A STUDY ON THE PARTICULARITIES OF GOVERNMENT CONTRACTS

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws
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ABSTRACT

"A Study on the Particularities of Government Contracts"

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The purpose of this study is to show that although the private law of contract forms the basic legal framework of government contracts, such contracts are fundamentally different from contracts concluded between private parties as they feature a strong inequality between the parties. This demonstration is made through the analysis of the conflicts between the principles of administrative law, which mainly relates to the unique powers of the State and to its special characteristics, and those of the law of contract. Attention is also paid to the numerous statutory requirements which are imposed on the conclusion of government contracts and to their impact on the validity of the contract.
ACKNOWLEDGEMENTS

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I am dedicating this thesis and all the heart I put into it to my parents, who never failed to encourage me and to be a constant source of strength, even when I was not always receptive, grateful or aware of their unconditional support. They surely knows what this degree means for me. However, these few words will never be enough to show them how much I appreciated their help when I needed it the most: merci infiniment de ne jamais avoir douté.

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TABLE OF CONTENTS

INTRODUCTION .................................................................................................................. 1

CHAPTER 1: APPLICABLE LAW ....................................................................................... 3
  1.1 THE SITUATION IN QUEBEC .................................................................................. 7
  1.2 JUDICIAL REVIEW ................................................................................................. 10
  1.3 STANDARD FORM CONTRACTS ............................................................................ 13

CHAPTER 2: CONDITIONS OF CONTRACTING .............................................................. 17
  2.1 THE PUBLIC INTEREST ......................................................................................... 17
  2.2 INTERPRETATION ................................................................................................. 20
  2.3 POWER OF CONTRACTING .................................................................................... 26
  2.4 STATUTORY REQUIREMENTS .............................................................................. 31
    2.4.1 Appropriation of Funds .................................................................................. 33
    2.4.2 Approbation by a Superior Authority ............................................................ 35
    2.4.3 Choice of the Contracting Party ................................................................... 41
  2.5 OTHER LIMITATIONS ON THE FREEDOM OF CONTRACTING ....................... 44
  2.6 THE STATE'S LIBERTY OF ACTION ..................................................................... 51
    2.6.1 The Rule Against Fettering of Discretion ...................................................... 51
    2.6.2 The Doctrine of Executive Necessity ............................................................. 65
    2.6.3 The Effect of the No-Fettering Rule and the Executive Necessity

  Doctrine on the Contract ............................................................................................. 73

- iv -
CHAPTER 3: PREROGATIVES OF THE CROWN ................................................. 79

3.1 THE IMMUNITY AGAINST STATUTES .......................................................... 86

3.2 INJUNCTION, SPECIFIC PERFORMANCE AND EXECUTION OF JUDGMENTS
AGAINST THE CROWN .................................................................................... 97

3.3 THE APPLICABILITY OF ESTOPPEL ................................................................. 105

3.3.1 Estoppel Generally .................................................................................. 106

3.3.2 Estoppel and the Crown ......................................................................... 112

3.3.2. The Supremacy of Legislation ............................................................. 113

3.3.2.2 The Jurisdictional Principle ................................................................ 126

CHAPTER 4: THE LEGISLATIVE POWER ......................................................... 135

4.1 INDIRECT IMPAIRMENT OF PERFORMANCE .............................................. 136

4.2 STATUTORY ALTERATION/TERRMINATION OF CONTRACTS ................. 141

4.3 VALIDITY OF LEGISLATION AFFECTING CONTRACTUAL RIGHTS ............. 146

4.3.1 The Charter of Rights and Freedoms .................................................... 146

4.3.2 The Provisions of the Constitution ....................................................... 147

4.3.3 The Rule of Law ..................................................................................... 149

4.3.4 The Canadian Bill of Rights .................................................................. 154

CONCLUSION .................................................................................................... 156
INTRODUCTION

In recent years, financial pressures have led the federal and provincial governments to rely more and more on the private sector for providing goods and services to the population or to the governments themselves. The contractual activity of the State has thus increased considerably, leaving only very few sectors of activities to be traditionally handled by the State.¹ The State is thereby making less use of its statutory powers to achieve its ends directed to the safeguard of the public interest, and is instead using a private law means, the contract. But as the contract concluded in these circumstances is designed for the execution of a government’s function, public and private interests become intertwined. A difficulty also arises from the contradiction between the idea of a contract and the sovereign authority of the State.

The purpose of this study will be to analyse how these considerations affect the private law model of contract and thus, how the State is considered in the contractual context. This study is therefore an analysis of what a private contractor is facing when engaging into a contractual agreement with the State, of the particularities of the State compared to an ordinary contracting party and of the possible conflicts between administrative law principles and the private law of contract.

This goal will be attained by firstly stating which principles of law form the basic legal framework of government contracts. This will be done in chapter 1. Chapter 2 will be mainly concerned with the impact of the mission of the State to act in the public interest and with the most well-known aspect of government contracts which

¹ In 1995, expenses for goods and services for all governments in Canada represented 42.6% (150 834 millions). Source: Statistics Canada, Canadian Economic Observer, Historical Statistical Supplement, 1995-1996.
Introduction

is the various conditions of contracting that must be respected in order for the contract to be valid and binding on the State.

Chapter 3 will be devoted to the State itself, and to how its inherent characteristics, mainly its prerogatives and immunities, influence its position as a contracting party.

Finally, chapter 4 will focus on the most important power of the State: the power to make laws. This last chapter will present the extent to which a contract involving the State as a contracting party may be affected by legislative changes.

All these elements are raised to demonstrate that, in view of the current case law and doctrine, the State is not an ordinary contracting party and that government contracts are significantly different from the private law model, justifying by then an adaptation or reform of the inappropriate legal principles which are presently applied to government contracts.

Due to the limited scope of this study, the analysis will be restrained to the contractual relationships between a private contractor and the government, such a relationship being defined as an agreement between a citizen, a physical person or a corporation, and the government in which the constitutive elements of the contract prescribed by private law are found. The word “government” or “State” are used as to restrict the study solely to contracts concluded by the Crown, either acting in right of the Dominion or the provinces. Therefore, these expressions include all branches of the executive, but set aside public corporations, municipalities and other decentralized public bodies, as they involve too many particularities.

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CHAPTER 1: APPLICABLE LAW

Government contract law does not really exist \textit{per se}. Although, it may be said that there is some distinct body of law due to the presence of various statutory provisions and because of the rules and practices developed by the Administration (standardisation).\textsuperscript{3} legal systems of Anglo-American tradition do not distinguish government contracts as "a separate legal category from private contracts".\textsuperscript{4} The situation is similar at the statutory level; neither the federal nor the provincial legislatures have enacted a general and complete statute on government contracts. The question is thus whether the private of law of contract is applicable to government contracts. The solution lies in the fundamental principles of constitutional and administrative law.

There is no written official legal principle which states that the government is subject to private law. However, Dicey, in its famous writings, gave to the idea of submitting the government to the private law a classic formulation which now stands as a basic constitutional law principle.

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limits. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.\textsuperscript{5}

\textsuperscript{5} A.V. Dicey, An Introduction to the Study of the Law of the Constitution, 10\textsuperscript{th} ed. (London: Macmillan, 1959) at 193.
[The rule of law] means...the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.\(^6\)

The principle known as the rule of law thus states that all citizens, including the government, is subject to the common law. This has later been interpreted as meaning that the government should not enjoy unnecessary privileges or exemptions from ordinary law: "[i]n principle, all public authorities should be subject to all normal duties and liabilities which are not inconsistent with their governmental functions".\(^7\)

The rule of law also requires that a person directly affected by a government’s action shall be able to carry a dispute with the government before the ordinary courts, where judges are wholly independent from the executive.\(^8\) The rule of law is therefore a principle which strives for the equality of the government and its citizens before the law.

The principle of the rule of law has been officially recognized as part of the Canadian constitutional law by both constitutional acts. Firstly, through the preamble of the B.N.A.A. of 1867 where it is stated that the provinces shall be united “with a constitution similar in principle to that of the United Kingdom”. As the rule of law is part of the British constitutional law, such wording implicitly includes this principle into Canadian law. The preamble of the 1982 Constitution Act is even more explicit by clearly stating that “Canada is founded upon the principles that recognize the supremacy of God and the rule of law”.

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\(^6\) Ibid. at 202.
\(^8\) Ibid. at 24.
The *rule of law* as a basic constitutional principle was also confirmed by the Supreme Court of Canada in *Re Manitoba Language Rights*. In this case where the Supreme Court had to decide whether or not all Manitoba statutes were invalid on the ground of violation of language rights, the *rule of law* was relied upon so as to maintain a positive legal order in the province. As to the inclusion of the *rule of law* in our constitutional order, the Court left no doubt.

The constitutional status of the *rule of law* is beyond question. (...) Additional to the inclusion of the *rule of law* in the preambles of the constitutional Acts of 1867 and 1982, the principle is clearly implicit in the very nature of a constitution. (...) [I]n the process of constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the *Patriation Reference*, this unwritten postulate was the principle of federalism. In the present case it is the principle of *rule of law*.10

Although the *rule of law* provides that the government is not above the law, there are some exceptions to this principle which make the government a “special citizen”. These exceptions exist to facilitate the performance of the government’s duty to protect the public interest. The most common of these exceptions are the royal prerogatives, which are mainly powers and immunities originating from the time where the King was the supreme source of law and which are still enjoyed by the government. All of these prerogatives have been limited and defined by the case law and are now specific common law rules.11 The historical evolution of the Crown’s contractual liability is a good illustration in this regard. For a long time, the Crown could not be sued for breach of contract. The only remedy for an aggrieved party was the Petition of Right.

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10 Ibid. at 750 and 752.

- 5 -
which was available upon clemency of the Crown. In the nineteenth century, the courts officially recognized the contractual liability of the Crown and the Petition of Right was abolished by statute, putting a definite end to the Crown's immunity and confirming the general applicability of ordinary law.

The end result as to the applicability of ordinary law to the government was well described by the Supreme Court in *A.G. Quebec v. Labrecque*, which was concerned with the legal relationship between the government and a civil servant.

It must be remembered that in Anglo-Canadian law, administrative law does not constitute a complete and independent system, separate from the ordinary law and administered by specialized courts. On the contrary, it is the ordinary law, administered by the courts of law, which is made part of public law and the provisions of which cover the public administrative authority, unless they are replaced by incompatible legislative provisions, or supplanted by rules peculiar to the royal prerogative, that group of powers and privileges belonging only to the Crown.

In accordance with these principles, the conclusion is thus that the law applicable to contracts made by the Administration is the private law of contract, with the exception

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12 The application of this remedy to contractual liability was decided in *The Bankers Case* (1700), 87 E.R. 500. See Generally, W.S. Holdsworth, “The History of Remedy Against the Crown” (1922) 38 L.Q.R. 141 and 280.


15 The liability of both the federal and provincial governments is now settled as various statutes now provide that they may be sued for breach of contract: see the *Federal Court Act*, R.S.C. 1985, c. F-7, s. 17(2). In Quebec, equivalent dispositions are found in the *Code of Civil Procedure*, s. 94 ff. In common law provinces, see for example *Proceedings Against the Crown Act*, R.S.O. 1990, c. P-27.
of some rules and privileges whose sources lie in statutes, regulations or in Crown prerogatives that are still applicable. Therefore, although the common law forms the legal framework for government contracts, it cannot be said that the common law applicable to the Crown is identical to the one that applies to the citizens.

1.1 THE SITUATION IN QUEBEC

The issue of the legal framework for government contracts becomes a little more complicated in Quebec where the private law of contract is civil law. The question thus becomes whether the applicable law is the common law or the civil law, and which legal system will provide the "basic fabric" for government contracts, and therefore, the interpretation principles.

It is well established in the doctrine and in the case law that administrative law, as part of the public law, is based on the common law of England, which remained applicable in this field throughout Canada, even after the Act of Quebec brought back the French law for what is considered "property and civil rights" in the Province of Quebec.

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In *Laurentide Motels Ltd v. Beauport (Ville)*,\(^\text{30}\) the Supreme Court concluded that public authorities are to be subject to private law only to the extent of what is provided for by the common law, which is the fundamental law in Quebec for everything not related to “property and civil rights”. This was recently confirmed in the case of *2747-3174 Quebec Inc. v. R.P.A.Q.* where L’Heureux-Dubé J. clearly stated that as for administrative law issues, the common law and the common law methodology apply.\(^\text{31}\)

As the public common law rules state that the ordinary law should be applied to government contracts to the extent that it is not contrary to statutory provisions or prerogatives, the same reasoning shall be applied in Quebec. Therefore, the ordinary law, in this case the civil law as stated by the Civil Code of Quebec, is the law providing the basic legal rules for government contracts. However, the interpretation principles are the ones provided by the English “public” common law, and not by the French administrative law, as the basic fabric in the area of administrative law is English common law.\(^\text{32}\)

This solution, accepting the predominance of the common law in public law fields and rejecting any incursion of the French administrative law principles in this matters, has also been recognized by the courts, which consistently refused to include such principles in cases involving Quebec public authorities.\(^\text{33}\) Therefore, any reference to

\(^{30}\) *Ibid.*

\(^{31}\) *2747-3174 Quebec Inc. v. R.P.A.Q.*, [1996] 3 S.C.R. 919 at 968-75. See also A. Garon, *supra* note 4 at 276, who affirmed that the Crown contractual liability in Canadian and Quebec law is a public law subject matter, and consequently that the sources of such liability are to be found first in English law.

\(^{32}\) *Ibid.* at 973.

\(^{33}\) “With great respect, in my opinion the French decisions have nothing to do with the interpretation of our law of public administration, which has been taken entirely from the law of England”: *Darmet v. City of Montreal* (1939), 67 B.R. 69 (Que. C.A.) at 73 (Barclay J.). See also *Peloquin v. Cité de Sorel*, [1943] R.L. 513 (Que. S.C.) at 514; *Canadian Copper Refiners Ltd. v. Quebec Labour Relations Board*, [1952] C.S. 295 (Que. S.C.) at 307; *Corporation du Comté d’Arthabaska*
French law should be limited to general principles of contract law, when these are made applicable to government contracts by virtue of the common law. 24

This leads to the conclusion that the private law of contract contained in the Civil Code applies to contracts entered into by public authorities in the province of Quebec, except in the circumstances where special rules found in statutory instruments or in public law principles of English inspiration apply. 25 This principle was codified in the Civil Code at section 1376 which reads as follows.

The rules set forth in this book [obligations] apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them. 26


26 In his commentaries on the new Civil Code, the Minister of Justice declared that s. 1376 was the codification of the law existing prior to the coming into force of the new Code. He added that the expression “any other rules of law” was meant to include all rules, even non-written rules of public law. See also s. 300 C.C.Q: “Legal persons established in the public interest are primarily governed by the special Acts by which they are constituted and by those which are applicable to them(...). Both kinds of legal persons are also governed by this code where the provisions of such Acts require to be complemented, particularly with regard to their status as a legal persons, their property or their relations with other persons”.

- 9 -
This reasoning is also valid for contracts of the federal government which are formed or executed in the province of Quebec.\(^27\)

However, it is important to remember that regardless of the differences in the Canadian legal systems, the leading principle in government contracts, as in ordinary contracts, is that the contract constitutes private ordering. Therefore, the relationship between the parties will be “primarily governed by the provisions of the contract, and unless it is silent or ambiguous on any point involved, one must be guided solely by its provisions”.\(^28\)

1.2 JUDICIAL REVIEW

Since contracting is a way for the government to fulfil its duties towards the community by which private rights may be affected, principles of judicial review cannot be ignored in a discussion on the applicable law. The question of the availability of public law remedies remains relevant even with the conclusion drawn above concerning the applicability of ordinary law. Although the private law of contract regulates the rights and obligations of the parties, one cannot forget that the basic fabric as to the legal framework in government contract is public law and that one of the parties to the contract is the government, which retains its special identity.\(^29\)


According to Arrowsmith, judicial review of government contracts can be described by a hesitation of the courts to consider powers arising from contractual agreement reviewable, in the same way as other powers of the government. In most cases, the courts have assumed that contractual powers are not reviewable; and that only the presence of some additional element of public law or of a statutory disposition governing the decision will render its review possible.\(^{30}\)

Accordingly, it has thus been said that the setting aside of judicial review in this case "is based on the concept that contractual decisions are private rather than public, and hence unsuited to administrative law mechanisms"\(^{31}\).

Despite these general comments, examples of judicial review in a contractual context remain.\(^{32}\) With the exception of two decisions,\(^{33}\) which are inconclusive, these examples are mainly concerned with the awarding of contracts following calls for public tenders rather than with real decisions made during the execution of the contract.

In the first of these two particular cases, Re Prysiaziuk and Regional Municipality of Hamilton-Wentworth,\(^{34}\) the Ontario High Court of Justice was faced with an application for judicial review in relation with the termination of a contract between


\(^{34}\) Ibid.
the regional municipality and the owner of a lodging-home for the elderly and homeless. The Commissioner of social service terminated the contract on the ground that the home did not respect the fire regulations. Although it was argued before the court that the termination was permitted as a matter of contract and that the actions of the commissioner in this case were not subject to judicial review, the court granted the application. The court based its decision on the fact that the agreement was merely a "licensing apparatus for dealing with persons in need and providing hostels for them". The court also added that as these persons were not parties to the contract, their rights took the contract beyond what otherwise might be similar to a contract for the sale of goods and services. On the basis that there was a lack of fairness in the decision of the Commissioner, the court thus quashed his decision.

The second case was decided by the Quebec Superior Court in 1984. The applicants were registered as building trades professionals at the central registry of contractors to the General Purchasing Service of the Quebec Department of Public Works and Supplies. Following a bid made upon an invitation of the respondent, the applicants entered into a contract with the respondent. The acceptance of the bid was later revoked by the respondent on the ground that the information received from the central registry was inaccurate regarding one of the applicants. Although, the court made it clear that the acceptance of the bid constituted a contract between the parties, no arguments were raised as to the non-applicability of judicial review in a contractual context. The court considered that the acts of the officials at the central registry in striking the applicants' names and of the respondent in revoking the contract were made in violation of the principles of natural justice and were thus subject to judicial review. Such a decision is unusual and contrary to the current tendency of the courts in this matter. Its strength as a precedent is thus arguable. A distinction may be made

\[\text{ibid. at 344 (Rosenberg I.)}\]
\[\text{The court cited the decision of the Ontario Court of Appeal in Re Webb and Ontario Housing Corp. (1978), 93 D.L.R. (3d) 187, to state that even if the rights of the parties were covered by a contract, there was, nevertheless a duty to act fairly.}\]
at the level of the central registry officer’s decision which was the cause of the revocation of the contract, as such decision was clearly a case of judicial review.

At an other level, the judicial review of the decision of a public body on whether or not to enter into a contract has also been the subject of discussions. As such decisions involve the exercise of a statutory discretion, it must therefore be made lawfully and must not constitute an abuse of power. In the case of a purely commercial decision, there will be no ground for a court to intervene. But if there is some ulterior purpose or an excess or abuse of power, it may constitute a justification for judicial review. And as such, “the court is entitled to examine the motives of a public body.”\(^{38}\)

Such arguments in favour of judicial review in government contracting are still very much straight forward, and examples of their application are rare. They however constitute a sensible way to reconcile the exercise of statutory discretion with the contractual context in which they are set.

An overview of government contract law would not be complete without a more practical approach. As one of the important points in the first section on applicable law was that the contract constitutes private ordering for the parties, it is relevant to examine contractual customs in the context of government contract.

### 1.3 STANDARD FORM CONTRACTS

The vast scope of the modern State’s responsibilities and of the ever-growing diversity of administrative agencies has forced public administrations to create greater

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\(^{37}\) Garand v. Société d'habitation du Québec, supra note 33.

\(^{38}\) S.A. De Smith, L Woolf and J Jowell, Judicial Review of Administrative Action, supra note 17 at 178-79.
standardization in the contractual process. The need for more coherence and uniformity has led to an extensive reliance on standard term contracts.

The frequent use of standard term contracts is now an important characteristic in government contracting as it is with other commercial contracts. This tendency to rely on standard term contracts has caused some scholars to maintain that these contracts should be considered as a source of law per se, as they create a particular and almost independent legal environment. Similarly it has been said that the quasi-legislative nature of these contracts should be recognized and their terms subjected to a measure of judicial review. It was also argued that regardless of their contractual facade, such type of contract was closer to an unilateral act and that because of their already pre-determined structure fixed by the government, the phenomenon could be qualified as “organized consensualism.”

This is due to the fact that certain standard terms are sometimes provided for in legislation or regulations, which require the public authority to incorporate them in its contracts. These terms however lose their statutory nature to become contractual, when accepted by the contractor. Thus, such contracts have two aspects: a regulatory

\[39\] R. Dussault and L. Borgeat, Administrative Law, A Treatise, supra note 2 at 531
\[40\] This reliance is also justified by the fact that standard term contracts allow the Administration to save costs, “by saving the need for constant renegotiation of basic contractual terms. Furthermore, they can be easily reviewed and amended to take account of changing circumstances or the needs of a particular contract”; P.P. Craig, Administrative Law, 3d ed. (London: Sweet and Maxwell, 1994) at 696.
\[41\] C. Turpin, “Public Contracts” supra note 17 at 4-47.
effect for the public officers who must include the standard terms in all contracts and, a contractual one, because they take effect through the will of the parties.\textsuperscript{45}

The regulatory aspect coupled with pre-established general formulas often established by a superior authority, affect the contractor as well as the agent contracting for the Administration. Therein lies the difference between government standard type contracts and those found in the private sector.

In spite of those characteristics, the contractual nature is still predominant in government standard contracts; we have not yet reached the stage of the State forcing individuals to contract. One must also take into account the fact that in all contracts awarded through a bidding process, the price, one of the fundamental elements, is fixed by the contractor.

Arguments of this nature are at the centre of the controversy surrounding the qualification of government contracts as “contracts of adhesion”,\textsuperscript{46} where the only liberty or choice left to the contractor is whether or not to contract. This could end up not being a choice at all for enterprises which depend on the State’s contracts to survive.\textsuperscript{47} Qualifying government contracts this way could have a great effect in

\textsuperscript{45} C. Turpin, \textit{Public Contracts, supra} note 17 at 4-49; R. Dussault and L. Borgeat, \textit{Administrative Law, A Treatise, supra} note 2 at 529.

\textsuperscript{46} Some authors also use the expression “status contract”.

