitution Act, 1867*: *GST Reference*, at pp. 467-71. For the second requirement, as a statutory Crown agent, BCI enjoys the same constitutional immunity in respect of its property as the provincial Crown does: *Westbank*, at para. 1; see also *City of Halifax v. Halifax Harbour Commissioners*, [1935] S.C.R. 215; *Re Canadian Broadcasting Corp. Assessment*, [1938] 4 D.L.R.

591 (Ont. Co. Ct.), aff'd [1938] 4 D.L.R. 764 (Ont. C.A.). As such, this appeal turns on whether the property made liable for tax under the *ETA* is property “belonging to” BCI within the meaning of s. 125.

[71] Courts have long held that s. 125 does not protect private interests from being taxed, even if the Crown also has an interest in the property: see, e.g., *Calgary & Edmonton Land Co. v. Attorney-General of Alberta* (1911), 45 S.C.R. 170 (purchaser of federal lands liable for provincial tax despite the fact that Canada still held bare legal title because the patent had not yet been issued); *Smith v. Rur. Mun. of Vermillion Hills* (1916), 30 D.L.R. 83 (P.C.) (lessee of federal lands liable for provincial tax levied on his leasehold); *City of Vancouver v. Attorney-General of Canada*, [1944] S.C.R. 23 (legal owner of land taxed despite the fact that the Crown leased the land and erected buildings on it); *Phillips and Taylor v. City of Sault Ste. Marie*, [1954] S.C.R. 404 (federal employees living in houses owned by Canada were liable for provincial tax payable by tenants of Crown property).

[72] However, the common thread in all these cases is that the taxing statute successfully captured a private interest in the property that was distinct from the Crown’s interest. For example, in *Calgary & Edmonton Land Co.*, the provincial statute imposed tax on “any person who has any right, title or estate whatsoever or any interest other than that of a mere occupant in any land”. The private purchaser’s interest in the land indisputably fell within this definition: pp. 185-86. In the words of Davies J., “The interest of the Crown whatever it might have been could not be taxed,

but the beneficial interest of the appellants certainly was not exempted under [s. 125]”: p. 179 (emphasis added).

[73] The legislation in *Smith* contained similar comprehensive definitions which captured the lessee’s interest in Crown land: see (1913), 6 Sask. L.R. 366 (S.C. *en banc*). And in *Phillips and Taylor*, s. 32 of *The Assessment Act*, R.S.O. 1950, c. 24, imposed tax liability on “the tenant of land owned by the Crown” — “tenant” was further defined as “any person who uses land belonging to the Crown as or for the purposes of, or in connection with his residence . . .”: p. 406. Because the “tenant” was the one who was liable to pay the tax, s. 125 was not engaged.

[74] Canada submits that *Calgary & Edmonton Land Co.* and *Smith (en banc)* demonstrate that s. 125 only applies if the provincial Crown (or BCI) is the *beneficial* owner of the Portfolio assets. Since the statutory framework makes clear that BCI is not the beneficiary, Canada says s. 125 does not apply.

[75] With respect, this asks the wrong question. Rather, the issue is whether the taxing statute seeks to tax the Crown’s interest in the property. In the cases relied on by Canada, the tax was levied on the interest of the beneficiary, not the interest of the Crown. These cases stand for the proposition that a private beneficial interest can be taxed despite the existence of legal title in the Crown. But if the tax is imposed on the Crown’s interest in the property, then constitutional immunity applies.

[76] Pursuant to s. 4(1) of the *Regulation* and s. 18.1(3) of the *PSPPA*, BCI, as trustee, legally owns the assets held in the Portfolios. In this case, the *ETA* places the burden of the tax on the Portfolio assets to which BCI holds legal title. BCI, a Crown agent, has thus successfully shown that it has an ownership interest in the property which bears the federal tax. I recognize that the beneficiaries of the trust may also be seen as bearing the burden of the tax. However, the key point is that the provincial *Crown's* interest is being taxed under federal law, which is not permitted by s. 125.

[77] Section 125 is directly engaged when one level of government attempts to require the other to use what is legally Crown property to pay tax. This is the case even if the Crown holds the property as trustee unless there is another distinct private beneficial ownership interest that is the subject of the tax. Accordingly, I agree with the intervener the Attorney General of Alberta that unless the tax is imposed directly on the beneficiaries or their beneficial interest, the protection of s. 125 extends to the Crown when it acts as a trustee.

[78] This conclusion is consistent with the early case of *Quirt v. The Queen* (1891), 19 S.C.R. 510. In that case, the property of an insolvent bank was vested in the federal Crown as trustee. This Court unanimously held that the property vested in the Crown could not be taxed: at pp. 514 (per Ritchie C.J.), 518 (per Strong J.), and 525 (per Patterson J.). While the Crown also had a beneficial interest in the bank's assets as its largest creditor, both Strong J. and Osler J.A. at the Court of Appeal held

that the Crown's interest as trustee was sufficient for Crown immunity to apply: see *Regina v. County of Wellington* (1890), 17 O. A. R. 421, at p. 444.

[79] In *Exported Natural Gas*, the majority of this Court wrote, “[t]he fundamental constitutional protection framed by s. 125 cannot depend on subtle nuances of form”: at p. 1078. Relying on this statement, Canada maintains that Portfolio assets purchased with monies from the pension boards (which Canada says are private, not public, bodies) do not belong to the Crown within the meaning of s. 125. While I agree with the general principle that constitutional protections should not turn on legal formalities, I disagree with Canada on its application to this case for two reasons.

[80] First, in *Exported Natural Gas*, the Court emphasized a substantive approach in giving s. 125 a broad and generous interpretation, not a narrow one. That case involved the federal government's attempt to impose an export levy on natural gas owned and produced by the province of Alberta. The federal government argued that s. 125 was not engaged because the tax resulted from Alberta's choice to engage in the commercial trading of natural gas. It was thus not a tax on Crown property but rather on a transaction. The majority of the Court rejected this formalistic approach and held that s. 125 applied because, in substance, the federal government was attempting to “exact a tax from the provincial Crown in respect of its property”: pp. 1078-80. *Exported Natural Gas* thus stands for the proposition that s. 125 immunity does not depend on the label assigned to a particular charge. But the situation in the

present appeal is reversed. Here, Canada argues that the Court should disregard the fact that BCI would be required to pay the tax using assets it legally owns because, in substance, a non-Crown entity would bear the burden of the tax. In my view, *Exported Natural Gas* does not dictate such a result.

[81] Second, Canada's approach to determining whether trust property falls within s. 125 treats legal ownership as irrelevant. According to Canada, s. 125 applies to property "held in trust" by the Crown only when it is clear that the Crown is the beneficial owner. However, legal ownership is clearly a property interest and nothing in s. 125 warrants reading the phrase "Property belonging to Canada or any Province" as requiring that property be beneficially owned by the Crown.

[82] Canada further submits that s. 125 immunity applies only to the extent that the property held by the Crown agent is available to discharge a government function. Applying this test, Canada says that the monies invested by the public sector pension boards fall outside the scope of s. 125.

[83] The difficulty with this submission is that it disregards the government objective underlying the Portfolios' existence. The Portfolios were created to allow the Province and other authorized entities to pool their monies for diversified investment. This purpose is underscored by the active role that BCI plays as trustee of this statutory trust. BCI has broad discretion over the investment and management of the Portfolios, including the distribution and re-investment of any income: *Regulation*, ss. 4(2) and 11. BCI may also establish or terminate Portfolios as it sees

fit: *Regulation*, ss. 2 and 14. This structure makes sense given the Province's interest in ensuring the public sector pension funds' investments are managed well. For example, if the pension funds have a surplus, there may be a contribution holiday. If there is a pension shortfall, the Province's consolidated revenue fund will satisfy any portion attributable to the government: *PSPPA*, s. 25.1.

[84] In short, these features demonstrate that the Portfolios, including the British Columbia legislature's choice to vest legal title of the Portfolio assets in BCI as trustee, fall within the "operational space" that s. 125 immunity from taxation affords to the Province and BCI. Clearly, BCI's operations would be affected by imposing federal tax on the Portfolios, thereby reducing significantly the investment assets under BCI's control. While it is unnecessary to determine the outer bounds of s. 125 in this case, these aspects of BCI's statutory mandate indicate that its control over the assets goes far beyond that of a bare trustee (as was the case in *Calgary & Edmonton Land Co.*). I leave for another day the question of whether s. 125 would apply to the activities of a Crown trustee which do not involve an appropriate governmental function.

[85] The British Columbia legislature's purpose in creating the Portfolios also answers Canada's objection that s. 125 immunity would confer an inappropriate tax advantage on the unit holders. While Canada may disagree with the legislature's decision to create this investment structure, s. 125 gives both the federal and provincial governments freedom to carry out their constitutionally assigned mandates:

Westbank, at para. 17. Subject to constitutional limits on its authority, the legislature is free to pursue its own policy objectives, even if the federal government has different priorities.

[86] Canada's reliance on tax fairness between Crown and non-Crown suppliers as a reason not to apply s. 125 is also difficult to square with the existence of the RTA. According to the RTA's preamble, one of its primary purposes is to address competitive inequities between government and non-government suppliers. If Crown immunity from taxation depended on whether it would create competitive inequity, there would be no need for voluntary agreements such as the RTA. As such, neither fairness nor the possibility of hindering tax neutrality under the federal *ETA* provides any basis for restricting the constitutional protection granted to the Province by s. 125.