Quebec, where there are provisions in the Civil Code allowing the courts to review abusive clauses in adhesion contracts.\textsuperscript{48}

Finally, as to the general legal impact of standard term contracting, they serve the purpose of fulfilling the lacuna in the law of countries like Canada which do not have a specific or complete body of law for government contracts. It is the only means by which the Administration can provide itself with certain special prerogatives and powers which it does not normally enjoy or are controversial in case law and thus, not safe to invoke.\textsuperscript{49} There is, however, a negative aspect to this: the reliance on standard terms to provide such powers has probably “hindered the development of a separate branch of government law”.\textsuperscript{50}

\textsuperscript{48} See sections 1379 and 1435-37 of the Civil Code of Quebec and the following texts: P. Giroux et D. Lemieux, \textit{Contrats des organismes publics québécois}, \textit{supra} note 17 at 65-116 (Les marchés publics sont-ils des contrats d’adhésion?); B. Moore, “À la recherche d’une règle régissant les clauses abusives en droit québécois” (1994) 28 R.J.T. 176; J.H. Gagnon, “Le contrat d’adhésion sous le Code civil du Québec” in \textit{Développement récents en droit commercial}, Service de la formation permanente du Barreau du Québec (Cowansville: Yvon Blais, 1995) at 1; A. Popovici, “Le nouveau Code civil et le contrat d’adhésion”, in Meredith Memerial Lectures, 1992, at 137. For an example of what may constitute an abusive clause in a government contract, see \textit{A.G. of Quebec v. Labrador excavating}, unreported, C.A.Q. 200-09-0000104-783, 8/08/80, where the court declared abusive a clause that forced a contractor who encounters soil conditions which differ from those described in the contract, to perform its obligations even though he may have to assume important additional costs.

\textsuperscript{49} C. Turpin, \textit{Public Contracts}, \textit{supra} note 17 at 4-47.

\textsuperscript{50} H. Street, \textit{Government Liability (A Comparative Study)} \textit{supra} note 4 at 104
CHAPTER 2: CONDITIONS OF CONTRACTING

2.1 THE PUBLIC INTEREST

A government contract is a hybrid legal creature: its form and framework are contractual, yet its content and nature are influenced by the fact that one party to it is the public State.51

There is wide agreement that the most distinctive element of government contracts is the fact that the State does not seek its own interest, like all private contractors, but the interest of the community. This particularity was soon recognized by the Exchequer Court of Canada in an early decision concerning the building of a portion of the Intercolonial Railway.52 Following a petition of right by the private contractor for the payment of extra work done beyond what was included in the contract, the Court noted the importance of the subject-matter which was of public interest: “[i]n an undertaking of such a magnitude, involving such an immense expenditure, the protection of the public and the public revenues of the country would necessarily be be matter of paramount importance”.53

The Court based its decision not to grant the petition of right on the provisions of the contract which specifically provided that no change or alterations were to be made to the work contemplated in the contract and that the contractor was waiving all claims for payment of extra work. But it is interesting to note that in relation with the petitioner’s argument that the work had been approved by the chief engineer, the Court made the following statement.

The contract may be of a stringent nature, but whether more so than the nature of the subject-matter, the magnitude of the

52 Jones and Simpson v. R. (1883), 7 R.C.S. 570 (Ex. Ct.).
53 Ibid. at 589 (Richie J.).
undertaking and the large public interest involved required and the action of Parliament necessitated, may be extremely doubtful. It must be borne in mind that the commissioners and chief engineer, with whom the contractor had to deal, and in whom such large powers were, no doubt, vested, stand in a different position from private parties or corporations contracting on their behalf, or engineers employed by parties so situated. They were appointed by the Crown to manage, superintend and carry to completion a great Dominion undertaking in which they had no private or individual interest.54

The impact of the public interest was also emphasized by the Supreme Court in R. v. McFairlane,55 which featured a claim for the compensation of damages suffered to the petitioner’s timber following its passage in slides built by the Crown on Crown property. Although the Court concluded that in this case, there was no contract between the Crown and the petitioner in the nature of those passed by common carriers, the Court noted in obiter that even if there had been such a contract, no analogy was possible as the improvements on the river which were “made for the benefit and convenience of the public, [and] vested in the Crown in trust for the public”.56 The Court also added that the liability of the Crown in relation with such improvements made for the public good “cannot for a moment be placed on the same footing or governed by the same principles as private property in which private individuals invest their capital for their private gain”.57 The Court thereby confirmed the paramount interest promoted by the government in its various actions.

More recently, in a case concerned with the payment of extra work done by the contractor, Justice Turgeon of the Quebec Court of Appeal explicitly confirmed the

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54 Ibid. at 616 (Richie J.).
55 (1882), 7 S.C.R. 216.
56 Ibid. at 236 (Ritchie C.J.).
57 Ibid. at 235 (Ritchie C.J.).
public interest ground that lies under each government contract.\textsuperscript{58} Denault J. of the Federal Court made the same observation in the case of \textit{Entreprises de transport Marcel Boivin Inc. v. Canada}, a key judgment on the interpretation of government contracts.\textsuperscript{59} The presence and the importance of the public interest in government contracting is also unanimously recognized by the doctrine, who considers it as the fundamental element of these contracts.\textsuperscript{60}

This notion of public interest, which guides any action of the State, is everything but a clear concept. No objective definition may be found for this notion in constant evolution, as it varies according to the time, place and circumstances of each case.\textsuperscript{61} Some indications may however be found in the case law. Firstly, although the duty to adequately manage the public purse appears crucial for the interest of the community, the courts do not tend to consider it as part of the public interest.

In my opinion, the term \textit{public interest} does not encompass tangibles such as costs to the public treasury or demands on the time of public servants. In a socially conscious society, it must refer only to fundamental public values and objectives.\textsuperscript{62}


\textsuperscript{59} (1989), 44 B.L.R. 208 at 214 (F.C.T.D.). The full extent of its decision will be discussed in the next section which is concerned with the interpretation rules applicable to government contracts.


\textsuperscript{61} See \textit{Basque v. New Brunswick (Registrar of Motor Vehicles)} (1988), 93 N.B.R. (2d) 1 at 8: “[w]hatever the term “the public interest” means, it seems to me that it is multifaceted and that it is impossible to circumscribe its definition” (Deschesnes J.). See also \textit{R. v. Zundel, }[1992] 2 S.C.R. 731 at 770, where McLachlin J. qualifies the public interest as a broad and undefined expression and G. Dion, “L’Intérêt public dans l’aménagement des relations de travail” (1964) Rel. Ind. 287 at 289.

The public interest has rather been associated with community values, particularly long term community values.63 Secondly, the public interest is not something which varies according to the public body involved. If such would be the case, the public interest would soon come into conflict with itself.64 This does not mean that the public interest must have a uniform meaning at all time. For example, when found in a statutory provision, the public interest “must be interpreted in the light of the legislative history of the particular provision in which it appears and the legislative and social context in which it is used.”65 Considering that these elements constitute mainly interpretation guidelines, what is considered “in the public interest” is thus mainly left to the discretion of governments and, ultimately, judges.

The impacts of the far-reaching duty of the State to act at all time in the public interest may be found in several aspects of government contracting. The following sections will provide an overview of the particularities of government contracts which are justified by public interest grounds.

2.2 INTERPRETATION

The omnipresence of the public interest in government contracts has a significant influence on the interpretation of such agreements by the courts. Although the private law rules of interpretation form the basis of the interpretation principles applied to government contracts,66 recent cases tend to show that since the State is contracting in this author argues that there is a difference between the public interest and a financial interest. According to Lemieux, the latter would not justify to breach a promise.

the public interest and the contractor in its own private interest, the courts are justified to adopt different rules which favour the government.

The first case to adopt this view came from the Manitoba Court of Appeal. In *R. v. Novak*, a student had contracted with the Crown to be supplied with certain necessaries for the purpose of taking a course to qualify himself as a teacher and for the recovery of payment out of his salary after receiving his permit to teach. The contract provided that if the student failed to teach for three years or to teach in the school selected by the Minister, payment of the amount due was to be made. The defendants joined the agreement for the purpose of binding themselves jointly and severally with the student to the Minister and covenanted to hold themselves personally liable for the repayment of all moneys due to the Minister under the agreement. The student left the school before becoming a teacher and was never heard of afterwards. The Crown thus sued the defendants for the payment of sums due for the support, maintenance and education of the student.

The defendant raised the argument that the contract was "too obscure, too improvident, and too unreasonable for enforcement. That the infant placed himself unreservedly in the hands of the Crown and that his rights were so indistinctly defined as to leave him at the mercy of the department of education without any assurance that he will ever receive a certificate, or a permit, or a school to teach in". In ruling for the Crown, the Court specifically stated that "had the contract been one of apprenticeship to a commercial firm or even one relating to education by an institution looking for a profit, the Court might well have adopted such a view". But in this case, it was to be assumed that the Crown, acting for the public good in providing qualified teachers for the public schools of the province with special reference to the non-English speaking communities, would deal fairly and justly with a young student.

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68 Ibid. at 137.
of foreign nationality. The contract was therefore considered valid by the Court, and the defendants were under the obligation to compensate the Crown.

The Federal Court went even further in Entreprises de transport Marcel Boivin Inc. v. Canada. In this case, the plaintiff had contracted with the Crown for the collection of garbage from certain federal government sites in Quebec City. After 6 months of providing service, and according to the default clause contained in the agreement, the Crown terminated the contract on the ground of alleged failure to provide the service in conformity with the stipulations and conditions of the contract. The plaintiff thus brought an action for wrongful termination, claiming damages for lost earnings and profits.

The Court noted that the cancellation of the contract had been lawfully made according to the power of termination which was duly provided for in the contract and that the requirements related to the exercise of such power had been respected. Such power and requirements were contained in clause 16 of the General Conditions which formed part of the contract.

16. Default
(1) If the contractor is in default in carrying out any of the terms, conditions, covenants or obligations of the contract, or has made a false representation or warranty, or if the contractor becomes bankrupt or insolvent, or has a receiving order made against it, or make an assignment for the benefit of creditors, or if the contractor takes the benefit of any statute for the time being in force relating to bankrupt or insolvent debtors the Minister may, by giving notice in writing to the contractor, terminate the whole or any part of the contract. Upon the giving of such notice the contractor shall have no claim for any further payment save as hereinafter provided, but shall remain liable to Her Majesty

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69 ibid.
70 supra note ??.
by reason of the default or occurrence upon which such notice was based.

The notice required by the contract was duly sent to the plaintiff and based on several defaults of the plaintiff which may be summarized in three items: messiness of garbage pick-up, caused chiefly by garbage leaking from one of the plaintiff's trucks, difficulties of contacting the owner of the business or an agent and failure to remove garbage at certain pick-up points on several occasions, thus allowing garbage to accumulate, and failure to operate at the hours set out by the engineer so as not to interfere with tourist activities.

As to the validity of the clause itself, which did not provide for compensation, the Court made the following statement.

Seen from the standpoint of a contract for services between private parties, such clauses may undoubtedly appear draconian; but it should be noted that this is an administrative contract, where a public authority has decided to award a contract to ensure the proper functioning of a public service. While the government body is acting in the public interest, the other contracting party is acting in a private interest. Academic opinion and the courts have recognized and accepted that there is a lack of parity between the parties, both because of the purpose and the subject-matter of the contract.

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71 The Court was then referring both to clause 16 and 15, which reads as follows: "15. Termination, suspension, change. (1) the Minister may, by giving notice to the contractor, terminate or suspend the contract as regards all or any part of the work or change or change the scope of the work or any portion of the work. The contractor shall immediately comply with the requirements of any such notice and in so doing take every reasonable action that will minimize the costs of performing the contract and comply with the notice. (2) When, as a result of a notice mentioned in subsection (1): (a) any suspension or change in the scope of the work results in an increase or decrease in the cost directly related to the performance of the contract the price of the contract shall be adjusted by the amount of such increase or decrease in cost; or, (b) the work or any portion of the work is terminated, the contractor shall be paid a reasonable price for performing any of the work that has been completed at the time of termination and any other cost directly and necessarily incurred as a result of the termination but in no event shall the aggregate of the price paid to date and any amounts payable pursuant to this paragraph exceed the total contract price."

72 Entreprises de transport Marcel Boivin Inc. v. Canada, supra note 59, at 214 (Denault J.).
On the issue of the appropriateness of the sanction applied by the Crown, the Court concluded that although it was the most radical measure which could have been taken in the circumstances considering the defaults involved, this option was open to the Crown. Any fault of the contractor should be interpreted more strictly in the context of a government contract. Citing P. Lemieux in his treaty on government contracts, the Court declared that

[the types of fault encountered in government contracts are not essentially different from those found in civil contracts. Contractual fault is a failure to perform an obligation contained in the contract or resulting from it. The only difference there can be is that the contract of a public body contains obligations of a special kind, such as the obligation of personal co-operation by the other contracting party, a strict requirement that deadlines be observed, an obligation to accept in some measure changes made in the contract by the government body, and above all the obligation to accept control by the government body which is a party to the contract. This type of obligation may to some extent create faults that are peculiar to government contract; but the difference with a contract concluded between private parties is that the default will be judged with a strictness and severity unknown to private law.]

The same reasoning was applied in a subsequent decision of the same court which involved a printing company who failed to produce a book according to the government’s specifications. The company had in fact printed the text in such a way that the binding encroached on the text frame and on the text itself at several occasions. Finding the work unacceptable, the Crown notified the company that it had to take back the work and complete it appropriately or it would be declared in breach of contract. The company refused to make the required corrections at its own

73 Ibid. at 215, quoting P. Lemieux, Les contrats de l'Administration fédérale, provinciale et municipale, supra note 17 at 253 (translation).
expense, which lead the Crown to send a notice of termination for non-performance of the contract, the whole according to the general conditions forming part of the contract. These conditions provided the Crown with a right of termination for any or all parts of the contract following a default by the contractor and specified that no compensation would be paid for work which had been rejected as not conforming to the stipulations of the contract.

The Court also ruled in favour of the government in this case by declaring that the latter had the right to terminate its contract with the plaintiff without reimbursing it, as the work was rightfully rejected and did not meet the stipulations of the contract.75 Once more, the Court noted the privileged position of the Crown when contracting with a private corporation or individual.

What we are dealing with here is an administrative contract where the government body is acting in the public interest and the private party is acting in a private interest. In this situation, the contractual penalty of termination, while a radical measure, is nevertheless recognized by academic opinion and the courts.76

At this point, one can already conclude that the nature of the State itself as a sovereign body bearing a duty to protect of the public interest renders its position in a contractual setting different from that of an individual, having special rules of interpretation in its favour. But another particularity inherent in the State is that unlike the private contractors, the State is not free to choose as it wishes among various actions and ends; it must always direct its actions towards the public interest. Therefore, it does not enjoy the same freedom of contract as private parties.77 As will be shown by the

75 Ibid. at 119 (Pinard J.).
76 Ibid. at 119 (Pinard J.), citing P. Garant, Droit Administratif, supra note 4 at 338ff and P. Lemieux, Les contrats de l’Administration fédérale, provinciale et municipale, supra note 17 at 253-254.
77 P. Lemieux, Les contrats de l’Administration fédérale, provinciale et municipale, supra note 17 at 72.
next sections, such freedom is also restrained by several limitations which are imposed on the conclusion of any agreements with the Crown.

2.3 POWER OF CONTRACTING

The first basic requirement in government contracting concerns contractual capacity. The power to make contract on behalf of the Crown depends on two factors: the scope of the Crown’s own capacity to enter into contracts and the scope of the particular agent’s authority to enter into contracts on the Crown’s behalf.

Both these issues were analyzed by the Supreme Court of Canada in the case of J.A. Verreault & Fils Ltée v. A.G. of Quebec. Pursuant to an Order-in-Council from the Government of Quebec authorizing the Minister of Social Welfare to sign a contract for the purchase of a land in view of the erection of a home for the aged, the Deputy Minister of Social Welfare signed an agreement with the appellant on behalf of the Minister for the building of such home. Following provincial elections and a change of government, the appellant received an order to stop the work. The department paid for the work performed, but the appellant claimed profit lost and compensation for damages to its reputation. The main question submitted to the court was whether the contract was valid, since the Order-in-Council had authorized only the purchase of the land and not the construction of the home.

The Court firstly established that the Crown was a physical person. This comment had the effect of settling the issue of the Crown’s capacity of contracting, as every physical person has an inherent capacity to enter into contracts. This reasoning was later stated even more explicitly in a subsequent decision of the Supreme Court, in which Beetz J. declared the following.
Chapter 2  Conditions of Contracting

The Crown is also the Sovereign, a physical person who, in addition to the prerogative, enjoys a general capacity to contract in accordance with the rule of ordinary law. 79

But the real issue in Verreault was whether the Minister or the Deputy Minister had the authority to bind the Crown, in the absence of a specific statutory provision to this effect. The Court answered in the affirmative, quoting with approval an extract of Griffith and Street.

In England, on the other hand, the ordinary principles of agency apply to public officers. They are not required to have express authority in order to bind their principals, and they are not themselves liable on contracts unless they have contracted personally. (...) [A] contract made by an agent of the Crown acting within the scope of his ostensible authority is a valid contract by the Crown". 80

The conclusion of the Court was thus that, in the absence of statutory restrictions, the general rules of mandate, including those of apparent mandate were applicable to the Crown, to the same extent as such rules apply to individuals. With regards to the particular circumstances of the case, the Court was therefore of the opinion that the Minister of Social Welfare was acting within his authority when concluding a contract for the construction of a home for the aged.

The decision of the Supreme Court in Verreault was later applied in two cases. In R. v. CAE Industries, the Federal Court of Appeal expressed its understanding of the Verreault case by stating that “by the general rules of mandate including those of apparent mandate a Minister of the Crown as head of the government department has authority to bind the Crown in contract unless that authority is restricted by or

78 Supra note 25 [hereinafter Verreault].
79 A.G. Quebec v. Labrecque, supra note 16 at 1082
pursuant to statute”. Accordingly, the Court ruled that the Ministers of Transport, Trade and Commerce, and Defence Production were acting within their ostensible authority when concluding a contract in which the government was guaranteeing a certain work load for the operation of an aircraft maintenance base.

The Verreault case was also applied by the Manitoba Court of Appeal in Somerville Belkin Industries Ltd v. Government of Manitoba. In this case, the plaintiff had relied on a representation made by the Minister of Economic Development and Tourism and on a letter signed by the Deputy Minister confirming that the Province of Manitoba was willing to provide him with a substantial grant for the take-over and conversion of a plant. The plaintiff had started to relocate personal and equipment, making important investments and commitments, when a new government assumed office and announced that there would be no grant forthcoming. Speaking for the court, Hall J.A. confirmed that, according to the principles developed in Verreault, and as there was no statutory restriction, the government was bound by the commitment made by the Minister in result of the application of the general rules of mandate and more specifically, apparent mandate.

The decision of the Federal Court of Appeal in R. v. Transworld Shipping Ltd is also relevant at this point to explain the scope of the ministers’ authority and its exercise. The Department of Transport had invited tenders for the chartering of “Commonwealth flag” tankers and cargo vessels for certain parts of an operation which aimed to transport supplies to Arctic posts. The respondent tendered the vessel Theokletos, on the basis of the terms set out in the invitation with certain modifications. A few days later, a Department of Transport official notified the respondent by telephone that its tender was accepted and that it should prepare its charter and submit it for signature. However, after the charter was sent to the

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Department but before it was signed, the Department informed the respondent that the charter would not be executed because it had decided that the vessel to be chartered would have to be a “Canadian flag” vessel.

The Court stated that a contract had been validly concluded by the acceptance of the tender and that such contract had been repudiated by anticipatory breach. For the Court, the acceptance of the tender by the Department official was binding on the Crown. The reasons given by the Court were that firstly, the conclusion of such a contract was within the Minister of Transport’s authority and that such authority could validly be exercised by officers of his department. The following extracts of the decision rendered by Jackett C.J. are conclusive on this point.

[I] must be noted that ordinarily government operations in Canada are divided among statutorily created departments each of which is presided over by a Minister of the Crown who has, by statute, the “management” and direction of his department. In my view, subject to such statutory restrictions as may be otherwise imposed, this confers on such Minister a statutory authority to enter into contracts of a current nature in connection with that part of the Federal Government’s business that is assigned to his department.

(...) Once it appears that the Minister has prima facie statutory authority to enter into contracts within his department’s domain, it follows in my view, subject to any inconsistent statutory provision, that his power can, and will, in the ordinary course of events, be exercised by the officers of his department. This facet of our system of government is described in Carltona Ltd v. Commissioners of Works\(^4\):

“...In the administration of government in this country the functions which are given to ministers (...) are functions so multifarious that no minister could ever personally attend to them. (...) The duty imposed upon ministers and the power given to ministers are normally exercised under the authority

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84 [1943] 2 All. E.R. 560 at 563, per Lord Greene, M.R.
of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority(...)

The Court also rejected the argument which was raised by the Crown that the contract was not enforceable due to section 15 of the Department of Transport Act, which reads as follow.

No deed, contract, document or writing relating to any matter under the control or direction of the Minister is binding upon Her Majesty unless it is signed by the Minister, or unless it is signed by the Deputy Minister and countersigned by the Secretary of the Department, or unless it is signed by some person specially authorized in writing by the Minister for that purpose; and such authority from the Minister to any person professing to act for him shall not be called in question except by the Minister or by some person acting for him or for Her Majesty.

The Court concluded that this section did not apply to the case at bar. According to previous statements of the Supreme Court of Canada, provisions of this type are only applicable to written contracts, and the contract in question was constituted by an oral acceptance of a written bid.

The rules which governs the capacity of the Crown to enter into contracts may be summarized in the following way. The Crown lacks the capacity to enter into contracts only to the extent that its power is cut down by statute. As for the authority of the agent to make the particular agreement on behalf of the Crown, the general rule is that the scope of a Crown servant's authority is determined according to the

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common law of agency. Therefore, the Crown will be bound if the servant or agent had actual or ostensible authority. A minister need not to be expressly authorized by statute or Order-in-Council, provided that the contract be directly related to that of the government business assigned to his department. The minister’s power may be delegated to lower officials, unless there is a statutory provision to the contrary. These rules are however not applicable when there is a statutory restriction on the authority of Crown servants or agents to bind the Crown. The most common restriction of this type is to require the minister’s signature for the agreement to be binding on the Crown. In the absence of the required signature, the act will be invalid.87 However, such a requirement is only applicable to written contracts.

2.4 STATUTORY REQUIREMENTS

Although Crown agents have the power to bind the Crown, the more “technical” statutory requirements must still be complied with in order for the contract to be valid.88 As was clearly specified by the Federal Court of Appeal, “where a statute regulates the power to make contracts, a contract does not come into existence unless the requirements of the statute are fulfilled”.89 These requirements are one of the most noticeable particularities of government contracts as they are unknown to private contracting. Such requirements are imposed on public interest grounds and are designed to meet several goals including ensuring proper bureaucratic supervision, providing for appropriate supervision of the works, protecting the public

88 "When the administration of a particular function of government is regulated by statute and the regulation expressly or impliedly touches the power of contracting, all statutory conditions must be observed and the power no doubt is no wider than the statute contemplates"; State of New South Wales v. Bardolph (1934), 52 C.L.R. 455, at 496 (Aus. H.C.).
89 R. v. CAE Industries, supra note 81 at 371 (Stone J.).
purse by obtaining the best performance at the best price, improving efficiency and avoiding favouritism, corruption and unfairness.  

All formalities applicable to some or every contracts of the government have a statutory basis. They can be found in more general statutes or regulations like the Financial Administration Act and its complement the Government Contracts Regulation, or in diverse statutes regarding government departments, commissions, public corporations or specific sectors of activities. Formalities or requirements may also be found in documents which are not regulatory instruments, for example government directives. But in this case, a contract which does not respect these formalities will not be considered invalid on this sole basis. Such was the case in a recent decision of the Quebec Superior Court where the government had issued a directive which provided that hospitals should establish a rotation among the various manufacturers of milk for infants in order not to promote any specific brand. The Court explained that, contrary to regulations, directives were not legally binding and did not impose any legal duty to those concerned by the directive. No sanction is associated with the violation of an act of this nature. Therefore a contract made between a hospital and a milk manufacturer which does not respect the quotas suggested in the directive is not invalid on this sole basis.

The formalities found in the various statutes and regulations are normally detailed and very specific. They are mainly concern with the bidding process, the approbation by a superior authority, payments (partial and final), securities, and precise clauses and covenants to be included in the contract.

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92 SOR/87-402, SOR91-651, SOR/92-503, SOR/96-472.
Due to the variety of these formalities, an exhaustive overview would be outside the scope of this study whose purpose is not to analyse such formalities thoroughly, but to emphasise their existence and their impact. Therefore, only a few remarks will be made on the most common formalities.

2.4.1 APPROPRIATION OF FUNDS

It has been long established in British-inspired legal systems that all expenditures of public funds must be authorized by an Act of Parliament.95 This fundamental common law rule is also applied to expenditures related to contracts, as showed by sections 32 and 40 of the Financial Administration Act,96 which reads as follows.

32. (1) No contract or other arrangement providing for a payment shall be entered into with respect to any program for which there is an appropriation by Parliament or an item included in estimates then before the House of Commons to which the payment will be charged unless there is a sufficient unencumbered balance available out of the appropriation or item to discharge any debt that, under the contract or other arrangement, will be incurred during the fiscal year in which the contract or other arrangement is entered into.

(2) The deputy head or other person charged with the administration of a program for which there is an appropriation by Parliament or an item included in estimates then before the House of Commons shall, as the Treasury Board may prescribe, establish procedures and maintain records respecting the control of financial commitments chargeable to each appropriation or item.

40. It is a term of every contract providing for the payment of any money by Her Majesty that payment under that contract is

96 Supra note 91.
subject to there being an appropriation for the particular service for the fiscal year in which any commitment under that contract would come in course of payment.

Accordingly, if a payment becomes due under a contract, it cannot be made if there is no appropriation of funds authorizing such payment. As for the effect of a lack of such appropriation on an otherwise valid contract, the wording of section 40 seems to differ from the current state of the common law.

The common law in this matter is found in the decision of the Australia Court of Appeal in the case of New South Wales v. Bardolph.\textsuperscript{97} In this case, the plaintiff entered into an agreement with the government for advertising purposes. The contract was signed by an official duly authorized by the Prime Minister and was to be in force for a period longer than the regular financial year. Parliament subsequently approved the necessary credits for publicity made for the government, but without any specific reference to the various contracts made for this purpose. The sum of money approved thereby was therefore superior to the amount which was to be paid to the plaintiff. During the execution of the contract, a new government took over and the contract with the plaintiff was cancelled. The plaintiff sued the government for breach of contract. In defence, the Crown tried to argue that as no specific budgetary authorization was voted by Parliament, the contract was nul and void for lack of compliance with an essential requirement.

The court rejected this argument and ruled that the lack of budgetary authorization was not a condition for the validity of the contract so as to affect the Crown’s capacity to enter into contracts: “the enforcement of such contracts is to be distinguished from their inherent validity”.\textsuperscript{98} The lack of such appropriation was not considered by the Court as an excuse for non-performance of the contract by the Crown. According to

\textsuperscript{97} (1934), 52 C.L.R. 455.

\textsuperscript{98} Ibid. at 474 (Evatt J.).
the Court, the contract was unenforceable, but the Crown was still liable for not performing the contract.

The Court also stated that no special or specific appropriation was necessary for each particular contract; a global appropriation of funds for the department involved was sufficient.99

In Canada, the common law rule regarding the effect of a lack of appropriation has been modified by the enactment of section 40 of the Financial Administration Act. Although there is no clear case on the subject, there is wide agreement among the writers to the effect that the impact of this provision is to reverse the current common law interpretation by making the appropriation of funds a condition of each contract, thereby affecting its validity in the absence of such appropriation.100

2.4.2 APPROBATION BY A SUPERIOR AUTHORITY

As a general rule, when a minister or Crown agent is acting within the scope of his authority and when the contract is within the body’s capacity, no further authorization is necessary for the contract to be valid and binding on the Crown. However, in certain cases, the conclusion of the contract by an inferior authority will be subject to the approbation of a distinct government authority, like the Governor in Council or the Treasury Board.

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99 See also Canadian Engineering Co v. Rae, [1919] 2 W.W.R. 762 at 777.
100 See A. Dufour, "L’importance de l’autorisation budgétaire en matière de contrats administratifs" (1965-66) 7 C. de D. 11. where the author relies on a few cases of the Exchequer Court which are not conclusive; P. Lemieux, Les contrats de l'Administration fédérale, provinciale et municipale, supra note 17at 97; P. Garant, Droit Administratif, supra note 4 at 519; P.W. Hogg, Liability of the Crown, supra note 3 at 165; P. Giroux et D. Lemieux, Contrats des organismes publics québécois, supra note 17 at 2-125.
Chapter 2

Conditions of Contracting

The contract may also be subject to the control of Parliament by way of legislative approval. Such was the case in *Commercial Cable Co. v. Government of Newfoundland*[^101^] where the contract concluded between the government of Newfoundland and a private corporation was subject to the prior approval of the Newfoundland Legislative Assembly according to the regulations governing the Assembly. Once the contractor had performed all the work under the contract, the Assembly refused to give its approval. The Court ruled that the contract had never been in force and that it was of no value, the approval being a condition to its validity. The Court however mentioned that a requirement of this type had to be stated in very clear terms.

As for approval by superior authorities other than Parliament, they must also be found in a statute or a regulation. Furthermore, as showed by the decision of the Supreme Court of Canada in *La Congrégation des Frères de l'Instruction Chrétienne v. The School Commissioners for the Municipality of Grand'pré*,[^102^] the statute or regulation imposing such approval will be interpreted very strictly.

In this case, the Supreme Court had to decide if the School Commissioners could enter into contracts regarding the transfer of certain of the Congregation’s immovables and movables used for public education as well as the terms on which education would be provided by the Congregation, without the authorization of the Lieutenant-Governor in Council, given section 238 of the Quebec *Education Act*,[^103^] which at the time read as follows.

> 238. With the authorization of the Lieutenant-Governor in Council, given upon the recommendation of the Superintendent, school boards may enter into agreements for school purposes with any person, institution or corporation.

[^101^] [1916] 2 A.C. 610.
Speaking for the Court, Pigeon J. gave the following interpretation of this section.

All that provision means is that the commissioners or trustees may make agreements with the authorization of the Lieutenant-Governor in Council given on the recommendation of the Superintendent; it does not say that without such authorization they may not do so. The intent of this rule cannot be to limit all the contractual powers conferred by other provisions, as this would mean that every hiring or teacher or employee, and all purchasing, would require such authorization, which would clearly be absurd.¹⁰⁴

Therefore, the contracts concluded between the School Commissioners and the Congregation were valid and binding on the parties even if they had not been approved by the Lieutenant-Governor. This case shows that for the authorization to be considered as a condition to the contract, the terms of the statute imposing such a formality must be express and unequivocal. The interpretation of the statute will determine whether or not the validity of the contract will be affected by a lack of approval when such requirement is imposed on the contracting authority.

This conclusion also flows from two other cases: R. v. Transworld Shipping,¹⁰⁵ which was analyzed in a previous section and Lalonde v. City of Montreal North.¹⁰⁶ In the latter case, the City had required the services of the appellants to prepare a complete report on the sewer system in the city and a draft plan for water purification. After the work was done, the City refused to pay the bill submitted by the appellants, which brought an action before the Superior court. The City argued that the appellant’s claim should failed because of the fact that the agreement had not been approved by

¹⁰⁵ supra note 83.
Chapter 2

Conditions of Contracting

the Municipal Commission according to section 25 of the Municipal Commission Act.¹⁰⁷

25 (...) Every agreement whatsoever entered into by a municipality affecting its credit must, to bind such municipality, be approved by the Commission, except an agreement respecting ordinary administrative acts under which agreement the expenses incurred must be paid entirely out of the revenues of the then current year.

[Emphasis added]

The Court concluded that, because of the wording used in section 25, the lack of approval by the Municipal Commission was fatal to the contract, which was invalid on this sole ground.

(...) [T]he second paragraph of section 25, which generally requires the approval of the Commission for every agreement affecting the credit of a municipality “except an agreement respecting ordinary administrative acts under which agreement the expenses incurred must be paid entirely out of the revenues of the then current year”. This requirement was imposed on pain of nullity, since the text reads: “must, to bind such municipality”. By this express provision the legislature has thus limited the contracting power of municipalities, even regarding “ordinary administrative acts”. For such acts to be spared the necessity of approval by the Municipal Commission, their cost must be paid entirely out of the budget for the year.¹⁰⁸

As the payment of the fees owned to the appellants had not been provided for in the current budget and as there were no revenues available for that purpose, the

¹⁰⁷ R.S.Q. 1941, c. 207.
exception found in section 25 as to certain ordinary administrative acts could not be applied, therefore the appellant’s claim was dismissed for the reason that it was based on an invalid agreement.

In the absence of wording similar to the one found in the Municipal Commission Act, as it was the case in La Congrégation des Frères de l’Instruction Chrétienne v. The School Commissioners for the Municipality of Grand’pré, the approval by a superior authority will not be seen as a condition for the validity of the contract. This also appears from the decision of the Federal Court of Appeal in R. v. Transworld Shipping Ltd.

In any event, unless, as contemplated by section 34 of the Financial Administration Act, the Government Contracts Regulations contain a special direction, which I have not been able to find, that no contract shall “have any force or effect” unless entry into such a contract has been authorized by Treasury Board, if it is for a higher amount than that prescribed by the regulation, I think it is very doubtful that failure to obtain such an authority is any more than a breach of a requirement as between departmental officers and their superiors and it does not follow, in my view, that such failure necessarily invalidates an otherwise valid contract.

One last issue remains relevant in this matter: the moment at which the authorization must be obtained. In cases where the authorization must be obtained in order for the contract to be valid, can such authorization be obtained after the performance of the contract had begun so as to retroactively confirm the contract?

The first answer that came from the courts was that when an authorization was required for a contract to bind a public authority, such authorization could not be

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109 supra note 102.
validly obtained after the conclusion of the contract. In *Tremblay v. Corporation de la Ville de La Malbaie*,\(^{111}\) which was also concerned with section 25 of the *Municipal Commission Act*, the Court ruled that the authorization which had to be obtained from the Municipal Commission in order for the municipality to conclude the purchase of a piece of land could not be obtained after the conclusion of the contract, so as to retroactively confirm the agreement. No ratification was possible. Therefore, the sale contract was declared invalid, even if the Municipal Commission's authorization had been obtained by the municipality a few months after the contract was concluded.

However, the same Court revised its position a few years later in *Tessier c. Corporation Municipale du Village de St-Casimir*.\(^{112}\) This case was once more concerned with the same section of the *Municipal Commission Act* and involved the purchase of machinery by a municipality which obtained the required authorization from the Municipal Commission only after the sale was concluded. The Court ruled that the Municipal Commission, by its late authorization, had ratified the contract and that from this point on the municipality was validly bound by the contract. The Court based its decision on the fact that the wording of section 25 of the *Municipal Commission Act* did not specify that the authorization had to be obtained prior to the conclusion of a contract, as opposed to other similar statutory provisions which contained such a specification.

The Legislator surely took act of this interpretation of the statute, as shortly after the decision was rendered by the Court, the text of section 25 was modified by the replacement of the word "approved" by the words "previously authorized".\(^{113}\)

\(^{110}\) *R. v. Transworld Shipping Ltd. supra* note 83 at 171 (Jackett J.).
\(^{113}\) *An Act to Amend the Municipal Commission Act, S.Q. 1977, c. 50, s.3.*
Therefore, the decision of the Court in *Tessier c. Corporation Municipale du Village de St-Casimir* is a very strong argument in favour of the opinion that in the absence of a specific mention to the effect that the authorization has to be obtained prior to the conclusion of the contract, a contract concluded in the absence of a required authorization may be ratified by the superior authority after the performance has begun.

### 2.4.3 CHOICE OF THE CONTRACTING PARTY

In the absence of any contrary indication in the statutes or regulations, the State has the liberty to choose the individual or corporation with whom it will contract. This flows from the State's inherent power of contracting which is, at its basis, the same as a physical person.\(^\text{114}\) The necessity of a statutory or regulatory provision to impose a call for tenders before the conclusion of a contract is confirmed by the abundant case law in which the main issue is the interpretation of a statutory provision imposing such a requirement to found out whether or not the State was at liberty to choose its contractor. A few cases also clearly state this basic principle. For example, in *Trans-Ad Ltd v. C.T.C.U.M.*\(^\text{115}\) the court, after examining the constitutive statute of Montreal Urban Community, concluded that there was no provision in this statute imposing a tendering process for the type of contract involved. The Court confirmed that in the absence of a clear statutory provision to this effect, the Urban Community did not have to call for tenders.\(^\text{116}\)

The imposition of a bidding process is therefore an exception to the rule providing for the freedom of contracting and is designed to meet several goals including providing

\(^{114}\) *A.G. of Quebec v. Labecque*, supra note 16.


the State with the best service or goods at the best price,\textsuperscript{117} eliminating all forms of favouritism and patronage, and giving every citizen an equal right to contract with the State.\textsuperscript{118} However, the scope of this exception has become broader than the general rule itself. Most of the statutes or regulations imposing a tendering process state that all contracts have to be concluded following such a process, except in certain circumstances. These circumstances often concern emergency situations, or are related to the minor spending involved or the nature of the works or services. For example, section 5 and 6 of the \textit{Government Contracts Regulation}\textsuperscript{119} read as follows.

5. Before any contract is entered into, the contracting authority shall solicit bids therefor in the manner prescribed by section 7.

6. Notwithstanding section 5, a contracting authority may enter into a contract without soliciting bids where:

(a) the need is one of pressing emergency in which delay would be injurious to the public interest;

(b) the estimated expenditure does not exceed

(i) $25 000

(ii) $100 000, where the contract is for the acquisition of architectural, engineering and other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work, or

(iii) $100 000, where the contract is to be entered into by the member of the Queen’s Privy Council for Canada responsible for the Canadian International Development Agency and is for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of an international development assistance program or project;

\textsuperscript{117} \textit{West v. City of Montreal} (1921), 21 B.R. 289 at 293 and 295 (Que. C.A.).

\textsuperscript{118} P. Giroux et D. Lemieux, \textit{Contrats des organismes publics québécois, supra} note 17 at 5-300.

\textsuperscript{119} \textit{Supra} note 92.
(c) the nature of the work is such that it would not be in
the public interest to solicit bids; or

(d) only one person is capable of performing the contract.

Several aspects of the procedure associated with the solicitation of bids have raised
much litigation, regarding for example, the conformity of the bids, the determination
of the lowest bid and the remedies available for those who had their rights affected.
However, for the purpose of this study, the main relevant issue is the validity of a
contract concluded without the solicitation of bids when such a process is imposed by a
statute or regulation. In R. v. Woodburn, the Supreme Court settled the issue. The
plaintiff had by contract with the Crown, the responsibility to execute all the binding
of the Statutes of Canada, Imperial Statutes, Orders in Council, treatises and other
related documents as well as all the binding required by several departments of the
Government of Canada. Following the termination of its contract, the plaintiff
received a letter from the Queen’s Printer containing the following mention: “I am
directed by the Honourable Secretary of State to inform you that pending future
arrangements the binding work of the government will be sent to you for execution
under the same rates and conditions as under the contract which has just now expired”.

The Supreme considered that this letter did not constitute a contract binding on the
Crown as the statutory requirements were not complied with since there was no public
notice or advertisement for tenders for the work referred to in the letter. The Court
added that the statute imposing such formality was not directory, but actually limited
the power of the Crown to make a contract except subject to its conditions. Therefore,
according to this decision a contract concluded without the solicitation of
bids when such a requirement is imposed by a statutory provision will be invalid.

\(^{120}\) (1898), 29 S.C.R. 112.
\(^{121}\) ibid at 122 (Sedgewick J.).
2.5 OTHER LIMITATIONS ON THE FREEDOM OF CONTRACTING

On top of all types of strict formalities which are imposed through specific statutes and regulations, other principles of administrative law limit the State’s freedom of contracting.

For instance, the Charter of Rights and Freedoms is an element of importance in this regard. This is particular to government contracts as the Charter has no application in private contracting, its provisions being only directed towards governmental and parliamentary activities by virtue of section 32. However, the applicability of the Charter in a contractual context where the Crown is involved was confirmed by the Supreme Court. In Douglas/Kwantlen Faculty Association v. Douglas College, the collective agreement concluded by the Douglas College, an agent of the Crown, was declared to be subject to the Charter. The Supreme Court ruled that as the College was established to implement government policy, it was performing acts of government, which included dealing with persons it employs. Accordingly, the negotiation and administration of the collective agreement were functions of the government for the purposes of section 32 of the Charter thereby making the Charter applicable to these activities. Furthermore, the Court considered the collective agreement as being “law” for the purposes of section 15 of the Charter which provides for protection against discrimination. The Court made the following remarks regarding Charter rights in a contractual context.

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122 32. (1) This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territory; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.
The fact that the collective agreement was agreed to by the appellant association does not alter the fact that the agreement was entered into by government pursuant to statutory power and so constitute government action. To permit government to pursue policies violating Charter rights by means of contracts and agreements with other persons or bodies cannot be tolerated.¹²⁴

Another limitation is to be found in the case of Ontario (Chicken Producers’ Marketing Board) v. Canada,¹²⁵ in which the court concluded that the powers of a body created by statute could not be extended by contract. This decision was made pursuant to an application for judicial review by the Ontario Chicken Producers’ Marketing Board to quash a decision made by the Canadian Chicken Marketing Agency to impose on the former the payment of liquidated damages. The Canadian Chicken Marketing Agency had been established by proclamation pursuant to the Farm Products Marketing Agencies Act, which gave it various powers to enable it to perform its functions, but not the power to assess liquidated damages. The Agency was created to ensure the promotion of an effective chicken industry in Canada. To this end, it entered into a federal-provincial agreement, which was subsequently amended to provide that each provincial marketing board would ensure that the quantity of chicken produced in the province and sold did not exceed its yearly allocation, failing which the provincial board would pay liquidated damages to the Canadian Agency. In 1991, the Canadian Agency assessed the Ontario Board with liquidated damages according to the federal-provincial agreement. In its application for judicial review, the Ontario Board argued that the Canadian Agency lacked jurisdiction in assessing such damages, although it was provided for in the agreement. Here are the comments made by the Court in this regard.

¹²⁴ Ibid. at 585 (La Forest J.).
The argument advanced by the Canadian Agency is initially premised on the assumption that a federal body, which has powers circumscribed by statute and proclamation, can negotiate and conclude a private bargain to expand its powers beyond those mandated to it by Parliament. I do not agree with this proposition. As stated in Administrative Law by Sir William Wade (Oxford: Clarendon Press, 1988, at page 264), it is a primary rule that "no waiver of rights and no consent of or private bargain can give a public authority more power than it legitimately possesses". The Canadian Agency, which by its nature is a creature of statute and proclamation, may only exercise those powers specifically accorded to it by the Act or Proclamation. In making an agreement to assess liquidated damages against the provincial commodity boards, the Canadian Agency has expanded its powers beyond those mandated to it by Parliament. Accordingly, its purported exercise of jurisdiction or powers in imposing liquidated damages under the terms of the Federal-Provincial Agreement is beyond those powers conferred on it by or under the Act or Proclamation and, for this reason alone, is reviewable by this court.¹²⁶

Characteristics of the Crown itself also provides for limitations as to the conditions to which the Crown may agree in a contract as may be seen from the decision of the Supreme Court in Charpentier v. R.¹²⁷ This case features a contract concluded by the Minister of Public Work for the purchase of a building. The contract was imposing several obligations on the Crown including the duty to pay municipal and school taxes as well as property taxes to which the building was subject after a certain date. The seller subsequently received a bill from the municipality requiring the payment of an additional tax which was imposed by the municipality before the sale was concluded, but which affected a subsequent period. After raising the argument of the existence of the covenant agreed to by the government regarding the payment of taxes, the seller paid the required amount to the municipality in order to avoid litigation. The seller then sued the government on the basis of the tax covenant. In defence, the

¹²⁶ ibid. at 128-29 (McGillis J.).
government argued that it enjoys fiscal immunity by virtue of section 125 of the Constitution Act of 1867 which provides that “[n]o lands or property belonging to Canada or any province shall be liable to taxation”.

Speaking for the Court, Fauteux J. stated that there was two exceptions to the rule contained in section 125. Firstly, the immunity does not extend to taxes imposed in consideration of services rendered by the municipality, for example, water taxes. Secondly, the Crown can get around the application of section 125 by authorizing the reimbursement of the taxes paid on its behalf. However, in this specific case, even if the contract allowed the Crown to reimburse the seller, the Order-in-Council upon which the contract was based did not allow it. The Order-in-Council contained such restricted terms that only few adjustments made at the time of the conclusion of the contract were authorized, excluding the reimbursement of taxes due at a later date. The contract being valid only to the extent of what was authorized in the Order-in-Council, the latter had to be preferred, with the consequence that the Crown could enjoy its full immunity. According to Dussault and Borgeat’s interpretation, this last statement does not mean that the authorization to reimburse certain taxes must come from an Order-in-Council. Such authorization may be included in a contract concluded in accordance with all the applicable statutory requirements. However, it is possible that, in certain cases like the one in Charpentier, the scope of action of Crown agents may be restricted and in such circumstances, these agents may not get around the immunity over and above what is allowed by the Order-in-Council.