[87] In summary, the *ETA* uses a legal fiction to require a trust to pay tax on taxable services provided to it by its trustee. However, when the trustee is a provincial Crown agent, this mechanism runs afoul of s. 125 because it imposes tax on property legally owned by the Crown. The *ETA* does not impose GST on a distinct private beneficial ownership interest in this case. Therefore, the *ETA* is constitutionally inapplicable to the Portfolios.

C. *The Effect of Intergovernmental Tax Agreements on a Statutory Agent*

[88] BCI, as appellant on the cross-appeal, submits that the Court of Appeal made two errors in holding that it is bound by the RTA and the CITCA. First, BCI argues that the Agreements are political, not legal, in nature — they have not been implemented by legislation and lack the features necessary to demonstrate intent to create legal obligations. Second, even if the Agreements place obligations on the Province, these commitments do not extend to BCI. In its view, s. 16(6) of the *PSPPA* is of no assistance because the Agreements do not create tax liability for the Province, and thus BCI, within the meaning of that section. The Province disagrees, arguing that the Agreements create binding obligations which apply to BCI as a statutory agent. Canada suggests the Agreements may create such obligations.

[89] The cross-appeal requires this Court to determine whether BCI is subject to the RTA and the CITCA. This requires an assessment of whether the Agreements impose legal obligations on the provincial Crown, and if so, whether s. 16(6) of the *PSPPA* extends these obligations to BCI. Stated differently, the question throughout these proceedings has been whether the Agreements have the legal effect of removing the immunity from tax that BCI would otherwise enjoy as a statutory agent. On this issue, the chambers judge's order simply declared that BCI is "bound by the provisions of the RTA and CITCA respecting [the Portfolio] assets" (para. 173). The details of any specific obligations under the Agreements are beyond the scope of the cross-appeal.

[90] I would dismiss the cross-appeal. I agree with Willcock J.A. that the language of the Agreements demonstrates that the Province and Canada intended to create mutually binding obligations. Although otherwise constitutionally immune from the *ETA*'s operation, the Province voluntarily agreed to pay GST to Canada. I also agree with the Court of Appeal that s. 16(6) of the *PSPPA* is broad enough to encompass the liability assumed by the Province under the Agreements. Because s. 16(6) ties BCI's tax immunities and obligations to those of the Province, BCI is generally subject to the obligations set out in the Agreements to the same extent that the Province is.

[91] There is no dispute that the respective Ministers of Finance exercised lawful authority when they entered into the Agreements. The execution of both Agreements by British Columbia's Minister of Finance was authorized by Order in Council (CITCA: O.I.C. No. 661/2009; RTA: O.I.C. No. 485/2010), pursuant to s. 4 of the *Ministry of Intergovernmental Relations Act*, R.S.B.C. 1996, c. 303. In a similar fashion, ss. 32 and 33 of the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8, authorize the federal Minister of Finance to enter into and carry out the requirements of reciprocal taxation agreements on behalf of Canada.

[92] As Laskin C.J. made clear in *Reference re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, the execution of an intergovernmental agreement by the proper signatory can make an agreement binding on the Crown: at p. 433; see also *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3

S.C.R. 309, at para. 11. Obviously, the legislature is entitled to enact legislation inconsistent with the government's commitments under a prior agreement: *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at pp. 548-49; *Reference re Pan - Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at paras. 62-71; see also S. A. Kennett, "Hard Law, Soft Law and Diplomacy: The Emerging Paradigm for Intergovernmental Cooperation in Environmental Assessment" (1993), 31 *Alta. L. Rev.* 644, at pp. 653-54. However, this possibility does not prevent a court from determining the legal status of an intergovernmental agreement or interpreting its terms. In *Reference Re Canada Assistance Plan (B.C.)*, Sopinka J. described the difference between purely political questions, which cannot be answered by courts and those which have "a sufficient legal component to warrant the intervention of the judicial branch": at p. 545. In this case, the legal question is whether the Agreements have the effect of modifying the rights and obligations of the Province.

[93] BCI argues that the Agreements do not have the force of law in British Columbia because they have not been legislatively implemented: A.F. on cross-appeal, at paras. 122-123. I agree that legislation would be required to implement an intergovernmental agreement to the extent that it purports to modify provincial law: *Reference re: Anti-Inflation Act*, at p. 433; *Reference re Pan - Canadian Securities Regulation*, at para. 66. However, the issue in this case is narrower — it does not depend upon any modification of provincial law. The issue here relates only to the nature of obligations voluntarily assumed by the Province and whether those obligations extend to its statutory agent, BCI. Whether the Agreements are "binding"

on their signatories thus turns on whether the commitments they contain are legal or merely political in nature.

[94] Intergovernmental agreements exist on a spectrum, ranging from the merely aspirational and political to those which resemble private law contracts and create legally enforceable obligations: see *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2017] 1 S.C.R. 557, at paras. 85-86, LeBel and Deschamps JJ. (dissenting, but not on this point). As with private law contracts, intergovernmental agreements must be evaluated to determine whether the parties intended to create legal obligations: see *Esquimalt and Nanaimo R. Co.*, at pp. 311-12; *South Australia v. The Commonwealth*, [1962] HCA 10, 108 C.L.R. 130.

[95] Various elements of an intergovernmental agreement may demonstrate an intention to create legal obligations:

- The subject matter: does the agreement deal with discrete commercial matters rather than broad questions of public policy?
- The language used: do the terms of the agreement resemble a private law contract? For example, does it use mandatory language such as “shall” or “binding,” set out the duration of the agreement, or require audits or the publishing of financial statements?

- The mechanism for resolving disputes: did the parties agree to refer disputes to arbitration or a designated court rather than resolving them by purely political means?
- Subsequent conduct: did the parties treat the agreement as binding, rely on it to their detriment or derive clear benefits from it?

See J. Poirier, “Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics” in J.P. Meekison, H. Telford and & H. Lazar, eds., *Canada: The State of the Federation 2002 - Reconsidering the Institutions of Canadian Federalism* (2004) 425, at pp. 430-34; Kennett, at pp. 653-56; N. Bankes, “Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia” (1991), 29 *Alta. L. Rev.* 792, at pp. 794 and 832; J. Owen Saunders, *Interjurisdictional Issues in Canadian Water Management* (1988), at pp. 95-99. I consider each factor in turn.

[96] In terms of the subject matter, the Agreements deal with taxation, which is undoubtedly a question of government policy. However, each government’s commitment is limited to paying the existing sales taxes levied by the other government. The Agreements do not involve the implementation of a new taxation regime or other broad policy goals. In addition, the Agreements are narrow in scope as they purport to apply only to Canada, the Province and their agents.

[97] As the Court of Appeal observed, the Agreements set out detailed payment, collection and remittance obligations: paras. 142-51. Article 3 of the RTA expressly states, “[t]his agreement is binding on Canada, the Province and their respective agents” (emphasis added). Both set out a discrete time period during which the Agreements are in force (RTA, art. 15; CITCA, art. 42) and art. 15 of the RTA specifically refers to “rights or obligations which may have accrued to either party during the term of this agreement” (emphasis added). This language evinces an intention to agree to much more than merely “aspirational” goals.

[98] BCI argues that the Agreements must, at a minimum, contain a binding dispute resolution system in order to give rise to liability. Otherwise, it says that the only consequences to a party for not honouring its commitments are political: A.F. on cross-appeal, at para. 165.

[99] I am not persuaded that this is a decisive factor. As the Court of Appeal noted, commentators have expressed varying views about the importance of a binding dispute resolution system: para. 148; see also K. Horsman and G. Morley, *Government Liability: Law and Practice* (loose-leaf), at para. 2.20.40(3), citing D. W. Mundell, “Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions between them” (1960), 2 *Osgoode Hall L.J.* 56; Poirier, at pp. 433-34; D. Culat, “Coveting Thy Neighbour’s Beer: Intergovernmental Agreements Dispute Settlement and Interprovincial Trade Barriers” (1992), 33 *C. de D.* 617, at pp. 619-21; Saunders, at p. 96. In my view, while a mandatory mechanism

for resolving disputes may create a “strong presumption” that the parties intended to create legal obligations, it is not a prerequisite: see Poirier, at p. 433.

[100] The nature of the mechanisms in the Agreements for referring disputes to a third party for independent consideration is disputed in this case. It is clear that a non-binding reference is available: see RTA, art. 9; CITCA, arts. 38 to 41; see also Court of Appeal reasons, at paras. 148-50. Canada also argues that the *ETA*'s statutory appeal mechanism would apply to any RTA disputes related to the “administration or enforcement” of that Act: see RTA, art. 9(9); see also *Toronto District School Board v. R.*, 2009 TCC 39, [2009] G.S.T.C. 6, at para. 50; *Ottawa Hospital Corp. v. R.*, 2010 TCC 53, [2010] G.S.T.C. 15, at paras. 65-67. However, whether any dispute resolution mechanism is binding is not determinative in this case. Even absent a binding dispute resolution mechanism, the other factors indicate an intention to create legal, not merely political, obligations.

[101] Finally, for the parties' subsequent conduct, the record does not indicate the extent to which the respective government signatories have carried out their commitments under the Agreements (beyond BCI's objection that the Agreements do not apply to it). However, both Canada and the Province take the position that the Agreements create binding obligations. This is a strong indicator that the parties intended to be bound by the Agreements.

[102] To summarize, in light of their clear wording, I have no difficulty in concluding that the Agreements at issue in the cross-appeal resemble private law

contracts and were intended to create legally binding obligations for Canada and the Province.

[103] Having concluded that the Agreements impose binding obligations on the Province, the remaining question is whether these obligations have any impact on BCI. In my opinion, in describing the extent of BCI's immunity from taxation, s. 16(6) of the *PSPPA* also encompasses the Province's choice to pay amounts which it would otherwise be constitutionally immune from paying. Although the Agreements have not been specifically implemented by British Columbia's legislature, the *PSPPA* ties BCI's tax obligations to those of the Province. Section 16(6) therefore provides the legislative link between the Province's immunities and obligations, under the Constitution, and the Agreements, and the immunities and obligations of BCI.

[104] Section 16(6) states:

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

[105] BCI raises three arguments for why s. 16(6) does not bind it to the Province's obligations under the Agreements. First, it submits that s. 16(6) is "plainly drafted" to deal with its immunity and liability under provincial statutes of general application: A.F. on cross-appeal, at paras. 146-48. While I do not doubt that it serves this purpose, there is nothing in the wording of the provision to restrict its scope to only provincial taxation statutes.

[106] Second, BCI argues that the amounts owed under the Agreements are not “tax” but rather amounts paid in lieu of tax, which fall outside the scope of s. 16(6). Because the Agreements expressly preserve the Province’s immunity from taxation (RTA, art. 4; CITCA, art. 65), in its view, any references to “taxes” in the Agreements are merely “shorthand”: A.F. on cross-appeal, at para. 149.

[107] I disagree. BCI’s approach implies that because the Province is constitutionally immune from federal taxation statutes, it cannot, by intergovernmental agreement, choose to pay “tax.” However, it appears that the Province has agreed to do precisely that. Beginning with the CITCA, pursuant to art. 51, “the Province agree[s] to pay the harmonized sales taxes in respect of supplies acquired by their respective governments or by agents and entities thereof” (emphasis added). Similarly, under art. 6(d) of the RTA, the Province agrees “to pay . . . the Value-Added Tax in accordance with the [ETA]”; art. 1 defines “Value-Added Tax” as “any tax imposed or levied under Part IX of the [ETA]” (emphasis added). In light of this clear wording, I see no other way of characterizing these amounts other than as voluntarily-assumed tax liabilities. The fact that the Province cannot have federal tax obligations imposed on it does not prevent the Province from assuming those obligations if it chooses to do so.

[108] Finally, BCI submits that even if the Province has voluntarily agreed to pay “tax”, it is not “liable” to pay tax under the Agreements because it cannot be obligated to pay federal tax as imposed by a taxing statute: A.F. on cross-appeal, at

para. 150. Again, this argument conflicts with the express wording of the Agreements. In similar fashion to the RTA, art. 1 of the CITCA defines “harmonized sales taxes” as the federal and provincial components of the “tax payable under Part IX of the Excise Tax Act”. As a matter of constitutional law, the Province is not obliged to pay federal tax under the *ETA*. However, by entering into the Agreements, the Province has agreed to pay tax determined in accordance with the *ETA*. Thus, as long as the Agreements are in force, the Province is “liable for taxation” under the *ETA*, notwithstanding the fact that the source of this liability lies in the Agreements themselves.

[109] Textual nuances aside, there is a more fundamental reason why BCI’s immunity from taxation (constitutional, statutory, contractual or otherwise) must be the same as the Province’s. Section 16(6) directly ties BCI’s liability for and immunity from tax to the liabilities and immunities of the Province. In a similar fashion, both Agreements indicate an intention to require the Province’s agents to assume the same tax liabilities as the Province: RTA, art. 3; CITCA, art. 51. By entering into the Agreements, the provincial Crown chose to pay taxes for which it would not otherwise have been liable. Given that any immunity that BCI enjoys is directly tied to the Crown’s by s. 16(6) of the *PSPPA*, there is simply no basis for BCI to assert that it is not generally subject to taxation on the same basis as the Province. Obviously, BCI’s actual liability is determined by the terms of the taxing statute and this cross-appeal does not concern any specific obligations that BCI might have under the Agreements.

[110] In summary, the language of the RTA and the CITCA demonstrates that the Province intended to bind itself to fulfill the obligations found in those Agreements. Section 16(6) of the *PSPPA* establishes that BCI's tax immunities and obligations follow those of the Province. Because the language of this provision is broad enough to include obligations voluntarily assumed by the Province, BCI is generally subject to the obligations set out in the Agreements to the same extent that the Province would be. However, as noted above, the nature of any specific obligations under the Agreements is beyond the scope of the cross-appeal.

D. *Conclusion*

[111] I would dismiss the appeal and the cross-appeal.

[112] Because Part IX of the *ETA* attempts to require a provincial agent to pay tax out of property legally held by the Crown, s. 125 of the *Constitution Act, 1867*, renders the relevant *ETA* provisions inapplicable in respect of the Portfolios. However, as a statutory Crown agent and pursuant to s. 16(6) of the *PSPPA*, BCI is subject to the obligations assumed by the Province under the RTA and CITCA.

[113] As a result, the following declaratory order is appropriate:

As a provincial Crown agent, the British Columbia Investment Management Corporation (BCI) is immune from taxation by Canada under the *Excise Tax Act*, R.S.C. 1985, c. E-15, in respect of assets BCI holds in pooled investment portfolios under the *Pooled Investment Portfolios Regulation*, B.C. Reg 447/99.

Under s. 16(6) of the *Public Sector Pension Plans Act*, S.B.C. 1999, c. 44, BCI is nevertheless subject to the provisions of the Reciprocal Taxation Agreement and the Comprehensive Integrated Tax Coordination Agreement respecting those assets to the same extent as Her Majesty The Queen in Right of the Province of British Columbia.

[114] All parties request costs in this Court and in the courts below. In light of the mixed outcome for the parties, I am of the view that this is a case where no cost award is appropriate.

The following are the reasons delivered by

WAGNER C.J. —

I. Overview

[115] This case is about whether private parties can rely on the Constitution to immunize themselves from paying tax on investment management services they receive from a Crown corporation. Here, private pension boards entered into contracts with the British Columbia Investment Management Corporation (“BCI”), a Crown corporation that is an agent of the provincial government. Under the contracts, BCI agreed to hold the pension boards’ funds in trust and to provide them with investment management services in respect of those funds in exchange for payment. The pension boards elected not to pay BCI for its services directly. Instead, they arranged to pay it

indirectly by allowing it to take its payment from the trust funds. If BCI were paid directly by the pension boards, the boards would be taxable as the recipients of the services under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the “*ETA*”), and would therefore be liable to pay Goods and Services Tax (“GST”). The indirect payment method elected by the pension boards and BCI makes the trust property itself the recipient of the services under the *ETA* and thus liable to pay the tax. My colleague concludes that, as a result, BCI’s provision of services is immune from taxation under s. 125 of the *Constitution Act, 1867*, because BCI holds legal title to the trust property.

[116] I cannot agree. BCI’s legal title to the taxed property is insufficient to make it property “belonging to” the Province, as s. 125 requires, because the property was entrusted to BCI by private parties to hold and manage for their sole benefit in exchange for payment. The property is liable to taxation only because the private pension boards chose to make it the mechanism of payment for the services they received from BCI. Extending immunity under s. 125 to the circumstances of this case does not protect the constitutional values of federalism and democracy that s. 125 exists to promote. Instead, it overshoots those purposes by giving private parties the benefit of immunity from taxation to which they are not entitled, protecting the Province from adverse contractual consequences, and providing BCI with an unjustified commercial advantage.

[117] I have had the benefit of reading the reasons of my colleague Karakatsanis J. I agree with her conclusion that the chambers judge appropriately assumed jurisdiction over this litigation. I also agree with her conclusion that BCI is bound by the relevant intergovernmental taxation agreements (“Agreements”) between British Columbia and Canada. My sole disagreement with my colleague is on the issue of immunity under s. 125.

II. Factual Background

[118] My colleague has skillfully outlined the complex factual underpinnings of this appeal. However, to clarify my position on the s. 125 immunity issue, I must provide some additional facts concerning the pension boards that are the unit holders of the pooled investment portfolios (“Portfolios”) held in trust by BCI and their relationship with BCI. In this regard, I will make four points:

- (a) The unit holders are the beneficiaries of the funds BCI holds in trust;
- (b) The pension boards, which form the “bulk” of the unit holders, are private parties;
- (c) The pension boards bear the real impact of the tax; and

- (d) The pension boards would be the recipients of BCI's services under the *ETA* but for the indirect payment method they have chosen.

A. *The Unit Holders Are the Beneficiaries of the Funds BCI Holds in Trust*

[119] First, it is important to underline one essential point. Both my colleague and I have proceeded under the assumption that the Portfolios are common law trusts. This being the case, there *must* be a beneficial interest in the Portfolios distinct from BCI's legal interest. It would be incompatible with the existence of a common law trust for BCI to be both the legal and the sole beneficial owner of the trust property (see *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224). The statutory and regulatory regime that governs the Portfolios does not specifically identify a beneficial interest in them. However, as I will demonstrate, an analysis of this regime makes it clear that the beneficial interest rests with the unit holders. Indeed, even had I accepted that the Portfolios are *sui generis* statutory trusts, to which common law requirements would therefore not necessarily apply, based on this regime I still would have easily concluded that the beneficial interest in them rests with the unit holders.

[120] BCI is a creature of the *Public Sector Pension Plans Act*, S.B.C. 1999, c. 44 ("*PSPPA*"). Section 18(3) of the *PSPPA* allows certain defined persons (various government or trust-fund entities) to place money or securities with BCI for investment. Money or securities placed with BCI under the authority of s. 18(3) are

referred to as “funds” (s. 15). Funds are held by BCI in one of two types of investment structures: segregated investments, which are operated like standard investment or brokerage accounts, and Portfolios. The operation of the Portfolios is governed primarily by the *Pooled Investment Portfolios Regulation*, B.C. Reg. 447/99 (“*Regulation*”). This appeal is concerned with the tax consequences of the Portfolios; however, I shall return to the segregated investments in my analysis below. BCI collects and remits GST on the investment management services it provides to the segregated funds.