The conclusion to be drawn from the reasons given by Fauteux J. regarding the Crown’s fiscal immunity is therefore that although the government cannot legally renounce to the immunity provided in section 125 of the Constitution Act of 1867, it

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129 R. Dussault et L. Borgeat, Administrative Law, A Treatise, supra note 2 at 537.
may get around it by authorizing the reimbursement of taxes in the exercise of its spending power.

Special rules are also applicable to situations where the Crown and the other contracting party wish to modify a contract which was validly concluded. The modification of a contract based on the mutual consent of the contracting parties does not habitually raise much controversy in private law, as no formalism is imposed on this procedure. However, when government contracts are involved, the issue becomes more serious because of the possible negative consequences of this practice. The government could in many ways use this means to avoid conforming to certain essential formalities related to the conclusion of contracts, like the necessity of an approbation or the call for public tenders. This was expressly pointed out by the Exchequer Court of Canada in the case of *Jones and Simpson v. The Queen*, previously analyzed in section 2.1.

If this or any other court undertook to dispense with the certificate of the engineer, the approval of the commissioners and the sanction of the Governor in Council, and adjudge to those suppliants $124 663.33, as due from the Crown to them as extra, outside of and beyond the written contract, without tender or contract, or any conditions or sureties for the protection of the public, and without any sanction of the government, it would be to set at naught all the securities provided for the due performance of the contract, and to abrogate all the checks and guards solemnly imposed by law for the public safety and security, and enable parties to do and obtain what Parliament has expressly forbidden to be done or had.¹³⁰

Accordingly, the case law has allowed modifications based on the mutual consent of the contracting parties to happen even when the Crown was involved,¹³¹ as long as

¹³⁰ *Supra* note 52, at 615-16.

¹³¹ *Nova Scotia Construction Co v. Quebec Streams Commission*, [1933] S.C.R. 220. Although this case did not concern a modification made by the parties to the contract, the court mentioned at two
certain requirements were fulfilled. One of these requirements is that the modification must be within the contractual power of the Crown agent. This is what the Exchequer Court of Canada decided in *National Dock and Dredging Corp. Ltd v. R.*, 132 which held that the Order-in-Council authorizing the contract limited the agent's authority; the latter could therefore not extend or amend the contract beyond what has been authorized.133

The fulfilment of other formalities, like the solicitation of bids or the prior approbation of a superior authority, also need to be considered. This issue was analyzed by the Supreme Court in a key decision: *Adricon v. The Town of East Angus.* 134 The facts of this case are rather simple. Following a call for tenders by the municipality for the construction of an arena, Adricon submitted a bid for the sum of $408 000. Before the contract was officially concluded, the architect made some changes which provided that the costs of temporary heating would be borne by the municipality instead of the contractor. After the work was completed, Adricon claimed an extra amount of $27 749.77 for the cost of heating, which, according to the changes made by the architect, was to be paid by the municipality. The main issue before the Supreme Court in this matter was the effect of the lack of a new call for tenders for this part of the work, as section 610 of the Cities and Towns Act provided specifically that any contract involving an expenditure of more than $10 000 had to be awarded after a call for public tenders.135

occasions that the parties could have modified the contract by mutual consent, as long as the statute limiting the capacity to contract of the public authority was respected.


133 See also *R. v. Henderson*, *supra* note 27.


135 R.S.Q. 1964, c. 193, s. 610: "(1) [u]nless it involves an expenditure of less than $10 000, no contract for the execution of municipal works or the supply of equipment or materials shall be awarded except after a call for public tenders by advertisement in a newspaper(...)".
Despite the non-compliance with such formality, the Court considered the modification as valid and proposed criteria to assess the importance of contractual amendments. After citing section 610 of the Cities and Towns Act, Beetz J. made the following statements.

It does not flow from this provision that any change in the original contract, even one that entails an expenditure of $10 000 or more, necessarily constitutes a new contract which is itself subject to the formalities prescribed by s. 610. Such an interpretation would render the execution of a large number of public works impracticable and I cannot believe that this was the intent of the legislator. Regard must be had to the specific circumstances of each case, such as whether the changes are minor in relation to the contract as a whole, the presence or absence of consideration, and in particular the intent of the parties, since they are clearly not permitted to evade the law by altering, for example, the fixed nature of the contract.  

As for the case at Bar, the Court, after stating that the change made by the party amounted to approximately seven percent of the fixed price and that there was nothing to lead to the conclusion that the parties intended to evade the law, concluded that a new call for tenders was not necessary in the circumstances.

The conclusion that may be drawn from this case is therefore that when a contract is modified upon consent of both parties, the statutory formalities normally imposed for the conclusion of such contract will not have to be fulfilled if only a minor change is made to the contract. In cases where the change affects the nature of the contract itself or any of its essential terms, or if there is proof of an intention to evade the law, these formalities will have to be observed.

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136 Adron v. The Town of East Angus, supra note 134 at 1117-18 (Beetz J.).
In applying this rule developed by the Supreme Court, inferior courts have ruled that modifications regarding the following elements cannot be considered minor: the duration of the contract,\textsuperscript{137} the renewal of the contract\textsuperscript{138} and the date at which the performance should start.\textsuperscript{139} As mentioned by Beetz J., one must however keep in mind that the main element of interpretation as to whether the change made to the contract is minor remains the particular circumstances of each case.

This concludes the overview of the various statutory limitations or formalities which characterize government contracts. Such formalities represent a substantial task for the private contractor who must be assured that they were fulfilled, as in most cases the sanction would be the invalidity of the contract. But these limitations are not the sole causes of invalidity proper to government contracts. The principles of administrative law related to the State's freedom of executive action also provides limitations of considerable importance.

2.6 THE STATE'S LIBERTY OF ACTION

2.6.1 THE RULE AGAINST FETTERING OF DISCRETION

The contracts of public authorities are greatly affected by an important rule of administrative law which prohibits the fettering of the discretion conferred to these authorities by statute.\textsuperscript{140} This rule has been at the centre of a lot of attention by the doctrine\textsuperscript{141} and, along with the associated principle of executive necessity,\textsuperscript{142} is a major point in discussions concerning the reform of government contract law.

\textsuperscript{138} Plante v. Meilleur (5 July 1993), Terrebonne 700-05-001638-927 (Que. S.C.).
\textsuperscript{140} This rule or doctrine is also referred to as “freedom of executive action” or “principle of government effectiveness”.
\textsuperscript{141} See P. Lemieux, Les contrats de l'Administration fédérale, provinciale et municipale, supra note 17 at 185ff; P. Cane, Introduction to Administrative Law, (Oxford: Clarendon Press, 1992) at 264-
Chapter 2  Conditions of Contracting

The rule against the fettering of discretion essentially deals with the conflict between the exercise of a discretionary power conferred to a public body by statute and that body's power to pass valid, binding contracts. This conflict is well-stated in the following extract from Wade's *Administrative Law*:

> An authority may not by contract fetter itself so as to disable itself from exercising its discretion as required by law. Its paramount duty is to preserve its own freedom to decide in every case as the public interest requires at the time. But at the same time its power may include the making of binding contracts, and it may be most important that it should make them. Since most contracts fetter freedom of action in some way, there may be difficult question of degree in determining how far the authority may legally commit itself for the future.\(^{143}\)

As showed by the last few words of this extract, the no-fettering principle is hard to reconcile with the idea that is behind every undertaking; a contract is in itself a technique by which the parties can restrict their freedom of action and such restrictions cannot be ignored by the parties as they wish. Although sound in private law, this principle can hardly be reconciled with the imperatives of public functions which demand the consideration of a variety of factors.

Accordingly, the rule against fettering of discretion is based on the principle that the government, or other public bodies invested with discretionary powers, should be free

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142 See *infra* p.65. This doctrine refers to a power of the Crown to get out of valid agreement when they are conflicting with the exercise of an executive power.
to act according to what it thinks is best in the public interest, without being influenced, deterred or prevented to do so, by prior undertakings with private individuals or corporations. Because public bodies do not cease to act in a public capacity in a contractual context, they have to consider the wider public interest in fulfilling their obligations.

For these reasons, the courts have recognized that there is a power to declare certain contracts or clauses void on the grounds that they are inconsistent with statutory discretion or powers conferred to public bodies.

The first clear case on the subject was decided in 1883 by the House of Lords in *Ayr Harbour*.\(^{144}\) The Harbour Trustees required a portion of the defendant's land for the purpose of the *Ayr Harbour Improvement Act*, which was adopted by the legislature for the management and improvement of the public harbour. To settle the compensation claim and in order to reduce the amount the trustees would have to pay, they agreed that they should restrict their use of the ground taken so as not to interfere with the access of the defendant's remaining property to the harbour.

The House of Lords declared the undertaking invalid on the grounds that it would improperly fetter the future trustees' discretion. As the main statutory power conferred on the trustees was to alter the conditions of the harbour works, whenever they thought fit, an undertaking by which they would agree not to exercise that power regarding a piece of land was an illegal fetter on their discretion. There was no power to impose such a restraint on the future trustees of the harbour, who are required to exercise their statutory powers, from time to time, as required by the purpose of the statute.

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\(^{143}\) H.W.R. Wade, *Administrative Law, supra* note7 at 375-76.

\(^{144}\) *Ayr Harbour Trustees v. Oswald* (1883), 8 A.C. 623 (H.L.) [hereinafter *Ayr Harbour*].
The same reasoning was applied in *York Corporation v. Henry Leetham and Sons Ltd*¹⁴⁵ where an agreement between York Corporation, which was in charge of the management of the navigation on two rivers, and the respondent company was declared void by the Court. In this agreement, the York Corporation covenanted to allow the company the right to navigate on the rivers in consideration for one annual payment instead of the usual toll charged to users. The Court ruled that the covenant was *ultra vires* because York Corporation had disabled itself from exercising its statutory powers to increase the tolls insofar as it might be necessary.¹⁴⁶

The Supreme Court of Canada also adopted this line of thought in *Dominion of Canada Postage Stamp Vending Company Ltd v. R.*¹⁴⁷ and ruled that the Postmaster General could not grant a irrevocable licence for the sale of postage stamps. According to the Court, such a licence would be equivalent to a covenant by which the Postmaster General undertook not to exercise his power of revocation. As this undertaking would have bound the Postmaster General's successors in the exercise of their discretion regarding the method of conducting business, it had to be authorized by Parliament. Since this was not the case, the granting of an irrevocable licence was beyond the power of the Postmaster General, who had to remain free to revoke the licence as the public interest might have required:

A minister cannot, by agreement, deprive himself of a power which is committed to him to be exercised from time to time as occasion may require in the public interest, or validly covenant to refrain from the use of that power when it may be requisite, or expedient in his discretion upon grounds of public policy, to execute it(...).¹⁴⁸

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¹⁴⁵ *York Corporation v. Henry Leetham and Sons Ltd*, [1924] 1 Ch 557.
¹⁴⁸ *Ibid.* at 506 (Newcombe J.). See however, *infra* p.68 for observations on the true nature of this case.
In all of these cases, the public authority involved bound itself not to exercise its statutory powers. For example, in *Dominion of Canada Postage Stamp and Ayr Harbour*, the Postmaster General and the Harbour Trustees respectively said that a particular course of action would not be taken regardless of the circumstances that may arise. These covenants were thus promises not to exercise their power of decision.¹⁴⁹

But public authorities may also illegally fetter their discretionary power by a promise to exercise such power in a certain way, when that promise is made outside the perspective within which the statute is intended to operate.

The most illustrative cases on this matter are largely concern with the by-law making power of municipalities. The first major case in this regard is *Vancouver v. Registrar Vancouver Land Registration District*.¹⁵⁰ In this case, the city of Vancouver had agreed with a few landowners, that in consideration for an undertaking by the latter to landscape their property to the satisfaction of the city and not to erect any buildings thereon, its council would re-zone the land as stipulated. Such an agreement was declared to be invalid by the Court as it impaired the discretion vested in the council by the *Town Planning Act* and thus amounted to an abdication by the council of its statutory duties.

[A] contract of a municipal corporation by which it engages in advance that its council will pass a by-law involving the exercise of a discretion such as that vested in it by the planning act is contrary to public policy, for by introducing the extraneous consideration of a possible claim against the city for its failure to pass the by-law the contract tends to restrict the freedom of the individual members to decide the


merits solely upon the relevant circumstances, as the law requires.\textsuperscript{151}

Speaking for the Court, Davies J.A. also referred to the following extract from \textit{Dillon on Municipal Corporations}, which provides another legal ground for the conclusions of the Court as to the validity of the agreement.

Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen be delegated, so they cannot without legislative authority express or implied, be bargained or battered away. Such corporations may make authorized contracts, but they have no implied power, as a party, to make contracts or pass by-laws which shall cede away, control or embarrassed their legislative or governmental powers, or which shall disable them from performing their public duties.\textsuperscript{152}

According to these cases, a conclusion may be drawn to the effect that a public authority cannot preclude itself from exercising discretionary powers or performing public duties by contractual undertakings. Thus, a contract may be invalid if it obligates the public authority to not make a decision, not perform a duty or to only make a particular decision.

However, this rule, as formulated above, was soon considered to be too broad, given the number of public authorities and the growing scope of their activities and powers. Such a rule, if applied without restrain, could affect almost all agreements of public authorities, because all contracts fetter their discretion to some extent. The effective functioning of the government, and thus the public interest, would be severely hampered if public authorities were unable to make any binding agreements.\textsuperscript{153}

\textsuperscript{151} \textit{Ibid.} at 713 (Davies J.A.). See also \textit{Finney v. Township of McKellar}, supra note 150.
\textsuperscript{152} 5th ed., vol. 1 at 463, s. 245 and vol. 2 at 1182, s. 792.
\textsuperscript{153} S. Arrowsmith, \textit{Government Procurement and Judicial Review}, supra note 30, at 127.
Accordingly, the courts started early on to apply some restrictions to the rule, distinguishing and narrowing the application of the principle developed in *Ayr Harbour*.

The first case to bring such limitations was *Stourcliffe Estates Company Ltd v. Corporation of Bournemouth*.\(^{154}\) In this case the municipal corporation of Bournemouth bought land by an agreement which provided that the land was to be devoted to the purpose of a public garden or pleasure ground. The municipal corporation undertook not to make any buildings or erections of any kind except structures such as summer houses or shelters. The corporation, however, proposed to erect on the land certain lavatories and urinals. The Court of Appeal confirmed the validity of the agreement and ruled that the corporation could not build the lavatories.

*Ayr Harbour* was distinguished by the fact that in that case, the land was compulsory acquired for a specific purpose (the improvement of the harbour) which was in conflict with the undertakings assumed by the Harbour Trustees. In *Stourcliffe*, however, the undertaking not to erect any buildings did not prevent the use of the land for the particular purpose for which it was acquired (a public park). The erection of lavatories was not essential to the use of the land as a pleasure ground. It was merely a subsidiary power and it was not necessary that the corporation should have been able to exercise such power in respect of each and every piece of land which was acquired.\(^{155}\)

A later decision from the Privy Council confirmed the view of the Court of Appeal and went even further.\(^{156}\) This case was concerned with an electric company which covenanted with a municipal corporation that the price of electrical energy supplied by

\(^{154}\) *Stourcliffe Estates Company Ltd v. Corporation of Bournemouth*, [1910] 2 Ch 12 (C.A.) [hereinafter *Stourcliffe*].

the company would not exceed a certain amount. The electric company contended that this agreement was *ultra vires* as being inconsistent with the due exercise of powers vested in them by statute. Such was not the opinion of the Privy Council which stated the following with regard to *Ayr Harbour*.

On examining the facts, it is plain that, in effect, the trustees did not merely propose to covenant in a manner that committed the business of the harbour to restricted lines in the future; they were to forbear, once and for all, to acquire all that the statute intended them to acquire, for, though technically they acquired the whole of the land, they were to sterilize part of acquisition, so far as the statutory purpose of their undertaking was concerned. This is some distance from a mere contract entered into with regard to trading profits.\(^{157}\)

According to Lord Sumner, the Harbour Trustees, by restricting their use of the land acquired, had renounced part of their statutory birthright. The same could not be said about the facts before the Privy Council. There was no mention in the statutory objects that the electric company should make a profit or at least not suffer a loss. The primary object of the statutory instrument governing the electric company was to get a supply of electric energy for the area in question. It was thus not a part of the direct purposes of the instrument that money should be made or dividends distributed.\(^{158}\)

The principle that may be inferred from these last two decisions is that the statutory discretion or duty in question has to be one of the essential functions of the public authority or necessary to the realization of its primary purposes. As Mitchell noted, the proposition is not “that in any case where a discretion is conferred no agreement can limit the future exercise of that discretion; that consequence will only follow

\(^{157}\) *Ibid.* at 371 (Lord Sumner).  
where the discretion involves a power fundamental to the purposes and existence of the authority in question".\textsuperscript{159}

The decision of the Privy Council in \textit{Birkdale}, was also an occasion for the Court to set out the basis for a test to determine the extent to which contractual undertakings that conflict with the exercise of any discretionary power should be declared void.\textsuperscript{160}

The task of the judiciary in setting out criteria in this matter was not, and still is, not an easy one, considering the issues at stake. As mentioned above, almost every contract passed by public authorities fetters, to some extent, the discretion conferred on it. Public confidence in government dealings could thus be greatly disturbed if all public authorities’ contracts were held to be not binding on the authorities. However, the rule against the fettering of discretion, as developed by the courts, cannot be set aside that easily as it is based on the fundamental principle that the due exercise of public decision-making power necessarily overrides the private interest of the parties to a contract which inhibits its exercise.

The duty of the courts is thus to attempt to strike a balance between two competing principles which are the need to ensure that discretionary powers can be exercised in the public interest and the public interest of a government being able to make contracts and to treat those who contract with public authorities fairly.

The House of Lords finally faced the issue in \textit{British Transport Commission v. Westmorland County Council},\textsuperscript{161} and established a test which is designed to help the

\textsuperscript{159} J.D.B. Mitchell, \textit{Contracts of Public Authorities}, supra note 4 at 60.  
\textsuperscript{160} \textit{Birkdale District Electric Supply Company Ltd v. Corporation of Southport}, supra note 156 at 372 (Lord Sumner).  
\textsuperscript{161} \textit{British Transport Commission v. Westmorland County Council}, [1958] A.C. 126 [hereinafter \textit{British Transport Commission}].
courts in deciding whether an undertaking is an illegal fetter on the proper exercise of a discretionary power.\footnote{162 P. Cane, \textit{Introduction to Administrative Law}, supra note 141 at 265.}

The facts of this case are as follows. The appellant owned a railway which was built according to an Act of Parliament on a piece of land held by the railway authority under statutory powers conferred on it for the public benefit. The question that was facing their Lordships was whether a footpath across a bridge spanning the railway had been dedicated to the public. The bridge had initially been built for the private accommodation of the occupiers of the lands severed by the construction of the railway. Since the construction of the bridge, members of the public had been using it in such manner and for such period so as to give rise to a presumption that the bridge had been dedicated as a public footpath, if the owner of the bridge was capable of such dedication. The arguments raised by the appellants against the dedication were that: a) the dedication of a public right of way would amount to a repeal of the appellants’ statutory obligation to discontinue the bridge if certain events occurred and b) that such a dedication would have been incompatible with the public or statutory purposes for which the appellants held the land.

According to their Lordships, the sole test to be applied was whether the dedication of the footpath was incompatible with the statutory purpose for which the railway authority was authorized to acquire the land. As for the first argument raised by the appellant, their Lordships ruled that it was included in the larger issue, as the argument amounted to asking whether the non-exercise of such a secondary power was consistent with the statutory purpose for which the land was acquired.

The test to be applied is thus one of incompatibility between the power to dedicate and the main statutory power or purpose involved.\footnote{163 But the Court did not stop there in its analysis of the appropriate criteria. According to Viscount Simonds,}
the test of incompatibility should not be applied with the contention that in no conceivable circumstances could the proposed user at any future time and in any way possibly interfere with the statutory purpose for which the land was acquired. To give to incompatibility such an extended meaning is in effect to reduce the principle to a nullity. The application of the test should be guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen.\(^\text{164}\)

As for *Ayr Harbour*, it was considered as being “an example of incompatibility, not a decision to the effect that incompatibility does not supply a test”.\(^\text{165}\)

Applying these findings to the case before them, their Lordships concluded that there was no likelihood that the existence of an alleged public right of way would interfere with the operation of the railway (the purpose for which the land was held), and thus, with the adequate and efficient discharge of the company’s main statutory duty.\(^\text{166}\)

Although this case was not one involving contractual undertakings, the conclusions set out by the courts as to conflicting powers of a public body are certainly applicable to conflict involving contractual powers.

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\(^{163}\) This test was in accordance with the basis established in *Birkdale* where Lord Birkenhead had declared, at 364: “a well established principle of law, that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take action incompatible with the due exercise of their powers or the discharge of their duties”.

\(^{164}\) *British Transport Commission v. Westmorland County Council*, *supra* note 161 at 144 (Viscount Simonds).

\(^{165}\) *Ibid.* at 143 (Viscount Simonds).

\(^{166}\) In support of this conclusion, Lord Radcliffe also stressed the fact that if a railway company could not, in any circumstances, grant even a footway over, across or under its line, it would be a grave impediment to public amenity.
The subsequent application of the test developed in *British Transport Commission* justified the courts in validating certain undertakings of public authorities which would probably have been declared void under the rule as stated in *Ayr Harbour*. For example, in *Blake v. Hendon Corporation*,\(^{167}\) the power to let a piece of land was held to be compatible with the full use by the public of the land as public walks and pleasure grounds, which was the primary purpose for which the land was held. In *Regina v. Liverpool Corporation*,\(^{168}\) the Court of Queen's Bench held that an undertaking by a municipal corporation to consult with a group of citizens before making changes in the regulation was not incompatible with the by-law-making power of the said municipality. Finally, in *Kell-Erny's Enterprises Ltd v. Dyck*,\(^{169}\) a statutory board charged with regulating, managing and operating a park granted a lease for a business concession. The lease contained a covenant by which the board undertook not to allow the operation of any other concession in the immediate surroundings. The British Columbia Court of Appeal held that the power to grant concessions was only ancillary to the board's primary powers which were to regulate, manage and maintain the park. The limitation brought by the covenant was thus not an illegal fetter on the board's statutory birthright, nor was it incompatible with the object for which the statutory power was conferred.

Generally speaking, what has to be understood from this line of cases is that in the case of conflicting powers, the first thing to ascertain is the purpose of the public authority or the main statutory duty which is imposed on it. All other powers are subordinate to the primary power to carry out the statutory object and can be used only if their exercise is compatible with that object, with regards to circumstances foreseeable as likely to happen in the future.\(^{170}\) In the case of contractual undertakings, it will thus mean that the contract will be void if its performance will, as

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a matter of probability, prevent the body in question from discharging its public duty or be incompatible with the fundamental object prescribed in the statute.\textsuperscript{171}

Situations similar to the one found in \textit{Vancouver},\textsuperscript{172} where the public authority binds itself to exercise its discretionary power in a certain way, may, at first glance seem different than those where such an authority makes a promise not to exercise a power. However, the former situation is just as much a form of incompatibility with public duties. It is an incompatibility which precludes public authorities from exercising their powers in the public interest, without having their view improperly fettered by competing private obligations. A promise to exercise a public power in a certain way is thus contrary to the no-fettering principle, as it is a promise made in disregard or ignorance of the factors intended to influence the decision, which must be considered when circumstances call for the exercise of the power.