[121] The “bulk” of the funding for the Portfolios comes from B.C.’s four major public sector pension plans – the Public Service Pension Plan, the Municipal Pension Plan, the Teachers’ Pension Plan and the College Pension Plan — and from the Workers’ Compensation Board. Other amounts come from the B.C. government directly, including from the Consolidated Revenue Fund. The amounts originating directly from the Province are said to “vary from time to time” (R.F., at para. 10; affidavit of S. Newton, A.R., vol. X, at p. 50), although logically the inverse of the “bulk” cannot be a particularly large percentage. BCI utilizes the funds to make various investments, including through subsidiary corporations.

[122] In the *Regulation*, a “participating fund” is defined as a fund from which money or securities are used to purchase “unit[s] of participation” (“units”) in a Portfolio (s. 1). Portfolios must be divided into units of equal value, and the proportionate interest attributed to each participating fund must be expressed by the

number of units allocated to it (*Regulation*, s. 5(1)). On the last opening date of the calendar year,¹⁰ the aggregate of the income and net taxable capital gains of each Portfolio for that year is payable to each participating fund in proportion to its participation in the Portfolio (less any income and net taxable capital gains already paid to the participating fund for that year) (s. 10(1)). A participating fund can demand the payment to which it is entitled (s. 10(2)). Where it does so demand, the number of its units must be reduced proportionally to reflect the value of the payment (s. 10(5)). If it does not so demand, it is deemed to have elected to contribute to the Portfolio the income and net taxable capital gains to which it is entitled, and those amounts must be added to the carrying costs of the units held by the fund (ss. 10(3) and (4)).

[123] Assets invested in Portfolios must be identified separately from other property of BCI (*Regulation*, s. 4(3)). The Chief Investment Officer must report to the trustees or other persons responsible for funds “with respect to the management and investment performance of the funds that they have placed with [BCI]” (*PSPPA*, s. 21(2)(b)). The *PSPPA* further recognizes that BCI may make investments “on its own behalf” (s. 24(1)(c)), which are distinct from investments that it makes on behalf of participating funds as their agent (s. 18(3)). The Chief Investment Officer is empowered to terminate a Portfolio but must then distribute the net proceeds realized to the unit holders (*Regulation*, s. 14). No part is payable on termination to BCI or to the Province (unless the Province itself is a unit holder).

¹⁰ “[O]pening date” is a term defined in the *Regulation* as “a date when funds may purchase or realize units in a portfolio” (s. 1). Opening dates for each Portfolio are set by the Chief Investment Officer (*Regulation*, s. 6(2)), a position created by s. 20 of the *PSPPA*.

[124] The investment management services that BCI provides for the Portfolios ultimately benefit the unit holders. It is the unit holders that are entitled to the income and capital gains generated by the Portfolios while they exist. It is the unit holders that are entitled to the net proceeds on termination of the Portfolios. Neither BCI nor the Province has the ability or right to appropriate Portfolio assets. The only benefit BCI derives from the Portfolios is the recouping of its operating costs and capital expenditures from the funds therein, which reduces the value of the units and the ultimate return realized by the unit holders (*PSPPA*, s. 24(1)(a)). I note that the *PSPPA* allows BCI to charge service fees directly to its clients to cover these expenses (s. 24(1)(b)). However, the Funds Investment and Management Agreement (“Funds Agreement”) between BCI and the teachers’ pension board (discussed further below) demonstrates that BCI charges such fees only with respect to segregated funds. BCI recoups its operating costs and capital expenditures with respect to Portfolios exclusively from the assets in the Portfolios.

[125] The parties advanced various arguments concerning s. 4(4) of the *Regulation*, which provides that “[o]wnership in any asset in a portfolio must not be attributed to a participating fund”. Section 4(4) must be read in conjunction with s. 4(1), which states that “[a]ll the assets of a portfolio are held in trust” by BCI. There is obviously a considerable difference between the Portfolios – vehicles intended for pooled investments in modern capital markets – and a more “traditional” trust reflecting divided interests in a piece of real property. Funds in each Portfolio originate from several sources. Section 4(4) indicates that unit holders cannot point to

any particular asset in a Portfolio and claim ownership of it. As Canada argues, the unit holders instead are collectively entitled to all assets in a Portfolio on a proportional basis, without possessing ownership rights in any particular asset (A.F., at para. 78).

[126] Based on this regime, I am satisfied that the beneficial interest in the Portfolios rests with the unit holders. My colleague has also accepted that if the Portfolios are a common law trust, then the unit holders are the beneficiaries (para. 65). The importance of this conclusion must be stressed. It means that the unit holders are the beneficial *owners* of the Portfolios.

B. *The Pension Boards, Which Form the “Bulk” of the Unit Holders, Are Private Parties*

[127] Moreover, the pension boards that are said to hold the “bulk” of the units in the Portfolios are private entities. British Columbia and BCI have never suggested, in this Court or the British Columbia courts, that the pension boards are Crown entities that are entitled to constitutional immunity from taxation. As I will explain, British Columbia and BCI were correct not to contest this point, as the pension boards cannot be equated with the provincial Crown and are instead creatures of contract.

[128] The public sector pension plans are governed by boards of trustees pursuant to contractual “joint trust” arrangements. Although the makeup of the four public sector pension plan boards differs somewhat, generally each board is

comprised of an equal number of trustees appointed, on the one hand, by the Province and the relevant employer(s) and, on the other, by the plan member union(s) and, in one case, the B.C. Government Retired Employees Association. The public sector pension plans were not always run via this joint trust model. Joint trust arrangements were initially introduced and imposed by the *PSPPA* when it was enacted in 1999. The provisions that did so were repealed following the successful negotiation of contractual joint trust agreements between the Province, the employers and the unions.

[129] I will refer to the Public Service Pension Plan Joint Trust Agreement as an example of the four such public sector pension plan agreements. The purpose of the agreements is to “provide for the prudent management” of the pension plans and funds, while having plan members and employers “share the responsibility of plan governance and share the risks and rewards of plan sponsorship” (preamble). The pre-existing pension plans and pension funds were continued under the joint trust agreements. Pension funds are held in trust by the boards of trustees for the sole benefit of plan members, i.e. current and former employees (art. 3). The power to amend or terminate the joint trust agreements resides solely with the boards of trustees (art. 13). The pension boards were required to retain BCI as investment manager for defined periods, after which they were given discretion to use other

managers (arts. 7.2 and 7.3). The four pension boards subsequently entered into funds investment and management agreements with BCI.¹¹

[130] When the *PSPPA* was introduced in the Legislature for second reading, the Honourable Minister Joy MacPhail indicated that joint trusteeship would result in “transferring full responsibility for the operation of each of the public sector pension plans to a board of pension trustees”. The Minister stated that “[t]he transfer of this responsibility will result in the pension plans being operated at arm’s length from government”. She explained that this arm’s length relationship was necessary because “pension trustees must have the unfettered ability to determine the quality and timeliness of the service provided to plan members in order to carry out their responsibilities” (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, No. 25, 3rd Sess., 36th Parl. (July 14, 1999, at p. 14409 (Hon. J. MacPhail)).

[131] The Province’s involvement with the public sector pension plans is purely contractual. It is a party to the various joint trust agreements and appoints a certain number of trustees directly pursuant to those agreements. However, the Province retains no control over the trustees once appointed. In addition, half of the contributions to the pension plans come from the provincial government through the public sector employers. However, once the contributions are made, such funds are

¹¹ It is unclear whether thus far any pension board has opted to use a manager other than BCI – Canada says that this has not occurred, while BCI says that there is no evidence on this point, given that the joint trust agreements do not require the appointment of a single, exclusive investment manager (A.F., at para. 16; R.F., at fn. 16).

impressed with the trust and governed by its contractual terms (see *Ehrcke v. Public Service Pension Board of Trustees*, 2004 BCSC 757, 32 B.C.L.R. (4th) 388, at para. 60). Finally, like the plan members, the Province (through the public sector employers) has certain responsibilities in the event of a pension shortfall and may be entitled to a contribution holiday in the event of a surplus. Any surplus must remain within the pension fund (Public Service Pension Plan Joint Trust Agreement, art. 10.3) and is subject to “equal ownership” (recitals, C(d)). There is also “equal sharing of responsibility” for any unfunded liabilities (recitals, C(c)). The *PSPPA* does not require the Province’s Consolidated Revenue Fund to make up any shortfalls but merely gives the Minister of Finance the discretion to make up the portion of the unfunded liability attributable to the government (s. 25.1). As Canada submitted, such obligations do not flow from provincial ownership of assets but are instead rooted in the contractual obligations the Province has assumed in relation to its employees (transcript, p. 39).

[132] I thus agree with the conclusion of the Supreme Court of British Columbia in *Ehrcke* that the pension boards are private bodies. In that case, Neilson J. considered whether the Public Service Pension Board of Trustees was a public body in order to determine whether its decisions were amenable to judicial review. Although the context of this appeal is different, I agree with her conclusion that “the nature of the Board of Trustees, the source and nature of its powers, and the description of its decision-making powers as set out in the Joint Trust Agreement lead to the inevitable conclusion that the Board of Trustees is a private body” (para. 63).

This is not solely because the pension boards are formally placed at arm's length from the government. In substance, their position can be analogized to that of the universities in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229. In that case, the Court held that universities do not form part of "government" within the meaning of s. 32 of the *Canadian Charter of Rights and Freedoms*. The following comment at pp. 272-74, adjusted for context, is applicable to the pension boards:

The fact is that each of the universities has its own governing body. Only a minority of its members . . . are appointed by the Lieutenant-Governor in Council Though the universities, like other private organizations, are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment.