The incompatibility test will also be applied to cases where the fettering undertaking is alleged to be implied from the contract. This means that the courts will never imply a term into an otherwise valid contract that would fail as an improper fetter if that term were express. For example, in \textit{William Cory & Son ltd v. London Corporation}\textsuperscript{173}, the London Corporation, acting as a sanitary authority, passed a contract with the appellant for the removal of refuse from a wharf. Twelve years later, the corporation, acting as port health authority passed a by-law concerning the disposal of refuse in the port area, which was much more onerous than the requirements contained in the contract. The appellant claimed that by imposing new requirements, the corporation had repudiated the contract, as it was implied in the contract that the corporation was to be refrained from altering its by-laws to the contractor's disadvantage. The Court of Appeal held that there could be no question of implying a term, which, even if

express, could not be valid, since the corporation could not contract out of its statutory
duties as port health authority.\textsuperscript{174}

As established above, the turning point in the application of the incompatibility test is
the analysis of the public authorities' purposes and statutory powers. However, there
is one last important point to consider regarding the exercise of statutory powers which
are incompatible with contractual undertaking, whether express or implied: these
powers must be exercised for governmental purposes. Rogerson gives the following
example, based on the \textit{William Cory}\textsuperscript{175} case: "if the local authority(…)
had exercised their by-law-making power for the purpose of achieving a particular reason under
the contract in question, namely in order to get out of their agreement with Cory because
they no longer find it advantageous, the by-law could have been declared \textit{ultra vires}
and void by the courts".\textsuperscript{176}

This point also caught the attention of Devlin L.J. while analyzing the facts in
\textit{Commissioners of Crown Lands v. Page}: "[t]he case here is dealing with an act done
for a general executive purpose, and not an act done for the purpose of achieving a
particular result under the contract in question".\textsuperscript{177}

\begin{flushleft}
\textsuperscript{174} To the same effect, see \textit{Board of Trade v. Temperley Steam Shipping Company Ltd} (1926), 26
Lloyd's L.R. 76, affd (1927), 27 Lloyd's L.R. 230 (following a charter-party agreement, the
company contended that the Crown could not cease hire by virtue of an implied term that the Crown
should do nothing to prevent the company from keeping the vessel seaworthy); \textit{Commissioners of
lease involving Crown lands, if the effect would be to limit the Crown's proper exercise of its
powers and duties under statute. However, this case is more a case about the exercise of executive
powers and will be examined in the following section on executive necessity.); \textit{Esquimalt and
Nanaimo Railway Company v. A.G. of B.C.}, [1949] 2 W.W.R. 1233 (P.C.) (there can be no implied
term that the Crown bound itself not to enact any new legislation).

\textsuperscript{175} \textit{William Cory and Sons Ltd v. London Corporation}, supra note 173.

\textsuperscript{176} P. Rogerson, "On the Fettering of Public Powers", supra note 141 at 299-300.

\textsuperscript{177} \textit{Commissioners of Crown Lands v. Page}, supra note 174 (Devlin L.J.).
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This distinction was also a major part of a more recent decision by the Federal Court. In *Continental Asphalte Inc. v. R.*, the Court was faced with a claim by a government contractor who wanted compensation for economic loss resulting from certain government decisions which had an impact on market prices. Referring to *William Cory*, the Court rejected the claim and declared that a distinction should be made between the contractual activities and the governmental, legislative or public activities of the government. As the government’s actions in this case were of the second category, the contractor’s claim had no basis in law.

To conclude on this point, it shall be said that the public interest in the inhibited exercise of a discretionary power will generally outweigh the private interest of a contracting party in enforcing a contract which fetters the exercise of the discretion. This means that a contract which have this effect will be invalid and unenforceable, and any decisions made pursuant to it will also be invalid. It also means that no term which would have a fettering effect will be implied into an otherwise valid contract. However, the rule does not prohibit all contracts which have some inhibiting effect. A contractual undertaking will be valid and enforceable if it is compatible with the due exercise of the public authority’s power and its purposes, with regards to foreseeable probabilities. In such an analysis, “what must be regarded is not so much the contract, but the power or discretion with which it conflicts”. The contract will be binding only if it does not conflict with a statutory power or discretion of primary importance.

### 2.6.2 THE DOCTRINE OF EXECUTIVE NECESSITY

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Chapter 2

Conditions of Contracting

The doctrine of executive necessity is closely associated with the rule against the fettering of discretion, and may even be seen as a more specific application of the latter. This doctrine is, however, more controversial than the fettering of discretion, as it is criticized not only for its reach, but also for its mere existence.

The doctrine of executive necessity suggests that, in rare circumstances, a government is able to get out of valid contracts without paying compensation to the other party where the public interest requires it to do so, because no contract can validly fetter the government’s freedom to act in the public interest. As this common law rule is also based on inconsistencies between the nature of government powers and contractual undertakings, it is thus clearly related to the principle against fettering discretion by contract. But executive necessity is nonetheless a distinct doctrine. Firstly, executive necessity is a wider doctrine since it is not limited to agreements concerning the exercise of specific statutory powers. For the executive necessity doctrine to apply, there must be proof of incompatibility “with the essential purposes of government” or with measures which are taken by the Crown for the public good and which affect the nation as a whole. Executive necessity will potentially operate whenever the contract would interfere with the exercise of such executive powers. Secondly, it is limited to executive bodies. Thirdly, a difference may be noticed in the timeframe. The fettering of discretion concerns agreements in which a public body binds itself regarding the future exercise of statutory powers. The incompatibility is present as soon as the agreement is concluded. In the case of the executive necessity doctrine, such agreements are more likely to be affected by a subsequent use of executive powers. Therefore, the incompatibility is not always apparent at the time of the

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conclusion of the contract. Furthermore, the doctrine of executive necessity is often considered as a power to override a contract when an executive action has to be taken in the public interest, regardless of its consequences on the contract, rather than as a problem of validity of the contract.

The doctrine was first enunciated in the *Amphitrite*, a case concerning the release of a Swedish ship by the English government during the first world war. The Swedish company which owned the ship had made an arrangement with the British government that, regardless of the German blockade, the ship would not be detained if she carried a particular cargo. One trip was successfully made under this agreement, but on the second trip, clearance was refused. After concluding that the agreement was an assurance as to what the government's executive action would be in the future, Rowlatt J., declared, in now famous words:

> it is not competent for the government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.\(^{185}\)

The company was thus not entitled to damages as the assurance given by the government was not a contract for the breach of which damages could be sued for in a court. Rowlatt J. however stated that this rule should not be applied to commercial contracts of the government, and that in such cases, the government shall pay damages if it does not perform accordingly.

Very few subsequent cases applied the reasoning of Rowlatt J. regarding the exercise of the Crown's executive powers in relation to contractual undertakings. The first major one is probably *Commissioners of Crown Lands v. Page*,\(^{186}\) a case featuring a

\(^{185}\) *Rederaiktiebolaget Amphitrite v. The King*, [1921] 3 K.B. 500 at 503.

\(^{186}\) Supra note 174.
requisition by the Crown of land which was subject to a lease with a private individual. Although the lease was a valid contract, it could not preclude the Crown from exercising one of its executive powers to requisition the land during war time, nor could this action be considered as an eviction.

The Supreme Court of Canada came to a similar conclusion to that of Rowlatt J. in *Walkerville Brewery Ltd v. The King*. Davies J. then declared that an undertaking from the government to refund a sum paid under a settlement was not binding on the Crown “for the reason that it was not competent for the minister to fetter the future executive action of the government". ¹⁸⁷

Another Supreme Court decision which was discussed in the previous section is also sometimes invoked as an application of the Amphitrite principle. It is however unclear whether the case of *Dominion of Canada Postage Stamp*¹⁸⁸ may be regarded as an example of this principle or of the general rule against the fettering of discretion. The indications which may be inferred from the facts and the reasoning of the Court are conflicting. The power to grant licences for the sale of stamps was a statutory power (which would call for the application of the no-fettering rule), but the power to revoke them was not specified in the statute. It could thus be part of a general power of the executive to change policies, as the officer involved was a member of the executive (application of the doctrine of executive necessity). However, the Court based its affirmations on *Ayr Harbour*, which is the case at the origins of the no-fettering rule. Therefore, it is difficult to come to a conclusion as to the real impact of this case regarding the applicability of the executive necessity doctrine.

¹⁸⁸ *The King v. Dominion of Canada Postage Stamp Vending Company Ltd.*, supra note 147.
The next revealing extract about executive necessity in Canadian case law came from an *obiter dicta* in which the Federal Court seems to narrow the application of the executive necessity doctrine to grounds of public need:

Would it be otherwise if the closing of the canal in this case resulted from an administrative decision by the Crown? I do not think so. This would only be the case, I think, if there was a decision made on the basis of public need and the resulting damage was suffered by the public in general and could not, for this reason alone, be recovered. Indeed, in this case one might well ask whether this kind of act, being necessary for the greater good of society and independent of any fault on the part of the lessor, might result in any responsibility whatever [Tr.].

However, the last comment of the Supreme Court regarding this matter is to be found in a more recent case concerning the theory of legitimate expectations. Sopinka J. adopted a dictum from the Supreme Court of South Australia which states that any fettering on the Ministers' discretion to present legislative proposals is illegal.

Ministers of State cannot, however, by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations.

It is English case law which provided the first true criticism of the doctrine of executive necessity. This criticism came from Denning J. (as he then was), who, in just a few lines, seriously challenged the existence of such a doctrine.

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Nor can the Crown escape by praying in aid the doctrine of executive necessity, that is, the doctrine that the Crown cannot bind itself so as to fetter its future executive action. That doctrine was propounded by Rowlatt J. in *Rederiatibolaget Amphitrite v. The King*, but it was unnecessary for the decision because the statement there was not a promise which was intended to be binding but only an expression of intention. (...) In my opinion the defence of executive necessity is of limited scope. It only avails the Crown where there is an implied term to that effect or that is the true meaning of the contract.191

In the first few lines, Denning J. refused to adopt the conclusion of Rowlatt J. concerning contracts which hamper executive action based on the fact that it constitutes *obiter dicta* as there was no real contract in that case. As suggested by Mitchell, such reasoning should be refuted; the executive necessity doctrine was part of the *ratio decidendi* of the case as Rowlatt J. decided that the “agreement” was only an expression of intention precisely because the government could not hamper its freedom of action, and that therefore there could be no valid contract.192 Denning J. also seems inconsistent in his last observations. After doubting the existence of the executive necessity doctrine, he introduces limits to its application.193 Therefore, it is difficult to give a lot of credibility or weight to his criticism. Furthermore, Denning J. did not explain what could constitute an “implied term” or a meaning of the contract which would give the Crown the right to invoke the executive necessity doctrine. This proposition was however not followed in any subsequent decision or by any author.

In general, the reactions from the courts on the application of the executive necessity doctrine were rather infrequent and insufficient considering the issues involved. But such was not the case amongst academics; very few could resist expressing their

opinions as to the opportunity of having an executive necessity doctrine and if so, what scope it should have.\textsuperscript{194}

It was suggested that the doctrine should be restricted only to exceptional circumstances, where the welfare or the security of the State is at stake\textsuperscript{195}, or when public interest generally is at stake.\textsuperscript{196} It was also mentioned that there was a need for narrower limits for that doctrine, and that although they could not be determined with precision, they were not necessarily limited to the military protection of the State, but should also includes matters where the contract would prevent the government from fulfilling its essential functions, such matters which are fundamental to the existence and proper government of the community.\textsuperscript{197}

As to the exception made by Rowlatt J. with regards to commercial contracts of the government, some authors think that such an exception, even if imprecise, should exist.\textsuperscript{198} On the other hand, it is been argued that commercial contracts should not be excluded as there is no commercial or private capacity into which public policy does


\textsuperscript{195} R. Dussault and L. Borgeat, \textit{Administrative Law, A Treatise}, supra note 2 at 544.

\textsuperscript{196} P. Lemieux, \textit{Les contrats de l'Administration fédérale, provinciale et municipale}, supra note 17 at 198.

\textsuperscript{197} J.D.B. Mitchell, \textit{Contracts of Public Authorities}, supra note 4 at 55-56.

not intrude. Finally, one author would rather see such contracts be subject to the *Amphitrite* rule only in time of grave emergency.

Some other criticisms are radical, qualifying the rule as too drastic and going as far as arguing that the rule should not exist at all since there is no need for such an unfair and far-reaching rule.

Without getting into this debate, one should remember the context of the main decisions that formed the executive necessity doctrine: in both the *Amphitrite* and *Commissioners of Crown Lands*, the country was at war and the powers exercised “resulted from the essential role which the State must play in times of war for the national security.” Although it may not mean that the rule should only be applied in cases where a plea of exigencies of war is made, it is surely revealing as to the kind of circumstances which would be treated by a court as justifying a government action contrary to its contractual undertakings. Added to the recent tendency of the Supreme Court to enlarge the applicability of private law to government contracts, and regardless of the criteria which would be used to identify the situations where the doctrine of executive necessity should intervene, these observations lead to a conclusion which would favour a very restricted interpretation of this controversial

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199 P. W. Hogg, *The Doctrine of Executive Necessity in the Law of Contract*, supra note 194 at 154, footnote 6; S.A. Arrowsmith, *Government Procurement and Judicial review*, supra note 30 at 128: “the performance of such contracts may involve matters as important to the national interest as those in the *Amphitrite*”.


201 P. Craig, *Administrative Law*, supra note 40 at 707.

202 See P.W. Hogg, *Liability of the Crown*, supra note 3 at 161, where he states that the Crown should be bound by its contracts in the same way as a private firm; the same view was expressed by the Ontario Law Reform Commission, *Report on the Liability of the Crown*, 1989, ch. 3, at 43 (this was not a surprise as the Commission was headed by Peter Hogg) and A. Lajoie, *Contrats administratifs: jalons pour une théorie*, supra note 24 at 135, who argues that the rule is doomed to disappear and that the proper remedy for the government in cases where public policy calls for the breaking of a contract without paying damages is legislation.


doctrine. However, it remains that in every case involving this doctrine, the courts will have to make a value judgment as to whether the public interest at issue is sufficiently important as to outweigh the interest of the private contractor.205

2.6.3 THE EFFECT OF THE NO-FETTERING RULE AND THE EXECUTIVE NECESSITY DOCTRINE ON THE CONTRACT

The large majority of the cases which were cited to explain the no-fettering rule and the executive necessity doctrine are fairly vague on the real and actual effects of these theories on the contract. When the courts apply these two theories, the incompatible contract is qualified either as being void,206 unenforceable,207 "ultra vires",208 invalid or contrary to public policy.210 In some other cases, the court simply concluded that there was no breach of contract.211 In every case, the court refused to allow any damage to the afflicted contractor. The attitude of the courts towards these two issues, namely the legal consequences on the contract and the question of compensation for the contractor, has raised passionate debates in the legal doctrine.212 However, the following observations may be made concerning the current application of the two theories.

205 P. Cane, Introduction to Administrative Law, supra note 141 at 267, see also S.A. DeSmith and R. Brazier, Constitutional and Administrative Law, supra note 42 at 629.
206 Ayr Harbour Trustees v. Oswald, supra note 144; Triggs v. Staines Urban District Council, supra note 146.
207 Rederiaktiebolaget Amphitrite v. The King, supra note 185.
208 York Corporation v. Henry Leetham and Sons Ltd, supra note 145.
209 The King v. Dominion of Canada Postage Stamp Vending Company Ltd, supra note 147.
210 This appear to be the most recent tendency, at least with regard to matters concerning municipal governments; Vancouver v. Registrar Vancouver Land Registration District, supra note 150; Winter et al v. City of Saskatoon, supra note 150; Finney v. Township of McKellar, supra note 150.
212 P.W. Hogg, Liability of the Crown, supra note 3 at 161 and 171; P. Cane, Introduction to Administrative Law, supra note 141 at 268; P. Lemieux, Les contrats de l'Administration fédérale, provinciale et municipale, supra note 17 at 198-99.
Chapter 2 | Conditions of Contracting

If the fettering provision is legal (compatible), damages for breach of contract arising out of an exercise of the discretion or power in a way inconsistent with the contract are available. Where an illegal fetter can be severed from the rest of the contract, the contract itself is valid (or enforceable), but no damages will be allowed for any action contrary to the severed term. Finally, when the discretion or power is exercised contrary to an illegal fetter which cannot be severed, the whole contract is invalid (or unenforceable) and no damages are available.

There is however a dilemma as to whether the contract with the illegal fetter is void ab initio (thereby affecting the contractual capacity of the public body) or whether it should only be considered unenforceable when the conflict arises.

The more practical and coherent view on the subject is the one inspired from the writings of Arrowsmith and Campbell. It suggests that a distinction should be made between agreements which are conflicting or are most likely to conflict with the exercise of a discretion or statutory power (according to the incompatibility test) and agreements which are affected by a subsequent and unforeseeable use of an executive power of a special nature (executive necessity). In the first case, such agreements should be declared void and public authorities should be forbidden from entering into these agreements, as it is probable that the existence of the contract will incorrectly influence the future exercise of the discretion in question.

However, this solution is not appropriate for cases where agreements are affected by a subsequent use of executive powers of a special nature (executive necessity doctrine). Giving the wide variety of such powers and their scope of application, the effect of considering void every contract which are likely to conflict with these powers would

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215 See the discussion on the scope on the executive necessity doctrine, supra p.65.
be to invalidate almost all contracts made with the government. Accordingly, the
more appropriate solution in this case would be to restrict the enforceability of the
contract should a conflict arise.

These conclusions lead to the issue of compensation for the contractor. According to
the present case law on the subject, compensation or any other contractual remedy is
denied to the contractor when the agreement is declared invalid following the
application of the no-fettering rule or the executive necessity doctrine. This rather
unfair situation raised much criticism from the authors, such criticisms being mainly
directed to cases of executive necessity.216

It has been argued that the denial of damages unfairly lays the loss of a public policy
decision on an innocent contracting party, and that such a denial discourages
contracting with the government and that it forces the Crown to pay higher prices.217
Several authors who agree with this proposition also estimate that protection from
injunction and specific performance would be sufficient for the purpose of the rule, as
what matters is that the public body preserves its freedom of action in the public
interest.218

216 See generally on this issue: P. Lemieux, Les contrats de l'Administration fédérale, provinciale et
municipale, supra note 17 at 198; J.D.B. Mitchell, Contracts of Public Authorities, supra note 4 at
227-231; W.S. Holdsworth, "A casebook on Constitutional Law", supra note 194 at 166, S.A.
DeSmith and R. Brazier, Constitutional and Administrative law, supra note 42 at 630, P.W. Hogg,
"The Doctrine of Executive Necessity", supra note 194; M. Aronson and H. Withmore, Public
Torts and Contracts supra note 194 at 199-202; E. Campbell, “Agreement About the Exercise of
Statutory Powers, supra note 184; P. Cane, Introduction to Administrative Law, supra note 141 at
268; P. Craig, Administrative Law, supra note 40 at 703-704, P. Rogerson, “On the Fettering of
Public Powers" supra note 141 at 300.
217 P.W. Hogg, Liability of the Crown, supra note 3 at 161 and 171; P. Cane, Introduction to
Administrative law, supra note 141 at 268; P. Lemieux, Les contrats de l'Administration fédérale,
provinciale et municipale supra note 17 at 198-99.
218 M. Aronson and H. Withmore, Public Torts and Contracts, supra note 194 at 200; S.A. DeSmith
and R. Brazier, Constitutional and Administrative Law, supra note 42 at 630; P.W. Hogg, “The
Doctrine of Executive Necessity”, supra note 194 at 155 (however, in subsequent writings, Hogg
abandoned this idea and argue instead that even such a protection was unnecessary as the remedies of
injunction and specific performance are discretionary, and "if they were to be available against the
However, these comments obviously concern the opportunity of allowing damages. On a more realistic basis, a most sensible comment by Craig which takes into consideration the present state of the case law, explains that compensation is denied because there is no legal basis for a contractual remedy.

A condition precedent to the grant of damages for breach of contract is that there has been a breach. Wherein lies this breach? The loss which is being caused to the private contractor flows from the exercise by the public body of other powers or duties which it possesses. This is simply a manifestation of the dual role which such bodies play, acting both commercially and as public authority. An allegation of breach would therefore have to be framed in the following terms: “you the public body have promised expressly or impliedly that you will do nothing in your pubic role which is incompatible with our contract”. Such a promise is clearly unrealistic and would never be made by a public authority. An express promise would certainly be ultra vires and thus a fortiori no such promise could be implied.\(^\text{219}\)

In this same line of thought, it has been argued that the prospect of paying damages would be a real deterrent to the exercise of the discretion\(^\text{220}\) and also, that damages should not be allowed since the risks borne by the contracting party to be adversely

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\(^{219}\) P. Craig, *Administrative Law*, supra note 40 at 703-704. Craig also rejects the solution based on frustration (at 704). He raises four difficulties in such a solution: firstly, it is unclear whether the performance would really become impossible; secondly, the compensation available under such doctrine might be inadequate; thirdly, the concept of self-induced frustration; fourthly, the idea behind the frustration doctrine which is that neither party have an interest in the continuity of the contract. On this topic, see also J.D.B. Mitchell, “Contracts of Public Authorities”, *supra* note 4 at 227; E. Campbell, “Agreement About the Exercise of Statutory Powers”, *supra* note 184 at 341-42; and P.W. Hogg, “The Doctrine of Executive Necessity”, *supra* note 194 at 156-57, who rejects the application of doctrine of frustration for two reasons: the doctrine cannot be relied upon by either party to a contract which expressly deals with the event which has happened and such doctrine can neither be relied upon by a party who is himself responsible for the happening of the event. See also *William Cory and Sons v. London Corporation*, *supra* note 173, in which the parties had agreed that in the event that the court would rule that there was no breach, they would consider the contract as frustrated.
affected by the exercise of an executive power is no greater than two ordinary contracting parties. 221

An hybrid solution has also been proposed. This solution suggests that compensation of a special character should be paid to the aggrieved contractor. As the interference with contractual rights by public bodies is different from an ordinary breach, their consequences should also differ. It is thus suggested that the contractor should be compensated for the losses he incurred in the performance of the contract (excluding damages for expectation of profits) and that there should be restitution of the benefits conferred to the public body. 222

Regardless of the alternative which is retained, there is a need for more clarity and fairness in the issue of contractual remedies in cases of undertakings which conflict with the exercise of public powers. It is acknowledged that any change in the present situation would have to be made through a legislative intervention, as the rule of stare decisis would preclude such a major modification in the case law which has persisted to deny any claim for damages. One of the questions which should be examined then, would surely be whether the whole scheme of compensation would be provided in the legislation or left to judicial discretion.

This concludes the overview of all particularities of government contract which are associated with the limitations of the State's freedom of contracting and the requirements imposed for the validity of government contracts. At this point, several characteristics of government contracts arising from the necessity of protecting the public interest have been emphasised and the impact of these characteristics is considerable as they add numerous grounds of invalidity of the

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221 P. Rogerson, "On the Fettering of Public Powers", supra note 141 at 300.  
222 J.D.B. Mitchell, Contracts of Public Authorities, supra note 4 at 223-31; P. Cane, Introduction to Administrative law, supra note 141 at 268.
contract which are unknown in private contracting. However, the sole fact that the State has all the attributes of the Sovereign, namely its prerogatives and immunities also have a noticeable influence on the balance of the contract. Such will be the purpose of the next chapter.
CHAPTER 3: PREROGATIVES OF THE CROWN

At the centre of the issue concerning the legal distinctions between the State and its subjects, lie the Royal Prerogatives. As it will be demonstrated in this chapter, these prerogatives play an important role in giving the State a privileged position in a commercial context. Although the impact of the special powers and immunities that form the prerogatives cannot be denied, the true extent of their effect on contractual relationships involving the State remains unclear. The nature of the prerogatives and the fact that they are subject to frequent interpretations by the courts are surely two important factors that contribute to this uncertainty. However, there is no need for a thorough review and analysis of the state and evolution of the prerogatives for the purpose of this chapter, which is merely to demonstrate that the prerogatives are another reason in which the State is different from an individual contracting party.

At this point, three prerogatives, also referred to as immunities of the Crown, will be examined. These three prerogatives have been chosen because they are the ones which are the most likely to have a strong impact on contractual relationships. They are: the immunity against the binding effect of statutes, the immunity against injunction, specific performance and enforcement of judgments, and the inapplicability of estoppel. However, one must keep in mind that the prerogative also consists of powers conferred on the Crown, such as the conducting of foreign affairs and treaty-making power, the power to issue passports, the war prerogative (power to take and use private property for defence in time of national emergency), the commandment of the armed forces, the pardoning of criminals, the right to summon and dissolve Parliament, and the hiring and dismissal of public servants.\(^{223}\)

Prior to the discussions on the specific immunities applicable in a contractual context, it is necessary to review certain principles about their distinctive nature.
Several authors in the field came up with their own definitions of the prerogatives and immunities, which differ in the scope they confer to the concept. For the purpose of the following comments it must be kept in mind that when the word prerogatives is used, it also includes immunities. In Halsbury’s Law of England, the following definition is put forward:

The royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her legal dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England.\(^\text{224}\)

Blackstone’s definition of the prerogatives is rather similar, but more precise.

By the word prerogative we usually understand that special pre-eminence, which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology (from prae and rogo), sometimes that is required or demanded before, or in preference to all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only applied to those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the Crown could be held in common with the subject it would cease to be prerogative any longer. And therefore Finch lays it down as a maxim, that the prerogative is that law in case of the King, which is law in no case on the subject.\(^\text{225}\)

\(^{223}\) See P. Lordon, Crown Law (Toronto: Butterworths, 1990) ch. 3.


\(^{225}\) Blackstone, Commentaries, vol. 1 (Chitty ed.) at 180 (239 in original paging).
This last definition may be simplified by saying that its fundamental idea is to present the prerogatives as “a body of common law rules that vary or add to the general common law rules insofar as they apply to Her Majesty”.\textsuperscript{226}

The question which thus needs to be considered at this point is who is the Crown? Who enjoys the prerogatives and immunities? As the prerogatives are inherent in the Crown, and as Her Majesty is at the head of the federal and provincial governments,\textsuperscript{227} it can thus be said that both levels of government enjoy the prerogatives.

At another level, the prerogatives have attracted their fair share of judicial attention. Their evolution has left a trace in the case law, which has mainly considered two aspects of the prerogatives. Firstly, their limitations by way of statute and secondly the judicial review of their exercise. As the second point is only related to the exercise of powers conferred upon the Crown by the prerogatives, it will be set aside for the purpose of this study, which is rather concerned with Crown immunities.

The first point may be described as follows: “as a consequence of the doctrine of legislative supremacy, statutes can bind the Crown and prerogatives can be abolished, restricted or regulated by the express words of a statute”.\textsuperscript{228} In the key judgment of the House of Lords in \textit{A.G. v. De Keyser's Royal Hotel Ltd.},\textsuperscript{229} the House of Lords had to decide whether the prerogative to take possession of lands and buildings for the defence of the realm in war time had been abolished by statutes and regulations which were adopted regarding the same matter. As a whole, these statutory instruments provided for the procedure applicable to takings of property when national defence so required, for a right to compensation in favour of the afflicted owner and for the assessment of such compensation. The Crown argued that in the case of the Hotel, the

\textsuperscript{226} D.W. Mundell, “Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions between them” \textit{supra} note 18 at 59.
\textsuperscript{227} Liquidators of the Maritime Bank v. The Queen, [1892] A.C. 437.
\textsuperscript{228} B.S. Markesinis, “The Royal Prerogative Re-visited” (1973) C.L.J. 287 at 299.
property was requisitioned under the Royal Prerogative and not under the coexisting statute and that therefore there was no obligation to pay compensation.

In this context, Lord Atkinson explained the relation between a prerogative and a statute which have the same subject-matter:

It is quite obvious that it would be useless and meaningless for the legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogatives do the very thing that the statute empowered it to do. One cannot in the construction of a statute attribute to the legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word "merged" is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the king and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same-namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.230

230 Ibid. at 539-40 (Lord Atkinson), see also the words of Lord Sumner at 561: "there is no object in dealing by statute with the same subject-matter as is already dealt with by prerogative, unless it be either to limit or at least vary its exercise, or to provide an additional mode of attaining the same object".
Chapter 3  
Prerogatives of the Crown

This rule is subject to a fundamental principle: no Royal Prerogative can be deemed to be taken away by a statute by implication. There must be an express provision to that effect or an inference which is irresistible.231

The special immunities conferred upon the Crown through the Royal Prerogatives, or at least those who are relevant to the Crown's contractual activities, will now be the subject of a more detailed analysis as they may have a direct impact on a Crown contract.

As an introduction to the study of these immunities, there is one important case which needs to be mentioned, as it provides for crucial principles on Crown prerogatives and contractual activities of the state. In Bank of Montreal v. A.G. Quebec,232 the Supreme Court of Canada considerably restricted the applicability of Crown Prerogatives in a contractual context.

The facts of this case were as follows. In April 1968, the government drew a cheque on the appellant Bank to provide for the payment of an indemnity following an expropriation. The cheque was sent to a notary who forged the beneficiary's endorsement and deposited the cheque in his own account. The government learned about this forgery at the end of 1968. However, it was not until 1972 that the government gave the Bank notice of the forgery when it claimed for the reimbursement of the amount of the cheque. The Bank refused to pay, invoking s.49(3) and (4) of the Bills of Exchange Act which provides that a notice of forgery must be given by the drawer in the year following his knowledge of the forgery. The

231 Kidd v. The King, [1924] Ex C.R. 29 at 31: "[o]f course the Crown's prerogative may be taken away by Parliament in respect of any such matter, but, that the prerogative should be taken away beyond all matter of doubt by the State, is insisted upon in all the cases, and when there is a doubt upon the face of the Act it is the duty of the Court to hold that the prerogative is maintained". See also: Rankin v. R., [1940] Ex. C.R. 105; Nudan v. R., [1926] 2 D.L.R. 177 (P.C.); R. v. Sayward Trading & Ranching Co., [1924] Ex C.R. 15; Canadian Pacific Railway v. Toronto, [1911] A.C. 461

government pleaded that it was not bound by such an obligation in virtue of its prerogatives and immunities. The main argument raised by the Crown was that it is not bound by a statute unless it is expressly mentioned therein, which was not the case here.

The Court ruled that the issue at stake was not one involving the various immunities of the State, but one of contractual undertakings. Speaking for the Court, Justice Pratte considered that the obligations assumed by the government in this case, arose not from the statute but from the contract with the bank, made by the opening of the account.

As this kind of contract is usually characterized by the absence of any explicit terms, the parties rely on commercial customs and the law. One of the main laws that applies is the *Bills of Exchange Act*. In this way, the obligational content of a banking contract implicitly includes s.49 of the act which sets out certain obligations that flow from this contract and its breach. The obligations are contractual not statutory. Since the government’s claim was based on the contract, in order to succeed it must comply with the other provisions of the agreement, which implicitly include the applicable statutory law. As the government failed to do as such by not giving the required notice within the time limit, its claim cannot be successful.

Pratte J. formulated his conclusion in the following terms:

subject possibly to a limited number of exceptions, which would not apply here in any event, the rights and prerogatives of the Crown cannot be invoked to limit or alter the terms of a contract, which comprises not only what is expressly

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233 The Court referred to s.1017 of the *Civil Code* which provides that “the customary clauses must be supplied in contracts, although they be not expressed”.

234 Here again, Justice Pratte applied a specific section of the *Civil Code* which provides for the following: “1024. The obligations of a contract extend not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature”.

- 84 -
provided in it, but also everything that normally results from it according to usage or the law.\textsuperscript{235}

The conclusions of the court as to the impossibility for the Crown to invoke its prerogatives to limit its contractual obligations is not surprising, considering the precedents stating that the Crown is bound by its contract in the same way as its subjects.\textsuperscript{236} What is however unexpected is the fact that the Court considered that the obligation to declare the forgery within a certain period was of contractual nature rather than statutory. This interpretation certainly shows that the Court was preoccupied by equity concerns and confirms a recent tendency in the Supreme Court's decisions to restrict more and more the applicability of Crown's prerogatives and immunities, and its reluctance to rely on such principles to provide the Crown with an excuse for not performing obligations.\textsuperscript{237}

Therefore, as Dussault points out, the conclusion which may be drawn from the \textit{Bank of Montreal} case is that "only in case of silence as to the applicable obligational content can a prerogative or an immunity be applied".\textsuperscript{238}

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\textsuperscript{235} \textit{Ibid.} at 574 (Pratte J.).
\textsuperscript{236} See The Bankers' case (1700), 14 How. St. Tr. 1 and Windsor and Annapolis Railway Co. v. The King (1886), 11 A.C. 607.
\textsuperscript{237} The first noticeable modern case which can be cited in support of this affirmation is \textit{The Queen v. Murray}, [1967] S.C.R. 262, in which the Court stated that the Crown could not rely on its prerogatives to avoid the application of a legislative provision aimed at limiting the liability of the party who by its delict caused a damage. A more recent case is \textit{A.G. of Quebec v. Labrecque}, supra note 16, where the court declared: "[m]odern English law, hostile to the extension of the royal prerogative, is unwilling to use it to explain a legal situation which can just as well be explained by the general capacity of the Crown" (Beetz J., at 1083). In this case, the Court concluded that a civil servant was not appointed to his position by virtue of the prerogative, but was rather under a contract of employment with the government. See also \textit{Nova Scotia Government Employees Association v. The Civil Service Commission of Nova Scotia}, [1981] 1 S.C.R. 211; \textit{R. v. Ouellette}, [1980] 1 S.C.R. 568; \textit{C.B.C. v. The Queen}, [1983] 1 S.C.R. 339; \textit{Operation Dismantle v. The Queen}, [1983] 1 F.C. 745 (C.A.) and finally \textit{R. v. Eldorado Nuclear Ltd}, [1983] 2 S.C.R. 551 at 558 in which Dickson J. stated this rather revealing thought: "the more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject".
\textsuperscript{238} R. Dussault and L. Borgeat, \textit{Administrative Law, A Treatise}, supra note 2 at 540.
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However, the concept of the implied contractual term transforming statutory obligations into contractual ones should not be taken to extremes so as to argue that the Crown will implicitly be bound by all statutes that would bind a private contractor in the same circumstances, as this would come close to removing all commercial activities of the Crown from the presumption of immunity. Not all statutory provisions which apply to a specific sectors of activities may be considered as implied terms of the contract. Furthermore, the Supreme Court always refused to create or acknowledge the existence of a “commercial activity exception” for Crown immunities. Therefore, the conclusions of the court regarding the immunity of the Crown toward statutes should be applied with circumspection, so they will not be taken to an extreme which may not have been wanted by the Court.

In conclusion, although the decisions of the courts of justice show a rather strong inclination towards a confinement of these special immunities and powers of the Crown, the prerogatives are still a very important part of the Crown law found in British-inspired constitutional systems. Moreover, even if this restrictive tendency cannot be ignored, the prerogatives are not about to disappear. Decades of judicial interpretation will be necessary for the prerogatives to be reduced to theoretical principles, if this is possible at all without the intervention of the legislature. Therefore, the prerogatives still need to be highly considered in the present analysis.

3.1 THE IMMUNITY AGAINST STATUTES

Section 17 of the Interpretation Act declares a presumption that legislation is not binding on the Crown in the following terms:

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239 P.W. Hogg, Liability of the Crown, supra note 3 at 220.
No enactment is binding on Her Majesty or affects Her Majesty’s rights or prerogatives in any manner, except as mentioned or referred to in the enactment.\(^1\)

Similarly, the Revised Statutes of Ontario contain the following provision:

No act affects the rights of her majesty, her heirs or successors, unless it is expressly stated therein that her majesty is bound thereby.\(^2\)

Such a presumption in favour of the Crown has its origins in a royal prerogative\(^3\) which was based on the premise that laws were made by the Crown to regulate the behaviour of its subjects alone.\(^4\) This prerogative was a general rule which provided that, “though the King may avail himself of the provisions of any acts of Parliament, he is not bound by such as do not particularly and expressly mention him”.\(^5\)

Although the fundamental principle was never challenged, controversy arose as to the limits of such an immunity. The case law declared certain exceptions to the immunity, the most important being that the Crown was to be bound by statutes enacted for the “public good”, even if the Crown was not expressly named therein.\(^6\) This

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\(^1\) R.S.C. 1985, c. I-21, s.17.
\(^2\) Interpretation Act, R.S.O. 1990, c. I-11, s.11.
\(^3\) The principle of Crown immunity is also considered as a common law rule of statutory construction: C. Swinton, “Federalism and Provincial Government Immunity” (1979) 29 U of T L. J. 1 at 35; C.H.H. McNairn, Governmental and Intergovernmental Immunity in Australia and Canada, (Toronto: University of Toronto Press, 1990) at 3, citing Madras Electric Supply Co. v. Boarland, [1955] A.C. 667 (H.L.); P.W. Hogg, Liability of the Crown, supra note 3 at 201. Hogg mentions that it is also accurate to describe this rule as a prerogative provided that the aforementioned notion is not defined according to Dicey’s view, which is that the prerogatives are powers of the Crown. “For the rule is not a prerogative power to override a statute which applies to the Crown”.
\(^6\) For a historical review of the issue, see H. Street, “The Effect of Statutes upon the Rights and Liabilities of the Crown” (1947-48) 7 U.T.L.J. 357.
controversy came to an end with the decision in *Bombay v. Municipal Corporation of Bombay*\(^{347}\) which settled the issue of the extent of Crown immunity to statutes.

In this case decided by the Privy Council in 1946, Lord Du Parcq declared that not only could the Crown be bound by a statute which contains an express provision to that effect, but it could also be bound by necessary implication.

The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein (...). But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, by "necessary implication". If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.\(^{248}\)

Further in the decision, Lord Du Parcq added this last statement, which caused some confusion in the subsequent doctrine and the case law:

If it can be affirmed that, at the time when the statute was passed and received royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.\(^{249}\)

This extract was often considered as the centre of the doctrine of necessary implication. According to this view, a statute may bind the Crown by necessary implication only if it may be considered that the purpose of the statute would be wholly frustrated unless it applies to the Crown. Several authors rightly disagree with this point of view which puts too much emphasis on the latter part of the decision. A


\(^{248}\) *Ibid.* at 61.
close reading reveals that the first extract quoted above expresses the predominant rule, which is that a statute may bind the Crown if it is manifest from the very terms of this statute that the Crown shall be bound by it. The “wholly frustrated purpose test” should be considered as one of the cases where it can be said that it is the intention of the legislature that Crown shall be bound by a statute rather than the general principle.  

However, as this necessary implication doctrine arose from the common law, one must considered the impact of the codification of the rule of Crown immunity in the various interpretation acts. According to the strict wording of the concerned sections, there seems to be no room for an exception based on the doctrine of necessary implication.

This issue has been the subject of controversy, at both the federal and provincial level. The debates are, however, a little different as the federal act does not contain the word “express” or “expressly”, as opposed to its provincial equivalents.

As for the federal act, several decisions of the Supreme Court have discussed the issue of the impact of this statute on the doctrine of necessary implication. Although these decisions have not always been consistent with each other, the latest decision leaves no doubt on the question of whether or not the doctrine of necessary implication is still

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249 Ibid. at 63.
250 P.A. Côté, Interprétation des lois, supra note 244 at 61-63; P.W. Hogg, Liability of the Crown, supra note 3 at 210-211, citing two Supreme Court cases in which he argues that the Crown was declared to be bound by a statute in application of the “logical implication test”: R. v. Ouellette, [1980] 1 S.C.R. 568; A.G. of Quebec v. Expropriation Tribunal (1986), [1986] 1 S.C.R. 732.
251 See supra, at p.87. The interpretation act of the other provinces are mostly similar to the provisions found in Ontario. However, the following conclusions on the impact of codification do not apply to B.C. and P.E.I. where the presumption has been reversed. The interpretation act of these provinces, rather, provides that: “unless it specifically provides otherwise, an enactment is binding on Her Majesty” (R.S.B.C. 1979, c. 206, s. 14(1)) or “unless an act otherwise specifically provides, every act and every regulation made thereunder, is binding on Her Majesty” (R.S.P.E.I. 1988, c. 1-8, s. 14.)
In Alberta Government Telephones v. C.R.T.C., Dickson C.J., speaking for the majority, settled the issue in the following way:

In my view, in light of PWA and Eldorado, the scope of the words “mentioned or referred to” must be given an interpretation independent of the supplemented common law. However, the qualifications in Bombay, supra, are based on sound principles of interpretation which have nor entirely disappeared over time. It seems to me that the words “mentioned or referred to” in s. 16 are capable of encompassing: (1) expressly binding words (“Her Majesty is bound”); (2) a clear intention to bind which, in Bombay terminology, “is manifest from the very terms of the statute”, in other words, an intention revealed when provisions are read in the context of other textual provisions, as in Ouellette, supra, and, (3) an intention to bind where the purpose of the statute would be “wholly frustrated” if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced.253

(Emphasis added)

At the provincial level, the issue has not been the subject of a clear decision yet, and as the wording of the statutes is different, the conclusions of Dickson C.J. cannot be applied integrally. It has been argued by a majority of authors that the doctrine of necessary implication should remain for the reason that it involves a narrower version

252 See Alberta Government Telephones v. C.R.T.C., supra note 240; R. v. Ouellette, supra note 250; contra Her Majesty in Right of the Province of Alberta v. Canadian Transport Commission, supra note 240; R. v. Eldorado Nuclear, supra note 240.

253 Alberta Government Telephones v. C.R.T.C., supra note 240 at 280 (Dickson C.J.).
of the statutory immunity. As for the case law on the subject, it is hardly reconcilable.

However, there is an interesting and revealing survey which was conducted by Peter Hogg and reported in his book Liability of the Crown. The author proceeded to examine all Ontario statutes which were in force in 1987. Out of a total of 619 statutes, 28 contained an express provision to make the statute binding on the Crown. Surprisingly, those which did not include such a mention included many statutes which involved the Crown directly. For example, the Crown Attorneys Act, the Escheats Act, the Interpretation Act, the Government Contracts Hours and Wages Acts, the Proceedings against the Crown Act, the Public Service Act and twenty six statutes creating ministries or departments of the government of Ontario. This led Hogg to conclude that such a “drafting practice is undoubtedly premised on the assumption that the Crown may be bound by a clear implication from the context”. Considering this reality, the general opinion on the subject and the fact that several cases may be

254 See C.H.H. McNairn, Governmental and intergovernmental immunity in Australia and Canada, supra note 243 at 18-19, who raised the argument that the word “expressly” is capable of embracing a necessary implication as is evident from the meaning given to it in other contexts (see footnote 79, at p. 18). See also P.A. Côté, Interprétation des lois, supra note 244 at 209-212; P.W. Hogg, Liability of the Crown, supra note 3 at 206-208; P. Garant, Contribution au statut juridique de l'administration gouvernementale, supra note 16 at 74.


256 P.W. Hogg, Liability of the Crown, supra note 3 at 207 (footnote 33).

257 Ibid.
considered as being in favour of the applicability of the doctrine of necessary implication, it is difficult to conclude otherwise.

The statutory immunity of the Crown also has other limits, which are not adversely affected by the codification of the rule. The first limitation is that the immunity does not affect every statutes. Only statutes that operate to the prejudice of the Crown will be subject to the immunity. This statement was applicable to all jurisdictions in which Crown immunity was codified, as the wording of the concerned provision expressed a necessity that the rights of the Crown had to be affected.

Such is not the case for the federal interpretation act, which was modified in 1967 to include a broader concept. The provision now states that "no enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives". As it is now clearly stipulated that no enactment shall bind the Crown, there is no longer need to prove that rights are adversely affected, as it was the case under the previous version of the statute, which was referring solely to acts affecting Her Majesty's rights or prerogatives. This situation is different from those found in most of the provincial acts, which are still modelled on the previous version of the federal statute and which thus contain only a reference to rights or prerogatives that might be affected, without any mention of the binding character of the statute. In these cases, it is still necessary to demonstrate that the statute operates to the prejudice of the Crown for the immunity to apply.


Mandras Electric Supply Corp. v. Boarland, supra note 243.

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

Chapter 3 Prerogatives of the Crown

The second limitation is that the Crown may, by its action, submit itself to the provision of the statute. This rule may be better explained by saying that the Crown can take advantage of a statute that does not bind it, but if the Crown does so, it is also burdened with the attendants restrictions. This principle is also often referred to as the benefit/burden exception. The scope of this exception was described by the Supreme Court in the case of *La Caisse de dépôt et de placement du Quebec v. Sparling.*

In this case, the Caisse, an agent of the Crown in right of Quebec, denied that it was bound by the *Canadian Business Corporation Act.* Accordingly, the Caisse refused to submit an insider report in relation to the purchase of more than 10% of the shares of a company. Speaking for the majority, Laforest J. confirmed that the benefit/burden exception is part of Canadian law and that it had already been applied by the Court in at least three cases. As for the case at bar, the Caisse tried to argue that it did not seek to take advantage of a statute, it simply purchased shares in a corporation which happened to be governed by a statute. This argument did not succeed in convincing the Court that the benefit/burden exception should not be applied to the facts of the case. The Court rejected the argument presented by the Caisse in the following words.