[133] Accordingly, it is evident that neither the plan members nor the pension boards are entitled to the protection of s. 125. As the applicable regime indicates, the pension boards are not the Province or agents thereof. Thus, the pension funds that belong to the pension boards do not qualify as "Property belonging to . . . any Province" under s. 125.

[134] It is not necessary to consider the percentage of the funds in the Portfolios that comes from the B.C. government directly, including from the Consolidated Revenue Fund. Canada acknowledges that BCI holds these funds for the ultimate benefit of the Province (A.F., at para. 77). As the Province holds a beneficial interest in these funds, s. 125 applies and they are immune from federal taxation.

C. *The Pension Boards Bear the Real Impact of the Tax*

[135] The real impact of the tax is borne by the unit holders because BCI provides the services relating to the Portfolios for the benefit of the unit holders alone. In substance, the GST is imposed in respect of services that BCI provides to the private unit holders. Only the pension boards' choice to pay BCI indirectly by permitting it to take its payment from the trust makes the Portfolios the recipients under the *ETA* of the services that BCI provides.

[136] The characteristics of the Portfolios demonstrate that the unit holders bear the real impact of the tax. To briefly recap, during the lifetime of the Portfolios, all the income and capital gains generated from them accrue to the unit holders. On termination of the Portfolios, the net proceeds flow entirely to the unit holders. BCI cannot appropriate assets from the Portfolios and receives nothing on their termination. Taxation of the Portfolios therefore does not result in BCI losing anything to which it would otherwise have had access without the tax. Instead, taxation of the Portfolios results in less income, capital gains and ultimate proceeds accruing to the unit holders. The *only* benefit BCI receives from each Portfolio is the recouping of its operating costs and capital expenditures with respect to that Portfolio. Such operating costs and capital expenditures arise only because BCI is managing the Portfolios for the ultimate benefit of the unit holders.

[137] The Funds Agreement between BCI and the teachers' pension board further demonstrates that the unit holders enjoy substantial control over their funds

even once they have been invested in the Portfolios.¹² As noted, the *Regulation* empowers BCI's Chief Investment Officer to terminate Portfolios. However, the Funds Agreement empowers the pension board to direct BCI to terminate a Portfolio, although BCI appears to retain discretion as to whether in fact to follow this direction (s. 2.4.3). Nonetheless, even if the pension board cannot order BCI to terminate a Portfolio, it has the ability to terminate the Funds Agreement on 180 days' notice (s. 8), following which, *inter alia*, the pro-rated share of the investments in a Portfolio belonging to the board will be returned to the board (s. 9.1.2.).

[138] Furthermore, the taxable transaction under the *ETA* is the direct result of BCI's contractual obligation to provide services to the private pension boards. In the Funds Agreement, BCI agrees to provide specified investment and management services to the teachers' pension board (s. 1.1.22). The Funds Agreement states that BCI is acting as the board's agent and is fulfilling the board's responsibilities in providing those services (ss. 2.1 and 2.2). The board also pays BCI in consideration of those services (s. 5.1 and Sch. A, s. 2).

D. *The Pension Boards Would Be the Recipients of BCI's Services Under the ETA but for the Indirect Payment Method They Have Chosen*

[139] The only reason why differing tax consequences may occur here is because the pension boards have agreed to a different form of payment where BCI

¹² Although BCI has entered into funds investment and management agreements with the boards of all four public sector pension plans, only the agreement with the teachers' pension board is in the record. There is no suggestion that there are any substantial differences between it and the other three agreements – counsel for Canada agreed during the hearing that it was “typical” (transcript, at p. 15).

holds their property in trust. BCI manages two types of funds: Portfolios and segregated funds. It holds the Portfolios in trust but does not hold the segregated funds in trust. For the segregated funds, BCI bills the pension board directly for the costs and expenditures it incurs in providing the services (Funds Agreement, Sch. A, s. 5). However, BCI and the pension board selected a different method of payment for the Portfolios. They agreed that the pension board would pay BCI indirectly by permitting it to recover its costs and expenses from the Portfolios (Funds Agreement, Sch. A, ss. 2 to 4). Nothing in the *PSPPA* required BCI to select this method of payment for the Portfolios. In fact, s. 24(1) of the *PSPPA* gives it the discretion as to whether to recover its operating costs and capital expenditures by charging the funds it manages or by charging its clients for the services provided.

[140] As a result of these contractual choices by BCI and the pension board, the tax consequences under the *ETA* differ. In the case of the segregated funds, the pension board is the “recipient” because it is liable under the Funds Agreement to pay consideration to BCI for the taxable supply of investment management services (*ETA*, s. 123(1) (definition of “recipient”). Accordingly, the pension board is liable to pay GST (*ETA*, s. 165(1)). In contrast, if it is assumed that the Portfolios are a “trust” for the purposes of the *ETA*, they are considered to be a “person” under the *ETA* and BCI is their trustee. The Canada Revenue Agency took the position that the Portfolios themselves are the recipients of the services because BCI as trustee recovers its costs and expenses from the Portfolios, not directly from the pension boards. It is the fact

that the Portfolios themselves, rather than the pension boards, are the recipients under the *ETA* that gives rise to immunity under s. 125 according to BCI.

[141] The contractual choices of BCI and the pension boards are the only reason why the recipients of the services BCI supplies under the *ETA* are the Portfolios and not the pension boards. Had BCI and the pension boards agreed that BCI would bill the boards directly for its services instead of taking its payment from the Portfolios, the boards would have been the recipients under the *ETA* and would thus have been liable to pay GST.

III. Section 125 of the *Constitution Act, 1867*

A. *Test for Immunity Under Section 125*

[142] 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.

[143] BCI is a statutory agent of the provincial Crown and thus has the same constitutional immunity from taxation under s. 125 as the provincial Crown (*Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, at para. 46). The two requirements for the provincial or federal Crown (or its agent) to make a successful s. 125 claim are well established. First, the impugned charge must constitute “Taxation” within the meaning of ss. 91(3) and 92(2) of the

Constitution Act, 1867. The taxation powers in those sections are subject to s. 125 (see: *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at pp. 1054-55, 1067 (“*Natural Gas Tax*”). There is no dispute in this case that the charge Canada seeks to levy on the Portfolios (the GST) constitutes taxation. Therefore, the dispute before the Court concerns the second requirement for a successful s. 125 claim: whether the subject matter of the taxation – the Portfolios – is property “belonging” to the Crown or its agent, in this case BCI. To determine whether this second requirement is met, it is necessary to consider the purposes of s. 125.

B. *Purposes of Section 125*

[144] Section 125 exists to protect two constitutional values: federalism and democracy. The primary value served by s. 125 is federalism (*Westbank*, at para. 19). This Court has thus identified one purpose of s. 125 as being “to prevent one level of government from appropriating to its own use the property of the other, or the fruits of that property” (*Natural Gas Tax*, at p. 1078). The placement of s. 125 in Part VIII of the *Constitution Act, 1867*, confirms this purpose. Entitled “Revenues; Debts; Assets; Taxation”, Part VIII divides Crown assets between Canada and the provinces. Section 125 protects that division of assets by preventing one level of government from “unilaterally . . . alter[ing] the terms of the division of assets” by taxing lands or property that belong to another level of government (*Natural Gas Tax*, at p. 1066). By providing such protection, s. 125 ensures that each level of government possesses “sufficient operational space to govern without interference” (*Westbank*, at para. 17).

[145] Section 125 also advances the constitutional value of democracy. As the Court explained in *Westbank*, at para. 19, intergovernmental taxation would permit the elected representatives at one level of government to determine how to spend taxes that the elected representatives at another level of government have levied. This would undermine the principle of no taxation without representation that this Court recognized in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at paras. 30-32. By barring intergovernmental taxation, s. 125 thus safeguards democracy at each of level of government.

C. *The Interpretation of Section 125 Should Not Overshoot These Purposes*

[146] The courts have been careful not to interpret s. 125 in a way that overshoots these twin purposes. For instance, in *Natural Gas Tax*, at pp. 1054-55, this Court restricted the protection of s. 125 to taxation under s. 91(3) or 92(2) and held that it was not a purpose of s. 125 to protect against proper regulatory action taken by either level of government. Similarly, in *Westbank*, at para. 33, the Court emphasized that the exclusion of regulatory charges from the ambit of s. 125 ensures that s. 125 will provide only the “degree of operational space” to governments that its purposes require. Such judicial caution is entirely appropriate because it is a settled principle of constitutional interpretation that it is important not to overshoot the purpose of a provision. Courts lack the power to “invent new obligations foreign to the original purpose of the provision” (*Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 37, citing *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at para. 40).

[147] Courts have restricted the application of s. 125 to ensure that it does not overshoot its purposes in two ways that are relevant to this appeal. First, courts have been careful not to extend the protection of s. 125 to private parties. As Davies J. held in *Calgary & Edmonton Land Co. v. (Attorney-General of Alberta)* (1911), 45 S.C.R. 170, at p. 180, the purpose of s. 125 immunity is not to shield from taxation the beneficial interests of private parties in property to which the Crown holds legal title. As my colleague explains at para. 71 of her reasons, courts have thus consistently rejected claims in which private parties sought to use the Crown's s. 125 immunity as a shield to avoid taxation.