To conclude from this, however, that the Crown is not bound by the obligations attendant upon the rights conferred by the statute requires that one presuppose a rather simplistic view of the nature of a share and its purchase. A share is not an isolated piece of property. It is rather, in the well-known phrase, a “bundle” of interrelated rights and liabilities. A share is not an entity independent of the statutory provisions that govern its possession and exchange. Those provisions make up its constitutive elements. They define the very rights

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and liabilities that constitute the share's existence. (...) A share and thus a "shareholder" are concepts inseparable from the comprehensive bundle of rights and liabilities created by the Act. Nothing in the statute, common sense or the common law indicates that this bundle can be parcelled out piecemeal at the whim of the Crown. It cannot pick and choose between the provisions it likes and those it does not.

The Court however ruled that such conclusions did not imply that the Crown was bound by any and every regulatory scheme that governs a particular state of affairs. The application of the benefit/burden does not depend on the sole existence of a regulatory scheme in a given field, but on the relationship between the benefits and the burdens. "The issue is not whether the benefit and burden arise under the same statute, but whether there exists a sufficient nexus between the benefit and burden". Therefore, this "sufficient nexus" criteria is the one that should be applied to determine which burdens are linked to the advantages which the Crown chose to enjoy.

As this case involves an agent of the Crown, it also raises the issue of who enjoys the immunity against statute. It is now accepted that such immunity is enjoyed not only by the Crown, but also by Crown agents and servants acting on its behalf. But more interesting is the fact that even Crown contractors may, in certain circumstances, claim the benefit of the immunity against statutes. According to McNairn, such an extension of a Crown immunity exists in situations where the Crown would be prejudiced otherwise. He refers to a case in which a contractor working on Crown lands had been declared not to be under the obligation of obtaining a permit under a licensing

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264 La caisse de dépôt et de placement du Québec v. Sparling, supra note 262 at 1025-26 (Laforest J).
265 Ibid. at 1025 and 1027 (Laforest J.).
266 See P.A. Côté, Interprétation des lois, supra note 244 at 199, and the case law cited therein.
scheme which involved approval and inspection of the works.\textsuperscript{268} Similarly, there are also cases of firms contracting with the Crown which were declared exempted from trade practices regulation so as to not prejudice the Crown's freedom to enter into anti-competitive contract.\textsuperscript{269} Commenting these cases, McNairn noticed that it is in reality on behalf of and for the ultimate of the Crown that government immunity had been accorded and that it was only incidental that others received advantages.\textsuperscript{270} But this principle is not unanimously accepted and there are cases to the contrary.\textsuperscript{271} Authors like Peter Hogg have expressed doubt on the opportunity of the decisions extending the immunity to contractors. Although Hogg agrees with the basic principle that the immunity should be extended when the Crown would be prejudiced otherwise, he argues that the cases have been wrongly decided. According to him, there is insufficient prejudice to the Crown in complying with building or trading regulations and not enough incompatibility with Crown's purposes to justify granting immunity.\textsuperscript{272} New developments regarding this matter will surely be interesting.

There is finally one last limitation to the statutory immunity of the Crown. This limitation was established by the Supreme Court of Canada in \textit{Bank of Montreal},\textsuperscript{273} which was analyzed in the section concerning prerogatives generally. This crucial decision has considerably reduced the scope of the immunity of the Crown by stating that the Crown may be bound by a statute through the implied terms of a contract. This principle flows from the rule that the Crown may voluntarily submit itself to a


\textsuperscript{270} C.H.H. McNairn, \textit{Governmental and intergovernmental immunity in Australia and Canada}, supra note 243 at 15.

\textsuperscript{271} \textit{A.G. Quebec v. Entreprises de Construction Gaston} (1979) Ltée, JE 91-507 (C.Q.), where the court concluded that a contractor performing works for the government on a public road was not a Crown agent and therefore that he could not enjoy Crown immunity as to the permit requirement.

\textsuperscript{272} See P.W. Hogg, \textit{Liability of the Crown}, supra note 3 at 239.

statute. But in the case of the implied term principle, the Crown is deemed to be bound by a statute through a contract if the statute may be considered as an implied term of the contract. The Crown is considered as having implicitly agrees to the provisions of the statute by concluding the contract. The obligations contained in the statute are thus considered as being of a contractual nature rather than statutory, therefore no immunity is enjoyed by the Crown.

As a conclusion on the subject-matter of Crown immunity against statute, a word should be said on the possible reversal of the presumption found in most interpretation acts. Much has been said in favour of such a reversal by the doctrine, who agrees with this alternative almost unanimously. The Alberta Law Reform Institute, in its report on the presumption of Crown immunity, also shares the same opinion.

Whatever justification there might have been for the presumption of Crown immunity from statutes in earlier times, the role of the Crown has recently expended and changed. In the last century both the scope of governmental activity and the scope of legislative regulation have greatly increased. The Crown is now often in competition with ordinary citizens, or engaged in endeavours that are regulated when undertaken by regular citizens. The effect of the presumption of immunity is often to place the Crown in a position of advantage relative to ordinary subjects, or to shield it from laws that are enacted for the protection and governance of society.

So far, two provinces have adopted this point and view and modified their statute accordingly: British Columbia and P.E.I. Their Interpretation Act is thus to the effect that unless a statute specifically provides, every act is binding on Her Majesty.

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3.2 INJUNCTION, SPECIFIC PERFORMANCE AND EXECUTION OF JUDGMENTS AGAINST THE CROWN

Crown immunities are also a determining factor in the coercive measures which may be taken against the Crown in a contractual context. At this level, the privilege of the Crown lies in the range of remedies that are available to the aggrieved contractor in cases of breach of contract by the Crown. The common law has always provided the Crown with a special protection against some of these remedies, which includes injunction (and thus specific performance), mandamus and execution of judgment. Although it has been applied the case law for years, this privilege has now been incorporated in statutory instruments in most jurisdictions.276

This section will examine the extent of such an immunity, both under the common law and under the applicable statutory instruments. The first part of the analysis will be restrained to the immunity against injunctions and specific performance, and the second part to the immunity against the execution of judgments. As for the applicability of mandamus, it will be set aside for the purpose of this study as it is rarely used in a contractual context.277

The immunity of the Crown against such measures like injunction and specific performance has its origins in the power of the courts over the Crown. As the courts are an emanation of the Crown, they have no power over the latter.278 The sole power

276 For example, Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 22; Proceedings against the Crown Acts: Alberta s.17, Manitoba s.17, Newfoundland s.15, New Brunswick s.14, Nova Scotia 16, Ontario s. 14, Saskatchewan s. 17, P.E.I. s. 15; British Columbia Crown Proceedings Act s.11; Code of Civil Procedure (Quebec), s.94.2. The impact of such a codification will be discuss further in this section.


278 R. v. The Lords Commissioners (1872), 7 Q.B. 387, 394 (Cockburn C.J.); “I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has
of constraint belong to the State, so it would be absurd to make this supreme public authority subject to its own power of constraint.\textsuperscript{279}

Another basis for the immunity against injunction is the fact that, in extreme situations, the Crown might need to override the law.\textsuperscript{280} This assumption is well stated in the following extract.

In an emergency, the government might find it imperative to do unlawful acts infringing individual rights, and it might be highly detrimental to the public interest if the party aggrieved were to be able to obtain immediate intervention of the courts.\textsuperscript{281}

Strayer, in his thorough analysis of the applicability of the injunctive remedy to Crown servants, is of the opinion that the immunity is based on the fact that "the conduct of the executive is subject to the direct control of Parliament and not the courts".\textsuperscript{282} He adds that "the propriety of executive action or inaction raises questions suitable for political, not judicial, determination".\textsuperscript{283}

For these reasons, the Crown is said to be immune from the coercive power of the courts, which have been consistent in recognising their lack of authority in such circumstances.\textsuperscript{284}

\textsuperscript{280} H.G. Street, \textit{Government Liability (A Comparative Study)}, supra note 4 at 140.
\textsuperscript{281} J.M. Evans, \textit{De Smith 's Judicial Review of Administrative Action}, 4\textsuperscript{th} ed., (London: Stevens and Sons Ltd, 1980) at 448.
\textsuperscript{283} \textit{Ibid.}, at 9.
Chapter 3
Prerogatives of the Crown

Even though the courts have no power to issue an order for specific performance against the Crown, "there is jurisdiction in respect of claims of the subject against the Crown to consider and determine what is right to be done and (...) to make a declaration as to the right of the subject to specific performance if the circumstances justify it". Therefore, when the Crown is involved, the court may, instead of issuing an order for specific performance, declare that the applicant is entitled to the specific performance of the contract by the Crown. However, it should be remembered that although they are binding on the parties, declaratory judgments are not subject to compulsory execution. The goodwill of the Crown is thus the only guarantee that the judgment rendered in the applicant's favour will be satisfied.

The immunity against injunction and the possibility of issuing a declaratory judgment was codified in the Crown Liability and Proceedings Act and in all provincial statutes in Canada. Except the Quebec one, all of these provisions are similar, as they are modelled on the federal provision.

22. (1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, a court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.

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285 Dominion Building Corp. v. The King, supra note 147 at 548.
287 Supra note 276.
288 The applicable sections of the Code of Civil Procedure are the following:
   s. 94.2. No extraordinary recourse or provisional remedy lies against the Government
   s. 100. No extraordinary recourse or provisional remedy lies against a minister of the
   government or any officer acting upon his instructions to force him to act or to refrain from
   acting in a matter which relates to the carrying out of his duties or to the exercise of any
   authority conferred upon him by any law of Quebec.
(2) A court shall not in any proceedings grant relief or make an order against a servant of the Crown that is not competent to grant or make against the Crown.²⁸⁹

According to the second paragraph of this section, the immunity of the Crown against injunction and specific performance is also enjoyed by its servants and agents. This is also the case for several other Crown immunities. But this immunity is not without limitation. The Privy Council was first to declare that in circumstances where a Crown agent has acted beyond his authority, an injunction could be granted to preclude that agent from committing an *ultra vires* action. This was the case in *Nireaha Tamaki v. Baker*, where an injunction was granted to preclude an illegal sale of land.²⁹⁰

This line of reasoning was followed by the Supreme Court of Canada in *Rattenbury v. Land Settlement Board*²⁹¹ and *National Harbour Board v. Langelier*.²⁹² In the latter case, the Supreme Court settled the law in this matter as Martland J. stated clearly that:

a person threatened with the commission of an unlawful act by a corporate Crown agent can seek the assistance of the court to prevent the corporation from doing that which it is not authorized to do as a Crown agent. This is clearly the principle laid down in the *Tamaki* and *Rattenbury* cases.

(...). There was always recourse in the common law courts in respect of acts done, without legal justification, by an agent of

²⁸⁹ In certain jurisdiction, the second paragraph rather reads as follows: “the court shall not in any proceedings grant an injunction or make an order against a servant of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in a proceeding against the Crown, but in lieu thereof may make an order declaratory of the rights of the parties”.
²⁹¹ *Rattenbury v. Land Settlement Board*, [1929] S.C.R. 52. In this case, an injunction was granted to restrain the Board from levying an *ultra vires* tax on the plaintiff.
the Crown, and the Board, on that principle, is liable if it commit itself, or orders or authorizes its servants to commit, an act done without legal justification. Equally, if it threatens to commit an act, without legal justification, a subject, whose legal rights are thereby threatened, has recourse to the courts to restrain the commission of such act.293

This conclusion was made before the codification of the immunity against injunction in the Crown Liability and Proceedings Act. Therefore, it is legitimate to ask whether or not the ultra vires exception still applies. This question was considered by the Ontario High Court in MacLean v. Liquor Licence Board of Ontario.294 In this decision the Court decided that the applicable section of the Proceedings against the Crown Act295 was declaratory of the common law and that the ultra vires exception still applies regarding injunctions against Crown servants.

This exception has also raised the issue of whether or not a breach of contract committed by a crown servant could be considered as an ultra vires action, and thus be subject to an injunction.296 A majority of authors argues that such cannot be the case. The statutory instrument that regulates government contracts controls the conclusion of the contract. In the event that they are not respected, judicial review and injunction will be available to the aggrieved party as it is an ultra vires case. But once the contract is concluded, it is no longer within the reach of the statutory instruments. If there is a failure to meet a contractual obligation, it is a breach of contract and not the


violation of a legal duty. There is thus no valid basis to consider a breach of contract as an *ultra vires* action.²⁹⁷ Therefore, the immunity against injunctive proceedings remains.²⁹⁸

There is however a new line of cases which considerably restrains the immunity enjoyed by Crown agents or servants. In *Wittal v. Saskatchewan Government Insurance*²⁹⁹ and *Canada (Attorney General) v. Saskatchewan Water Corp.*³⁰⁰ the Saskatchewan Court of Appeal ruled that:

> "to determine whether the Crown immunity preserved by s. 17³⁰¹ attaches to a particular governmental person or agency one looks not only at *who* the person or agency is but at *what* function or power the person or agency is exercising at the critical time. If it is a function or power of the Crown, immunity attaches. If it is a function or power conferred by

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²⁹⁸ However, see R.J. Sharpe, *Injunction and Specific Performance*, supra note 296 at 3-58 and ff. where this author notes that in a few isolated cases, the courts are inclined to favour the position that when the Crown is involved in commercial activities, it should not be immune to the courts’ jurisdiction (*Baton Broadcasting Ltd v. C.B.C.* (1966), 56 D.L.R. (2d) 215 (H.C.J.), in which the court finally applied the *Tamaki* and *Rattenbury* cases; *Kohler Drugstore Ltd. v. Ontario Lottery Corp.* (1984), 46 O.R. (2d) 333). The Supreme Court, in several *obiter dicta* has rejected that there is a commercial activity exception for Crown immunity; see *supra* note 240 and accompanying text.
³⁰¹ The Court is here referring to s. 17 of the *Proceedings Against the Crown Act*, R.S.S. 1978, c. P-27, which reads as follows: "17. (1) Subject to this act, in proceedings against the Crown the rights of the parties are as nearly as possible the same as in a suit between person and person; and the court may: (a) make any order, including an order as to costs, that it may make in proceedings between persons; and (b) otherwise give such appropriate relief as the case may require. (2) Where, in proceedings against the Crown, any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties. (3) The Court shall not in any proceedings grant an injunction or make an order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in proceedings against the Crown, but may in lieu thereof make an order declaratory of the rights of the parties."
statute upon the person himself or the agency itself, immunity does not attach”.

In both cases, the Court of Appeal ruled that the powers exercised by the Crown agencies which were involved were powers conferred directly upon these agencies by statute, therefore there was no immunity and an injunction could have been granted.

These two decisions are of great impact, as few powers exercised by Crown servants or agencies are true powers of the Crown. The extent of the immunity against injunction is thus affected negatively. Although the principle set out in these two decisions is in the shadow of other strong precedents, which did not make any distinction in the source of the power that was exercised by the Crown servant or agency at the critical time, it has been cited by the Supreme Court and by the Federal Court of Appeal.

The ultra vires or lack of authority exception is not the only situation where the immunity against injunction is said not to be applicable. The courts have set out other exceptions to this immunity.

Firstly, it is well established that no injunction will be granted to interfere with the legislative process or with any other proceedings in Parliament. Secondly, injunction is available in litigation involving constitutional issues like the separation of

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303 In his conclusions, Bayda C.J.S. mentioned that Crown powers are, for example, “powers exercisable by Order-in-Council, proclamation, writ or in such other form as to indicate that they are powers of the Crown as opposed to statutory powers” (ibid. at 106).
304 The Minister of Finance of British Columbia v. The King, [1935] S.C.R. 278; Grand Council of the Crees (Quebec) v. The Queen, [1982] 1 C.F. 599 (F.C.A.) at 601: “a mandatory order cannot be issued against a Minister of the Crown when he is simply acting as a servant of the Crown rather than as an agent of the legislature for the performance of a specific duty imposed on him by a statute for the benefit of some designated third person” (Pratte J.).
305 See J.M. Evans, De Smith ‘s Judicial Review of Administrative Action supra note 281 at 465 and 469; R.J. Sharpe, supra note 296 at 3-52, 3-53 and case law cited therein.
powers.306 Similarly, an injunction may be granted to preclude the enforcement of an unconstitutional statute.307 Finally, the Crown cannot claim any immunity so as to avoid giving effect to the Charter of Rights and Freedoms.308

The lack of power of the Courts over the Crown is also responsible for the Crown immunity against compulsory execution of judgments. A further justification for this immunity is that the “seizure of Crown property could cause intolerable interruptions in public services”.309

The immunity of the Crown in such matter arose from the common law and was clearly reaffirmed by the Privy Council in Dominion Building Corp. v. The Queen.310 This immunity was also codified in the various Proceedings against the Crown Acts.311

The situation is however different when the judgment orders the Crown to pay a sum a money. In that case, the immunity still stands, but the Minister of Finance has a statutory duty to pay the said sum, according to the provisions of the Proceedings against the Crown Acts.312

This brief overview of the immunity against injunction, specific performance and compulsory execution once again shows that the Crown is no ordinary contracting

309 P.W. Hogg, Liability of the Crown, supra note 3 at 47. See also H. Street, Governmental Liability (A Comparative Study) supra note 4 at 182: “interference with public property would hamper the State in the performance of its public duties”. See generally on this issue: D. Muckle, Immunity from execution, supra note 279.
312 See e.g., Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 30(1).
party, as it cannot be constrained to perform its obligations, except in certain circumstances. The declaratory judgment is somewhat useful to settle a dispute between the parties, but no execution is available. The decision of the Court is thus more or less an opinion with no coercive power. In such a situation, the applicant has thus been said to “remain dependant upon a combination of goodwill and the moral pressure he may hope to secure from the public opinion”.

3.3 THE APPLICABILITY OF ESTOPPEL

The rules that govern whether one party will be bound by representations made on its behalf as to a state of affairs or future conduct are another important characteristic of contractual relationships. Such representations will often be very influential on the conduct of the party to whom they are made. If that party does rely on those representations to his detriment, these rules of estoppel may then be invoked to constrain the other party from taking actions contrary to those representations.

The extent to which these rules are applicable to the Crown has always been problematic in the doctrine and case law. Judges and authors are torn between the principles of the rule of law, which provides for the application of private law to the Crown, and the fact that such an application may sometimes be incompatible with the proper exercise of public functions. Generally speaking, the most frequently raised concern regarding the application of estoppel to the Crown involves the ultra vires problem. A common fear is to think that to allow estoppel against the Crown would destroy the ultra vires doctrine: “it would allow public bodies to extend their powers by making a representation outside their statutory or common law limits, which would then be binding upon them through the medium of estoppel”.

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A second concern has to do with the application of estoppel in matters of statutory requirements. This issue revolves around the impact of representations made by a public officer as to the importance of certain requirements. In the case where a private party relies on these representations, it appears that it would be unfair not to force this party to comply with the statute regardless of the representations. A public body does not enjoy the same freedom as a private party to waive rights.\(^{315}\) When statutory requirements are involved, allowing public bodies to waive formalities in the absence of a specific provision in the statute, would amount to giving these bodies a power to amend legislation. It would also involve discrimination between private parties who were aware of the representations and those who were not, and would thereby benefit the well-informed.\(^{316}\)

These considerations would lead to the conclusion that the Crown should not be bound by estoppels. However, any conclusion of this nature would mean that the Crown would enjoy a privileged position compared with that of an ordinary contracting party. Such a situation would be contrary to the spirit of the rule of law. Therein lies the controversy. But before getting into this debate, a brief overview of the principles of estoppel will provide a better understanding of the analysis to follow.

### 3.3.1 ESTOPPEL GENERALLY

Estoppel has been defined firstly as a rule of evidence.\(^{317}\) However, some authorities disagree and argue that estoppel should be considered as a substantive rule of law.\(^{318}\)

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\(^{315}\) H.W.R. Wade, Administrative Law, supra note 7 at 264.

\(^{316}\) S.A. DeSmith, L. Woolf and J. Jowell, Judicial Review of Administrative Action, supra note 17 at 426.

Chapter 3  
Prerogatives of the Crown

Lord Denning, in the case of Moorgate Mercantile, adopted the latter point of view and declared: "[e]stoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity".319

Such a conflict among authors and judges gives rise to what may be qualified as a highly academic discussion. On the practical level, whatever view one chooses to adopt, the end result will not vary. The rules of estoppel will remain the same, should it be part of the law of evidence or a principle of law in itself. The purpose of this section is rather to explore the applicability of the rules of estoppel to the Crown, so this discussion will be set aside and left to a more appropriate context.

There was originally three types of estoppel: by matter of record, by deed and by representation (also referred to as estoppel by conduct or in pais or common law estoppel).320 The first kind is equivalent to the modern principle of res judicata.321 It is defined as a final decision, pronounced by a judicial tribunal having a competent jurisdiction over the cause or matter in litigation and over the parties, thereto disposing once and for all of the matters decided, so that they cannot afterwards be raised for relitigation between the same parties.322

The second type, also referred to as estoppel by convention or by writing, may arise when both parties to a transaction have agreed to a statement of facts, the truth of

which has been assumed in the convention of the parties. The parties are then precluded to later question the truth of the statement.  

Finally, estoppel by representation is the most common type and also the most relevant in a contractual context. Several definitions exist to define this type of estoppel, but the most frequently cited belongs to Spencer Bower and Turner:

Where one person, ("the representor" has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making or attempting to establish by evidence, any argument substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

Three requirements may be inferred from this definition: a representation or conduct intended to induce a certain behaviour, an act resulting from the said representation and a detriment to the person who so acted as a consequence of such action.

Included in estoppel by representation, is proprietary estoppel. It allows an occupier of a land to maintain an interest in the said land and precludes the owner from enforcing its strict legal rights, when the latter's conduct has misled the occupier. 

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The most frequently studied kind of estoppel, promissory estoppel, also arises out of estoppel by representation. This form of estoppel may be described as an equity rule, rather than as a common law rule, which is the case for the other types of estoppel mentioned above.\textsuperscript{326} Promissory estoppel may be distinguished from other estoppels by the fact that its impact is concentrated on pre-existing contracts, making it even more pertinent to this study.\textsuperscript{327}

The doctrine of promissory estoppel, which is of recent origin, stems from the decision of Lord Cairn in \textit{Hughes v. Metropolitan Ry.}\textsuperscript{328} In that case a landlord gave his tenant six months notice requiring the tenant to do repairs. During the time allowed for these repairs, the landlord began negotiating with the tenant for the purchase of the lease. When the negotiations failed, he claimed to forfeit the lease on the ground that the tenant had not done the repairs. The House of Lords ruled in favour of the tenant who was led to believe by the other party that the strict rights under the contract would not be enforced or would be kept in suspense during the negotiations. According to Lord Cairn, it would thus be unequitable, considering the dealings which had taken place between the parties, to allow the landlord to enforce his rights as soon as the negotiations broke down.