[148] In particular, this Court has made it clear that Parliament can require private purchasers of provincial services to pay GST in respect of those services without running afoul of s. 125. In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 (“*GST Reference*”), Alberta argued that imposing the GST on taxable supplies made by the provinces amounted to taxation of the “fruits” of provincial property. The Court rejected this argument. The GST was payable not by the provinces as the suppliers, but instead by the private parties purchasing provincial services as the recipients: *GST Reference*, at pp. 479-80.

[149] Second, courts have found that s. 125 is not intended to immunize the Crown from contractual consequences or other adverse commercial effects that it may bear as a result of the taxation of a private party. For instance, in *City of Vancouver v. Attorney-General of Canada*, [1944] S.C.R. 23, Vancouver taxed a private legal

owner of land leased to Canada based on the value of the land, which included the value of structures Canada had erected as tenant. Canada argued that the effect of the tax would be to leave it on the hook to pay, because the private party would either charge an increased rental fee or require Canada to indemnify it for the taxes. This Court conclusively rejected that argument and held that s. 125 did not protect Canada from such adverse contractual or commercial consequences (at pp. 36-37, per Davies J., p. 56, per Rand J. (Taschereau J. concurring)). Likewise, in *Phillips and Taylor v. City of Sault Ste. Marie*, [1954] S.C.R. 404, at pp. 408-9, the Court rejected the argument that the fact that Canada might be contractually liable to pay a tax levied on an occupant of federal Crown land was sufficient to engage s. 125 immunity. Similarly, this Court held that the GST does not offend s. 125 simply because it renders provincial property less commercially attractive than it would be if the tax did not apply (*GST Reference*, at p. 480).

[150] This line of jurisprudence reflects a concern not to overshoot s. 125's purposes by favouring the commercial and contractual interests of the Crown at the expense of those of private parties. The Court recognized this concern in *Natural Gas Tax* by stressing the narrowness of its holding that the proposed federal tax on provincial resource property was unconstitutional. At p. 1081, the Court stated that it was not addressing a situation in which Parliament was taxing the provision of a service by a province or the conduct by a province of business that only incidentally concerned the consumption of a provincial resource property.

[151] Such judicial caution is appropriate. An overbroad definition would overshoot the purpose of protecting the division of assets. It would instead “shift the balance between private and public enterprise in favour of public ownership” by encouraging provinces to create Crown corporations to manage activities previously undertaken by private enterprise (G. Bale, “Reciprocal Tax Immunity in a Federation – Section 125 of the Constitution Act, 1867 and the Proposed Federal Tax on Exported Natural Gas” (1983), 61 *Can. Bar Rev.* 652, at p. 678). I take no position on whether such a shift is desirable from a public policy standpoint. That is for Parliament and the provincial legislatures to decide. My point is that it forms no part of s. 125’s purposes to effect or incentivize such a shift.

IV. Section 125 Does Not Apply to Immunize BCI’s Services from GST

A. *In Substance, the Portfolios Belong to the Private Pension Boards*

[152] The real issue is whether, in the circumstances of this case, the property “belong[s] to” the Crown and is thus immune under s. 125. I hold that the property does not belong to the Crown as s. 125 requires. Section 125 does not immunize property that private parties have placed with the Crown to hold in trust for their sole benefit from a tax on services that they have contracted to receive from the Crown in respect of that property. In these circumstances, the property in substance belongs not to the Crown but to the private parties, and the Crown’s legal title as trustee does not trigger the immunity.

[153] I agree with my colleague that legal ownership is clearly a property interest and that nothing limits the word “Property” in s. 125 to beneficial interests in property. However, this is only part of the puzzle. The phrase “belonging to Canada or any Province” in s. 125 must also be given meaning.

[154] It is appropriate in construing the scope of s. 125 immunity, as this Court held in *Natural Gas Tax* at p. 1078, to prevent such “subtle nuances of form” as the pension boards and BCI employed in this case from reshaping the substance of the immunity. It is true, as my colleague notes, that the Court in *Natural Gas Tax* made this comment in the context of interpreting s. 125 broadly, not narrowly. The Court interpreted s. 125 broadly in that case so that its purpose of protecting against unilateral alterations to the division of assets in Part VIII of the *Constitution Act, 1867*, would be achieved. However, as I have explained, the courts have also been cautious not to overshoot the purposes of s. 125 in construing the limits of the immunity it provides. There is no reason why the same principle of substance over form should not apply to prevent s. 125 from overshooting its purposes.

[155] Indeed, this Court did apply the principle of substance over form to prevent s. 125 from overshooting its purposes in *Phillips and Taylor*. In that case, employees of the federal Crown were required to use federal Crown land as their residence in order to better perform their duties but had no legal interest in the land. A provincial tax statute contained a provision allowing a municipality to assess occupants of Crown land in respect of that land regardless of their legal relationship

with the federal Crown concerning that land. The Court held that the tax did not offend s. 125. While in form the tenants had no legal interest in the land and the Crown held both legal and beneficial title, in substance they occupied the Crown land and thus could be assessed for taxes without offending s. 125 (*Phillips and Taylor*, at pp. 407-8).

[156] I would apply this same principle of substance over form to interpret the phrase “belonging to Canada or any Province” in s. 125. I am of the view that s. 125 does not immunize property that private parties have placed with the Crown to hold in trust for their sole benefit from a tax on services that they have contracted to receive from the Crown in respect of that property. In form, the Crown does have a legal interest in the property, but in substance, the property belongs not to the Crown but to the private parties. This Court’s own jurisprudence on beneficial ownership makes this clear. As this Court has stated, “[t]he beneficial owner of property has been described as ‘the real owner of property even though it is in someone else’s name’” (*Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 4, quoting *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570). Likewise, in *Valard Construction*, at para. 16, this Court found that the very essence of a trust is that the trustee must hold property “for the benefit” of another such that the “real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust”. The trustee may not hold the property for its own enjoyment, but only for that of the beneficiary (*Valard Construction*, at para. 17).

[157] Moreover, this obligation to hold property solely for the benefit of a private beneficiary runs counter to the very concept of public ownership under Part VIII of the *Constitution Act, 1867*, that s. 125 aims to protect. In *Natural Resources and Public Property under the Canadian Constitution* (1969), at p. 18, G.V. La Forest defined public ownership in Part VIII of the *Constitution Act, 1867*, as referring in part to the ability of a province to “administer and control for the provincial . . . benefit property vested in the Queen”. As should be evident, as trustee BCI is expressly precluded from administering and controlling the Portfolios for its own benefit or for the benefit of its principal, British Columbia. Instead, it is required by law to administer and control them for the benefit of the private parties that have entrusted their money to it to manage as trustee.

B. *Extending the Immunity Would Overshoot Section 125’s Purposes*

[158] The interpretation of s. 125’s ambit that I have adopted properly avoids overshooting the purposes of that provision because it does not extend immunity to private parties’ interests. On my colleague’s interpretation, the private pension boards can always immunize themselves from paying GST on the services they contracted to receive from BCI. All they have to do is ask BCI to hold their funds in trust instead of in a segregated account and then authorize BCI to take its payment from the funds instead of billing the boards directly. The private parties derive all the real benefit from the immunity, not BCI, since the Portfolios subject to the tax do not belong to BCI but are merely held in trust. In form, the property is owned by BCI, but in

substance, it belongs to the private parties. And as the Funds Agreement makes clear, in substance the private parties are using the property to pay BCI for the investment management services it provides them.

[159] Likewise, my interpretation avoids overshooting s. 125's purposes because it does not rely on adverse contractual consequences for the Crown to extend the immunity. As noted previously, a tax does not offend s. 125 simply because it will result in adverse contractual consequences for the Crown. This principle applies with full force here. The Province's obligations in the event of a pension shortfall are contractual in nature. The joint trust agreements require the Province as employer to share the cost of making up shortfalls equally with the Plan Members (Public Service Pension Plan Joint Trust Agreement, s. 10.3(b)). The Province has no statutory obligation to fill an unfunded liability. Instead, s. 25.1(1) of the *PSPPA* merely provides the Minister of Finance with the discretion to do so. At paras. 83 to 84 of her reasons, my colleague relies on the remote prospect that taxing the trust property would create a shortfall for which the Province would be liable to fill to justify applying immunity. However, the jurisprudence indicates that it is improper to rely on this contractual consequence to do so.

[160] Furthermore, my interpretation avoids overshooting s. 125's purposes because it does not render the Crown's assets more commercially attractive by making them a tax haven for private parties. As I have explained, the Funds Agreement makes it clear that the pension boards are paying BCI for the services it

provides them and have simply selected the recovery of moneys from the Portfolios as the mechanism of payment. The effect of this payment mechanism is to give BCI a commercial advantage over private investment managers because investors that place their money with it to hold in trust do not have to pay GST on the investment management services they receive as long as payment is made from the trust funds. What is in substance a tax on the private recipients of provincial services does not engage s. 125, even if the effect of such taxation is to remove a commercial advantage that provincial property would otherwise enjoy (*GST Reference*, at p. 480).

C. *Extending the Immunity Would Not Advance Section 125's Purposes*

[161] Not only would extending the immunity overshoot s. 125's purposes, but it would also do nothing to advance those purposes. This case is far removed from s. 125's objective of preventing one level of government from appropriating the property of the other, or the fruits of that property, to its own use. That objective is rooted in the need to preserve the division of Crown assets between the federal and provincial governments effected by Part VIII of the *Constitution Act, 1867*. Yet here, the Portfolio funds were not originally provincial property. They were private property owned by private pension boards. BCI did not purchase this property but merely agreed to manage it as the agent of the boards. While the boards permitted BCI to assume legal title, they retained a full beneficial interest, and they agreed to pay BCI for the services it provided them in respect of the property.

[162] Taxing the trust funds for BCI's services does not undermine the government objectives underlying the Portfolios' existence. I agree with my colleague's conclusion that the B.C. Legislature created BCI to pursue various public objectives. However, the relevant legislative objective in relation to the investment management services that BCI provides is much narrower. That objective is to require BCI to recover the costs of the services it performs for clients (*PSPPA*, ss. 20(2)(d), 24(1)). As my colleague accepts at para. 16 of her reasons, the *PSPPA* gives BCI a discretion as to how to do so. In addition to recovering its costs from the Portfolios themselves (*PSPPA*, s. 24(1)(a)), BCI can bill its clients directly for the services it provides (*PSPPA*, s. 24(1)(b)). If BCI bills its clients directly, as it does for the segregated funds, the clients are liable to pay GST.

[163] Accordingly, holding that the immunity does not apply in the circumstances of this case would not undermine the B.C. Legislature's decision to allow BCI to hold the Portfolio assets in trust, as my colleague suggests at para. 84 of her reasons. Instead, it would merely impose appropriate tax consequences on a mode of payment for services chosen by BCI and its private clients. Nothing in the *PSPPA* or trust law requires the mode of payment that is said to give rise to s. 125 immunity. As noted previously, the *PSPPA* makes direct payment from the trust funds only one of multiple possible payment options available and also permits BCI to bill its clients directly for services rendered. As for trust law, a trust instrument may expressly provide for the remuneration of a trustee (*Oosterhoff on Trusts: Text, Commentary and Materials* (9th ed. 2019), by A. H. Oosterhoff, R. Chambers and M. McInnes, at

p. 975). It is settled law that the parties to a trust instrument may agree that a trustee's remuneration is payable directly by a person who assumes personal liability for it, instead of from the trust funds (*Lewin on Trusts* (19th ed. 2015), by L. Tucker, N. Le Poidevin and J. Brightwell, at para. 20-249).

[164] This undercuts the assertion that providing immunity is necessary to protect the Province's "operational space" to govern. The B.C. Legislature contemplated that BCI would recover its costs from its clients, either directly or by charging the Portfolios it operates for their benefit. The Legislature is presumed to know the prevailing case law (*R. v. Penunsi*, 2019 SCC 39, at para. 59). Accordingly, as the enactment of the *PSPPA* postdated this Court's decision in the *GST Reference*, the Legislature must be taken to have understood that clients would pay GST on services they received from BCI if BCI charged them directly. The Legislature's decision to still provide for this direct charge option in s. 24(1)(b) of the *PSPPA* indicates that it did not see the liability of private parties to pay GST on the investment management services they receive from BCI as undermining the Province's operational space to govern. Direct charges to BCI's clients are also wholly compatible with the trust structure that the B.C. Legislature authorized BCI to use for the Portfolio assets. Moreover, I do not accept BCI's argument that requiring the Portfolios to pay GST would put them at risk. BCI and the pension boards remain free to ensure that the GST is not paid from the trust funds by agreeing that the boards will pay BCI directly for its services, an option that is both provided for by the Legislature and used by BCI and the boards for the segregated funds.

[165] I would also note that BCI plays a less active role in relation to the management of the funds entrusted to it by the pension boards than my colleague suggests. At para. 83 of her reasons, my colleague stresses the “active role” that BCI plays as trustee largely by making reference to the *Regulation*. Yet considering the *Regulation* in isolation from the Funds Agreement yields only a partial picture. The Funds Agreement in fact restricts the “active role” of BCI to which my colleague refers by stipulating that BCI provides investment management services as the agent of the teachers’ pension board and exercises that board’s delegated authority (ss. 2.1 and 2.2). The Funds Agreement does contemplate BCI taking direction from the board regarding investment decisions, as evidenced by the provision exempting BCI from liability if it complies with an express direction of the board concerning investment decisions (ss. 2.4.3 and 12.1.1) Similarly, BCI is obligated to convey the trust property to the teachers’ pension board upon demand (ss. 8.2 and 9.1.2). I agree with my colleague that BCI is not a bare trustee because the Funds Agreement does grant it discretionary authority to make specified independent investment decisions (*Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. (2d) 65 (C.A.), at p. 75). Nonetheless, the agency relationship, the taking of instructions from the pension board, and the obligation to convey the property to the pension board on demand are all elements consistent with a bare trust relationship and show that BCI’s “active role” is significantly restricted (see *De Mond v. The Queen* (1999), 99 D.T.C. 893 (T.C.C.), at paras. 35-37).

[166] Finally, applying immunity does not advance the constitutional value of democracy because this case is not about the federal Parliament deciding how taxes levied by the B.C. Legislature should be spent. The B.C. Legislature has already decided how it should spend its tax revenues. It authorized the payment of tax funds to private pension boards in order to meet B.C.'s contractual obligations to compensate provincial employees. Once B.C. paid those funds to the private pension boards, they ceased to be public funds and became subject to the contractual terms of the joint trust agreements. The services at issue are thus provided by BCI to private parties that agreed to pay for those services. All Canada is trying to do is ensure that those private parties pay GST on those services. Deeming the trust to be the recipient of those services is not an attempt to deprive BCI of property that belongs to it. Instead, it is simply a way to prevent private parties from using the trust formality to avoid paying GST on the management services they both pay for and receive in respect of funds held for their benefit. Indeed, Canada concedes that any funds that British Columbia itself has invested from the Consolidated Revenue Fund with BCI, are held by BCI for the benefit of the Province (A.F., at para. 77).

D. *The Jurisprudence Does Not Compel the Result My Colleague Reaches*

[167] I further disagree with my colleague that the jurisprudence compels the outcome she reaches. In fact, the issue of whether s. 125 applies where the Crown has legal title but no beneficial interest did not arise in any of the cases to which she refers. Nor did any of those cases involve a private party successfully structuring its

contractual relationship with a government body so as to avoid tax by invoking the immunity created by s. 125.

[168] My colleague relies heavily on *Calgary & Edmonton Land Co.* and *Smith v. Rural Municipality of Vermilion Hills* (1914), 49 S.C.R. 563, aff'd (1916), 30 D.L.R. 83 (P.C.), to support the proposition that the taxation of any Crown interest in property triggers the application of s. 125. However, in neither of those cases did the taxing statute purport to tax the Crown's legal interest in land. Instead, because the taxing statute did not expressly bind the federal Crown, the courts applied the longstanding interpretive presumption that the provincial legislature did not intend to tax the federal Crown's interests in property or land (*Calgary & Edmonton Land Co.*, at pp. 180, 184-85 and 192; *Smith* (SCC), at pp. 564-65). Accordingly, it was not necessary for the Court to decide whether s. 125 would immunize property from taxation in circumstances where a private party had placed that property with the Crown to hold in trust for its sole benefit. The statement by Davies J. at p. 179 of *Calgary & Edmonton Land Co.* that any interest of the Crown in property is immune under s. 125 was thus *obiter*.

[169] Moreover, *Quirt v. The Queen* (1891), 19 S.C.R. 510, does not stand for the proposition that the Crown's legal ownership as trustee is sufficient to give rise to s. 125 immunity even when the Crown lacks a beneficial interest. In that case, as my colleague acknowledges, not only was the Crown the trustee of the insolvent bank's assets, but it also had a substantial beneficial interest in the bank's assets as its largest

creditor. Moreover, s. 125 was not even at issue in *Quirt*. This Court decided the case on the basis that the federal Crown was exempt from taxation because the Ontario taxing statute explicitly exempted property vested in the Crown (*Quirt*, at p. 514, per Ritchie C.J., p. 518, per Strong J., p. 525, per Patterson J. (Strong and Taschereau JJ. concurring)). So too did the Ontario courts. The Divisional Court explicitly held that it was unnecessary to consider whether Ontario had the constitutional power to tax federal property because of the express exemption in the taxing statute (*Regina v. County of Wellington* (1889), 17 O.R. 615 (Div. Ct.), at p. 619). As for the Court of Appeal, the passage of Osler J.A.'s reasons relied on by my colleague in fact addresses the statutory exemption in the Ontario taxing statute, not the constitutional immunity in s. 125 (*Regina v. County of Wellington* (1890), 17 O.A.R. 421, at p. 444).

V. Conclusion

[170] For these reasons, I would allow the appeal on the immunity issue. The beneficial interest in the Portfolios rests with the unit holders. The private pension boards — which comprise a very significant portion of the unit holders — are not the provincial Crown or agents thereof. Section 125 does not immunize the property they have placed with BCI to hold in trust from GST liability for the services they receive from BCI in respect of that property.

[171] I agree with my colleague's disposition on the issues relating to jurisdiction and the Agreements.

APPENDIX

Public Sector Pension Plans Act, S.B.C. 1999, c. 44

British Columbia Investment Management Corporation established

16 (1) A corporation, to be known as the British Columbia Investment Management Corporation, is established and incorporated as a trust company authorized to carry on trust business and investment management services as provided in this Part.

...

- (5) The investment management corporation is an agent of the government.
- (6) The investment management corporation, as an agent of the government, is not liable for taxation except as the government is liable for taxation.

...

Capital of the investment management corporation

17 (1) The capital of the investment management corporation is one share with a par value of \$10.

- (2) The share in the investment management corporation must be issued to and registered in the name of the Minister of Finance and must be held by that minister on behalf of the government.

Powers, functions and duties of the investment management corporation

18 ...

- (2) The purpose of the investment management corporation is to provide funds management services, including the making of investments and loans, for funds placed with the investment management corporation.

...

- (4) In addition to the powers, functions and duties of the investment management corporation as provided in this Part, the investment management corporation has the same powers, functions and duties in the provision of funds management services for funds placed with it under subsection (3) as the Minister of Finance would have if the funds

had been placed with that minister under Part 5 of the *Financial Administration Act* as it read on April 1, 1999.

...

Continuation of investment portfolios

- 18.1** (1) Each portfolio established under B.C. Reg. 84/86, the Pooled Investment Portfolios Regulation, is continued under this Act.
- (2) Each participating fund allocated units of a portfolio immediately before January 1, 2000 must continue to be allocated those units of the portfolio with the investment management corporation holding those units as agent for the participating fund.
- (3) All assets held under or in a portfolio by the Minister of Finance or the chief investment officer under the *Financial Administration Act* immediately before January 1, 2000 must continue to be held under or in the portfolio, in trust, by the investment management corporation.

Powers, functions and duties of the investment management board

20 ...

- (2) The investment management board must, through the investment management corporation and to the extent possible under the budget approved for the investment management corporation, do all of the following:

...

- (d) have in place an equitable fee system based on the user pay principle;

...

Operating costs and capital expenditures of the investment management corporation

- 24** (1) The investment management corporation must recover its operating costs and capital expenditures from one or more of the following:
- (a) amounts charged to the funds for operating costs and capital expenditures necessarily incurred by the investment management corporation on behalf of the funds it manages;
- (b) amounts charged to persons, organizations and other clients for services provided by the investment management corporation;

- (c) income accruing from investments made by the investment management corporation on its own behalf.

...

Appropriation for unfunded pension plan liability

- 25.1** (1) If an actuarial valuation discloses that a pension plan has an unfunded liability, the Minister of Finance may, in accordance with generally accepted accounting principles, allocate an expense to the consolidated revenue fund to amortize the portion of the unfunded liability that is attributable to the government.

...

Pooled Investment Portfolios Regulation, B.C. Reg. 447/99

Establishment of pooled investment portfolios

- 2** The investment management corporation may establish one or more portfolios.

Continuation of pooled investment portfolios

- 3** Each portfolio established under B.C. Reg. 84/86 is continued under this regulation.

Management of pooled investment portfolios

- 4** (1) All the assets of a portfolio are held in trust by the investment management corporation.
- (2) Subject to the Act, the chief investment officer is responsible for investing money of a portfolio in categories of investment the chief investment officer considers desirable and for managing and controlling the portfolio.
 - (3) The investments of a portfolio must be identified separately from other property of the investment management corporation, with each investment recorded to show clearly the portfolio to which the investment belongs.
 - (4) Ownership in any asset in a portfolio must not be attributed to a participating fund.

Units of participation

- 5 (1) A portfolio must be divided into units of participation, that on any given day are of equal value, and the proportionate interest to be attributed to each participating fund must be expressed by the number of units allocated to it.
- (2) The value of each full unit in a portfolio is
- (a) on establishment of the portfolio, \$1 million, and
 - (b) on any subsequent date, the value determined by the chief investment officer.
- (3) On establishment of a portfolio, the appropriate number of units must be allocated to each participating fund proportionate to its investment in the portfolio.
- (4) Subject to section 10 (4.1), the cost of a unit in a portfolio is the value of the units on the date of purchase.
- (5) A participating fund may hold a fraction of a unit calculated to 9 decimal places.

Investment of income and other proceeds

- 11 Subject to section 10, the chief investment officer may
- (a) distribute any net income, net capital gains or other proceeds received by a portfolio to each participating fund in proportion to its participation in the portfolio, or
 - (b) invest any net income, net capital gains or other proceeds received by a portfolio in that portfolio.

Termination of a pooled investment portfolio

- 14 The chief investment officer may terminate a portfolio and distribute to the unit holders the net proceeds realized.

Excise Tax Act, R.S.C. 1985, c. E-15

PART IX

Goods and Services Tax

Application

122 This Part is binding

- (a) on Her Majesty in right of Canada; and
- (b) 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.

Definitions

123 (1) In section 121, this Part and Schedules V to X,

...

person means an individual, a partnership, a corporation, the estate of a deceased individual, a trust, or a body that is a society, union, club, association, commission or other organization of any kind; (*personne*)

...

recipient of a supply of property or a service means

- (a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,
- (b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and
- (c) where no consideration is payable for the supply,
 - (i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,
 - (ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and

(iii) in the case of a supply of a service, the person to whom the service is rendered,

and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply; (*acquéreur*)

...

taxable supply means a supply that is made in the course of a commercial activity; (*fourniture taxable*)

...

Imposition of goods and services tax

165 (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

Tax in participating province

(2) Subject to this Part, every recipient of a taxable supply made in a participating province shall pay to Her Majesty in right of Canada, in addition to the tax imposed by subsection (1), tax in respect of the supply calculated at the tax rate for that province on the value of the consideration for the supply.

Collection of tax

221 (1) Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

...

Calculation of net tax

228 (1) Every person who is required to file a return under this Division shall, in the return, calculate the net tax of the person for the reporting period for which the return is required to be filed, except where subsection (2.1) or (2.3) applies in respect of the reporting period.

Remittance

(2) Where the net tax for a reporting period of a person is a positive amount, the person shall, except where subsection (2.1) or (2.3) applies in respect of the reporting period, remit that amount to the Receiver General,

(a) where the person is an individual to whom subparagraph 238(1)(a)(ii) applies in respect of the reporting period, on or before April 30 of the year following the end of the reporting period; and

(b) in any other case, on or before the day on or before which the return for that period is required to be filed.

[267.1]

Activities of a trustee

(5) For the purposes of this Part, where a person acts as trustee of a trust,

(a) anything done by the person in the person's capacity as trustee of the trust is deemed to have been done by the trust and not by the person; and

(b) notwithstanding paragraph (a), where the person is not an officer of the trust, the person is deemed to supply a service to the trust of acting as a trustee of the trust and any amount to which the person is entitled for acting in that capacity that is included in computing, for the purposes of the *Income Tax Act*, the person's income or, where the person is an individual, the person's income from a business, is deemed to be consideration for that supply.

Reciprocal Taxation Agreement (Canada — British Columbia)

Definitions

1. In this agreement:

...

“Federal Act” means the *Excise Tax Act*, R.S.C. 1985, c. E-15;

...

“Value-Added Tax” means any tax imposed or levied under Part IX of the Federal Act.

Application

3. This agreement is binding on Canada, the Province and their respective agents.

Constitutional immunity

4. It is understood that neither Canada nor the Province is deemed, by reason of having entered into this agreement, to have surrendered or abandoned any of its powers, rights, privileges or authorities under the Constitution of Canada, or to have impaired any such powers, rights, privileges or authorities.

Agreement by the Province

6. The Province agrees:

...

- (d) to pay, subject to clauses 6(e) and 7(1) the Value-Added Tax in accordance with the Federal Act;

...

Settlement of disputes under agreement

9. (1) If the parties fail to agree on the interpretation or application of this agreement, a party can refer the matter in dispute to Board established in accordance with subclause (2).

...

- (9) This clause does not apply where a difference arises between the parties as to any matter related to the administration or enforcement of any Act that imposes a tax that a party has agreed to pay.

Duration

15. (1) This agreement shall end on December 31, 2015, except if either party terminates the agreement earlier by giving six months notice in writing to the other party.
- (2) No rights or obligations which may have accrued to either party during the term of this agreement are affected if this agreement ceases to have effect.

*Comprehensive Integrated Tax Coordination Agreement Between the Government of
Canada and the Government of British Columbia*

Part I

Interpretation

1. In this Agreement,

...

“harmonized sales taxes” means the CVAT and the PVAT in respect of each participating province;

...

Part XIV

Dispute Resolution

38. Best 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.

39. Subject to clause 40, issues not resolved by federal and provincial officials will be referred to the Minister of Finance (Canada) and the Ministers of Finance of the relevant participating provinces.

40. If the issue relates to the administration of the harmonized sales taxes contemplated by clause 29, the issue will be referred to the Minister of National Revenue, the Minister of Finance (British Columbia) and, if applicable, to the appropriate Minister of relevant participating provinces, with notice of same to the Minister of Finance (Canada). If the issue relates to the collection of the harmonized sales taxes contemplated by clause 30, the issue will be referred to the Minister of Public Safety, the Minister of Finance (British Columbia) and, if applicable, to the appropriate Minister of relevant participating provinces, with notice of same to the Minister of Finance (Canada) and the Minister of National Revenue.

41. If an unresolved issue has been referred to the Ministers described in clauses 39 or 40, those Ministers may refer the issue to a third party for consideration and advice.

Part XV

Term, Amendment and Termination

42. The terms and conditions of this Agreement will continue in full force and effect, in accordance with and subject to the provisions of this Part, until the date that is specified by a Party in a written notice that is delivered to the other Party setting out the Party's desire to terminate this Agreement.

...

Part XVI

Government Purchases

51. Canada and the Province agree to pay the harmonized sales taxes in respect of supplies acquired by their respective governments or by agents and entities thereof.

Part XIX

Miscellaneous

65. By entering into this Agreement, neither Party is deemed to surrender or abandon any of the powers, rights, privileges or authorities vested in either of them under the Constitution Acts, 1867-1982 (or under any amendments to those acts) or otherwise, or to impair any of such powers, rights, privileges or authorities.

*Appeal and cross-appeal dismissed without costs, WAGNER C.J.
dissenting in part.*

*Solicitor for the appellant/respondent on cross-appeal the Attorney
General of Canada: Attorney General of Canada, Vancouver.*

Solicitors for the respondent/appellant on cross-appeal the British Columbia Investment Management Corporation: Lawson Lundell, Vancouver.

Solicitor for the respondent/respondent on cross-appeal Her Majesty The Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.