The doctrine was re-stated by Lord Denning in \textit{Central London Property Trust Ltd v. High Trees Houses Ltd},\textsuperscript{329} where a landlord, having promised to reduce the rent

\textsuperscript{326} See Sir R. Cross and C. Tapper, \textit{Cross on Evidence}, 6th ed. (London: Butterworth, 1985) at 90, citing \textit{Pickard v. Sears} (1837), 6 Ad. & El. 469 at 474 (Lord Denning). See also \textit{Keate v. Philips} (1881), 18 Ch.D. 560, at 577 where Vice-Chancellor Bacon declared: "[t]he common law doctrine of estoppel was, as I have said, a device which the common law courts resorted to at a very early period to strengthen and lengthen their arm, and not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special pleading tactics into an instrument by which they could obtain an end which the Court of Chancery, without any foreign assistance did at all times, and I hope will at all times put into force in order to do justice".

\textsuperscript{327} This most recent variety of estoppel is also identified as “quasi-estoppel” or “equitable estoppel”.

\textsuperscript{328} [1877] 2 A.C. 439.

\textsuperscript{329} [1947] 1 K.B. 130.
payable under a lease, could not subsequently demand the rent originally due. Lord Denning then said:

(...). They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases, the courts have said that the promise must so be honoured. 330

Accordingly, promissory or equitable estoppel may be defined as arising from a promise (or an assurance or representation in the nature of a promise) which is intended to be relied upon by the promisee and which indicates that the promisor will not insist on his strict legal rights. 331 Promissory estoppel may be distinguish from estoppel by representation because the former is concerned with a representation of intention or an assurance as to future conduct rather than of existing facts, which is the case in the latter form of estoppel.

The role of this equity doctrine is "to act as the conscience of contract law and, specifically, to mitigate the rigours of the legal rules, especially the consideration requirement. It acts as a conscience because it is used to prevent both unjust enrichment, and unscrupulous manipulation of the rules. (...) Promissory estoppel is one of the doctrines that allow the courts to intervene when the rules of contract law become obstacles to justice". 332

Even though such a doctrine gives more flexibility to the judges towards the rules of contract law, promissory estoppel still has its rules and its limits. According to

330 Ibid., at 131.
Fridman, three requirements must be fulfilled for promissory estoppel to apply: (i) there must be an existing relationship at the time of the representation; (ii) a clear promise or representation establishing the intention of the promisor to be bound by it; (iii) a reliance by the promisee upon the statement or conduct of the promisor; (iv) the promisor must have acted upon the representation to his detriment; (v) the promisee must have acted equitably.

The last important aspect of estoppel generally is that it can never be used as a cause of action. The point was decided in an English case where a promise of support was made by a husband to his wife during divorce proceedings. The wife, in reliance on that promise, did not apply to the court for maintenance. She was refused the right to enforce her husband's promise since estoppel does not create a cause of action where none existed before, as it is confined to be used a defence.

As a final remark, it should be noted that all kinds of estoppel, except estoppel by record (res judicata), do not apply to contracts subject to the rules of civil law.

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193, who made an important precision as to the role of promissory estoppel: "the principle is one of preventing an injustice caused by the reliance, rather than enforcing the promise to its full extent".  
34 This issue is conflicting in the doctrine and the case law (see S.M. Waddams, *The Law of Contracts*, supra note 332 at 191 and case law cited therein). The Supreme Court was however clear when Martland J., speaking for the Court, declared: "this principle assumes the existence of a legal relationship between the parties when a representation is made" (*Canadian Superior Oil Ltd v. Paddon-Hughes Development Co. Ltd.*, [1970] S.C.R. 933 at 938). In this case, the Court ruled that the contractual relationship (a petroleum and natural gas lease) had come to an end before any representation was alleged to have been made.  
3.3.2 ESTOPPEL AND THE CROWN

Now that estoppel has been defined and its rules briefly established, its applicability to the Crown can be analyzed. This study of the case law will be confined mainly to estoppel by representation and promissory estoppel, which are the most frequently raised in the context of contractual relationships. As for estoppel by record (res judicata), it is less relevant for the purpose of this study. Moreover, there is clear authority that the Crown "can take advantage of, and is bound by an estoppel per res judicatam, as much as any of the King's subjects". As for estoppel by deed, it is mostly an illustration of the importance of seals in English law and does not have much interest in this context.

The early English cases on the subject on estoppel and the Crown seem to lead to the conclusion that estoppels bind the Crown. However, some British authors have argued that the Crown is immune from estoppels. As for the Canadian case law, it also reflects this dichotomy, with decisions going in both directions. Therefore, it would not be appropriate to express the relation between the Crown and estoppels with a single statement as to whether or not the Crown is bound. The correct approach is

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338 G. Spencer Bower and A.K. Turner, The Doctrine of Res Judicata, supra note 322 at 129. See also F.E. Farrer, "A Prerogative Fallacy - That the King is not Bound by Estoppel" (1933) 49 L.Q.R. 511 and cases cited therein.


340 J. Chitty A treatise on the law of Prerogatives of the Crown, (London: Butterworths, 1968) at 381: "[t]he King is not by fictions or relations of law, or by estoppel". L.K. Everest, Everest and Strodes on Estoppel, supra note 317 at 8: "though it appears from the authorities that the King is not bound by estoppels, though he can take advantage of them".

341 See e.g. R. v. Gooderham & Worts Ltd (1928), 62 O.L.R. 218; Queen Victoria Niagara Falls Park Commissioners v. International Railway Co. (1928-29), 63 O.L.R. 49 (Ont. C.A.); Bank of Montreal v.
rather to establish guidelines regarding the applicability of estoppels to the Crown through a thorough review of the facts and ratios of the decisions on the subject.

As there are strong cases in which the Crown was declared to be bound by estoppel, the view adopted in this study is that the Crown is normally subject to estoppels, except when certain principles of public law prohibit such an application. These principles were identified in accordance with the case law and are: the supremacy of legislation, the ultra vires doctrine, and the limited powers of an agent to bind the Crown. Also involved is the importance of a proper exercise of discretionary powers.

3.3.2.1 THE SUPREMACY OF LEGISLATION

The principle of the supremacy of legislation, which provides that no estoppel can defeat the operation of a clear statutory disposition, was first stated in *Maritime Electric Company Ltd v. General Dairies Ltd.* The decision in this case arose from a Canadian affair and marked a fundamental turning point in the issue of estoppel and the Crown. Maritime Electric was a utility company which sold electricity to General Dairies Ltd. Due to a clerical error on the part of the utility company, General Dairies was charged for only one-tenth of the energy supplied to them. When Maritime Electric claimed the balance, General Dairies argued that they relied on the statement of the company as to the amount of electricity supplied, and fixed their prices

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accordingly. Maritime was thus estopped from recovering the balance. Lord Maugham rejected this argument on the basis that the electric company had, according to the Act governing utility companies in the province, a statutory duty to collect a schedule rate and was guilty of discrimination if a greater or lesser rate was charged. To estop the company from claiming the balance would thus have been a violation of that duty. The Act also imposed a corollary duty on the clients of the utility company to pay the schedule rate. The court declared that when a statute, enacted on grounds of public policy, “imposes a duty of a positive kind for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it”.

The conclusions of the Privy Council in this case were unanimously followed by English and Canadian courts. It is, even now, one of the few uncontroversial aspects of the long history of the Crown and estoppels which took its origins from a dictum found in *Phipson on Evidence*: “[e]stoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land”. Accordingly, estoppel cannot bind the Crown when the effect would be to interfere with the operation of the legislation.

The most common application of that general principle is that no estoppel can preclude the performance of a statutory duty. Such was the *ratio* in *Maritime Electric*; since the *Public Utility Act* was imposing an express duty on the utility company to collect and on the customers to pay a schedule rate, estoppel could not prevent the plaintiff from recovering the balance due by the defendant as the result would have been to relieve the parties from their statutory obligations.

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346 *Supra* note 317.
Shortly after Maritime Electric, the Supreme Court of Canada applied this principle to a Canadian case. In 1950, in the case of the St. Ann's Island Shooting and Fishing Club Ltd, the Court was faced with the renewal of a lease of an Indian land under the provisions of the Indian Act. According to the provisions of the Act, such a lease had to be approved by the government. The initial lease received such approval and was renewed a few times, after which new, similar leases were concluded by the Superintendent General. When the last renewal was refused by the Superintendent General, the tenant, who was operating a hunting and fishing club on the premises, argued that the government was estopped from doing so. The Court concluded that although the first lease was duly approved, the efficacy of that approval was exhausted when new leases were concluded. Since such an approval was expressly required by the provisions of the statute, no estoppel could be invoked against the government to preclude it from challenging the lease. Consequently, when a statute provides for express conditions or requirements, no estoppel can preclude the authority from enforcing such conditions, even though it may have previously waived them.

In a later case, the Exchequer Court was more explicit in stating the same principle. In Millet v. R, the plaintiff's husband contracted an insurance policy under the Veterans Insurance Act. He paid all premiums within the period of grace, except two that were accepted by the agents of the Crown regardless. The last payment before the husband's death was also made after the end of the grace period. To avoid paying the indemnity, the Crown argued that according to the regulations under the Act, the policy had ceased to be in force due to the late payment of the last premium. The

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347 Early statements concerning estoppel and statutory dispositions can also be found in a Canadian case that was decided even before Maritime Electric. In City of Toronto v. Toronto Railway Co (1918), 46 DLR 435 (Ont. CA), the Ontario Court of Appeal was faced with a contract passed by the parties to implement their obligations under a statute. Following a dispute concerning the said contract, the Court stated that the city was not estopped from claiming discrepancy between the contract and the statute because to do so would give permission to violate a statute.

348 St. Ann's Island Shooting and Fishing Club Ltd v. The King, supra note 108.

349 Indian Act, R.S.C. 1985, c. 1-5

plaintiff argued that the Crown was estopped from alleging that the policy was no longer in force by reason of late payment, as it had not previously complied with the regulatory provisions.

The Court held that the Crown was not bound by the acts of its servants and ruled that “when a particular obligation or duty is imposed by statute or by regulation validly made thereunder and embodied in a contract, no estoppel should be allowed to give relief from the said obligation”.\textsuperscript{351} It may also be inferred from this case that the Crown cannot be estopped by the actions of its officials from insisting on strict compliance with regulations enacted pursuant to a statute. The effect would be “to treat such regulations as if they had not been enacted”.\textsuperscript{352}

The general rule of the supremacy of the legislation also allows the reconciliation of some previous judgments which, at the time they were delivered, appeared to

\textsuperscript{351} Ibid. at 272, Fournier J.
\textsuperscript{352} P. MacDonald, “Contradictory Government Action: Estoppel of Statutory Authorities” \textit{supra} note 141 at 162. On estoppel against strict compliance with statute, see \textit{A.G. Canada v. C.C. Fields & Co.} [1947] 1 D.L.R. 434 (Ont. H.C.). See also \textit{Gamble v. R.}, [1959] Ex. C.R. 138, where the plaintiff’s husband decided to opt out of new death benefits that became available for public servants. Accordingly, he signed the prescribed form. However, the form never made it to the comptroller before his death. Monthly deductions were thus made from his salary. The widow argued that she and her husband had been lulled into a feeling of false security by the silence of the Crown’s agents. Applying \textit{Millet}, the Exchequer Court declared that no estoppel will hold against a formality prescribed by statute. In this case, the formality was of a negative character: to refrain from making an irrevocable option not to participate to the new benefits. Gamble did not do so, so he was not entitled to the benefits. However, in \textit{Wells v. Minister of Housing and Local Government}, \textit{supra} note 342, a planning authority was estopped from denying the validity of the decision of one of its officers even though the formalities required by statute for such an application had not been satisfied. The decision concerned the need for planning permission for the erection of a new plant in a builders’ yard. Denning J., as he then was, declared: “I now know that a public authority cannot be estopped from doing its public duty, but I do not think that it can be estopped from relying on technicalities . (…)I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid”. This case is now seen as an exception to the general rule governing the applicability of estoppel to the Crown and may be considered as an authority that a public body may waive certain defects in formal procedural requirements, so long as third parties are not adversely affected: see S.A. De Smith, L. Woolf and J. Jowell, \textit{Judicial Review of Administrative Action}, \textit{supra} note 17 at 566-568; H.W.R. Wade, \textit{Administrative Law}, \textit{supra} note 7 at 263; \textit{Western Fish Products Ltd v. Penwith DC}, [1981] 2 All E.R. 204.
contradict the existing case law. In *Bank of Montreal v. The King*, the Supreme Court was faced with a case in which a government clerk, who was in charge of some of his department's banking, forged some of the department's checks and deposited them to his credit in other banks. The accountant of the department, deceived by false returns of checking by the clerk, acknowledged the statements provided by the bank. Davies J. clearly mentioned that the Crown could not be bound by the approvals of false returns of checking since the prescriptions of the *Audit Act* had not been followed: "the *Audit Act* prescribes and defines the only means by which accounts between banks and the government can finally be settled and that no departmental officer has any authority outside of this act to sign any settlement binding the Crown". Therefore, the Crown was not estopped from establishing the forgery and claiming the money from the Bank.

A reference should also be made to *The King v. Royal Bank of Canada*, in which it was decided that the Crown could not be estopped from recuperating the amount of cheques wrongfully endorsed by its agent, since the latter had a statutory duty to deposit the checks.

The strict application of statutory dispositions involving no discretion, is also characteristic of cases involving tax dispositions. No estoppel arising from representations or interpretations given by agents of the Crown will bind the Crown if the sole power of these agents is to enforce the statutory requirements.

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353 See S. Lyman, "Estoppel and the Crown" (1978) 8 Man. L.J. 15, who argued that the two decisions explained hereinafter are authority on the fact that estoppels are not binding on the Crown.

354 Supra note 341.

355 *Bank of Montreal v. The King*, supra note 341 at 274 (Davies J).

356 Supra note 341.

357 Supra note 341 at 212, Dennistoun, J.A.

Several tax cases may be cited in support of this statement. All cases involving tax and estoppel have similar rulings.\(^{359}\) For example, In M.N.R. v. Inland Industries Ltd.\(^{360}\) the issue was whether it was possible to deduct certain contributions made to pension plans which had been given the Minister's prior approval. The Minister later disallowed the deductions and assessed the taxpayers accordingly. The Supreme Court, in accordance with the case law and after deciding that the pension plans did not meet the requirements of the income tax, concluded that the Minister could not be bound by an approval given when the conditions prescribed by the law were not met.

Another clear case came from the Federal Court of Appeal in Gibbon v. R.\(^{361}\) After Gibbon was refunded for unclaimed deductions concerning his voluntary alimony payments to his wife and children, the Department of National Revenue found out that these payment were in fact not allowable deductions and claimed the unpaid taxes. Gibbon argued that he relied on the department's error and continued his voluntary payments instead of some other means by which he could have made comparable tax savings. The Court ruled that this was a case of failure to apply to law and no decision by a servant or officer could bind the Crown.

Finally, in Granger v. Employment and Immigration Commission, Lacombe J. of the Federal Court of Appeal summarized the issue as follows: "[i]n Canadian tax law, the courts have consistently held that the Crown is not bound by the representations made and interpretations given to taxpayers by authorized representatives of the department,


\(^{360}\) Ibid.

\(^{361}\) Supra, note 359.
Chapter 3  
Prerogatives of the Crown

if such representations and interpretations are contrary to clear and pre-emptory provisions of the law”.

The rule has also been discussed in the recent case of Churchill Falls, the facts of which were the following. Pursuant to a statute adopted by the Province of Newfoundland, the government of Newfoundland leased to Churchill Falls (Labrador) Corporation Ltd (CFLCo) the right to exploit the hydro-electric power of Churchill Falls and to sell the electricity. In the said lease, there was a clause providing that the customers of Newfoundland would have priority where it was feasible and economic to do so (clause 2e). Hydro-Quebec later agreed to buy all the power except 300MW, which was subject to a right of recapture by CFLCo according to a clause in what was referred to as the power contract. That clause was intended, with the acquiescence of the government of Newfoundland, to limit the potential claim of that government under clause 2e of the lease between them and CFLCo. The government represented that 300MW would be sufficient for its needs and both CFLCo and Hydro-Quebec relied on the representation. About ten years later, the government of Newfoundland realized that its power needs were greater than anticipated and, two years later, by order-in-council, requested CFLCo to supply 800MW to the government according to clause 2e. CFLCo refused, because of its contractual commitment to sell all but 300MW to Hydro-Quebec.

The issue of estoppel was raised because of the representation made by the government as to the needs of the Newfoundland customers, which was relied upon by

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362 Granger v. Employment and immigration Commission, supra note 359 (Lacombe J). In one of its latest decisions on the subject, the Federal Court of Appeal reaffirmed that estoppel could not be invoked to preclude the exercise of a statutory duty. The case involved representations regarding an application for a sponsored immigration to Canada. The Court declared that common sense would dictate that one could not fail to apply the law due to the misstatement, the negligence or the simple misrepresentation of a government worker: Lidder v. Canada (1992), 6 Admin LR 62 (F.C.A.D.), see the notes of Marceau J.A.

both CFLCo and Hydro-Quebec. Only Goodridge J. of the Newfounland Supreme Court, trial division mentioned the argument raised as to the government being estopped from going back on its words.

In this case, Goodridge J. declared that the situation did not involve a representation made by a minister to a contracting party, in a matter related to his authority. The contract in this case involved something more than a regular lease. "It is part of an act of the House of Assembly. Whatever meaning may be attributed to clause 2e, the meaning is the will of the House. It has legislative sanction. The law of the land is that the Newfoundland consumer shall, upon request of the Lieutenant-Governor, be given priority. No person, however highly placed, may deny that right to the Crown, or limit it". Consequently, estoppel could not operate to defeat that expression of the will of the legislature.

The principle of the supremacy of statutory dispositions over estoppels was however narrowed by the Supreme Court in its latest intervention. The case of *The Hydro-Electric Commission of the Town of Kenora v. Vacationland Dairy Cooperative Ltd.*, is almost identical, with regard to the facts, to *Maritime Electric*. Kenora Hydro had the responsibility of supplying power to local customers. By an unwritten arrangement, the town retained the responsibility for billing and collecting the accounts. Following the installation of a new meter at Vacationland Dairy, which was supposed to be used with a multiplier of two, the billing was not made properly by reason of a clerical error which was that the multiplying factor had not been transferred to the billing card. Vacationland Dairy was thus charged for only half the money it owed.

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364 *Ibid.* at 243, Goodridge J.
365 *Supra* note 342.
366 *Supra* note 317.
In this case, contrary to the decision in *Maritime Electric*, the Supreme Court ruled that the utility company was estopped from recovering the arrears. The facts of the former affair were distinguished from those of the latter, principally on the provisions of the legislation involved in each cases. In *Maritime Electric*, the New Brunswick Act was imposing a duty on the utility company not to collect a greater or lesser compensation. The failure to comply with this obligation constituted a punishable offence and a penalty could be imposed on the company. The said Act also made it a punishable offence for customers to accept unauthorized rates. As for the *Ontario Power Corporation Act*, it also made it an offence for a public authority to charge an unauthorized rate, but the similarities with the previous Act stop there. The penalty attached to that offence, contrary to the one in the New Brunswick Act, is the disqualification of the council members. The following extracts from the judgment of Major J. illustrate the reasoning of the Court in distinguishing this case from *Maritime Electric* and in precluding the company from claiming the arrears when the customer acted to its detriment in reliance on the company's billing statements.

However, the penalty provision in the Ontario provision stands in marked contrast to that in Maritime Electric. The Ontario penalty of disqualifying council members aims to control the activity of municipal power authorities and prevent abuse. The difference between the Ontario and New Brunswick acts is underscored by the fact that council members do not face disqualification under s.99 where an employee's inadvertent error resulted in a customer effectively receiving power on better terms. In addition, the Ontario legislation neither imposes an express duty on customers to pay nor fines customers for insufficient payment in contrast to the legislation in Maritime Electric. In this context, the most defensible interpretation of the Ontario legislation is that it is designed to prevent deliberate, unauthorized discrimination among power customers. The penalty provision is not directed against simple negligent mistakes.

A statute can only affect the operations of the common law principles of restitution and bar the defence of estoppel or
change of position where there exists a clear positive duty on
the public utility which is incompatible with the operation of
those principles.

(...)Compelling payment to correct an error in these
circumstances introduces costly uncertainty for power
customers and makes them individually bear the burden of the
appellant's mistake. Such a harsh public policy should clearly
appear in the statute, which is not the case in the Act.367

One may thus conclude that only a clear statutory disposition imposing a duty will
preclude the application of the rules of estoppel in cases where the Crown is involved.

All these cases involve situations in which the public body (or one of its officers) had a
statutory duty which involves the enforcement of legal requirements. Would the result
be the same in cases where the statute confers a discretion on the public officer? The
question was first brought to the court in the case of Southend-on-Sea Corporation v.
Hodgson (Wickford) Ltd,368 where the respondents, willing to buy land to establish a
builders' yard, asked the planning authority if there were existing user rights on
specific land they had found. The authority replied that there were such rights, so the
respondents, relying on that affirmation bought the land and moved a quantity of
materials and equipment. The city later changed its mind and sent a notice to the
effect that there was no user rights as a builders' yard and required the respondents to
stop using the land as such.

The decision of the Court was to the effect that the discretion of a local planning
authority to serve an enforcement notice with respect to a development in fact carried

367 The Hydro-Electric Commission of the Town of Kenora v. Vacationland Dairy Cooperative Ltd, supra
note 342 at 111-12 (Major J., L’Heureux-Dubé, Sopinka, Gonthier and Cory JJ). See however the
interesting dissent of Iacobucci J. (Lamer C.J., Laforest and McLachlin JJ concurring) in which he
argues that the duty may be express or implied and that the specific words did not matter. He also
mentioned that “the nature of the penalty provided for the offence, or the mischief which it seeks to
remedy through that penalty, is irrelevant to the issue of whether the positive statutory duty exists” (at
101).

out without permission is a statutory discretion of a public character. The exercise of such a discretion cannot be prevented or hindered by estoppel. Citing *Maritime Electric*, the Court declared that there is “no logical distinction between a case such as that of an estoppel being sought to be raised to prevent the performance of a statutory duty and one where it is sought to be raised to hinder the exercise of a statutory discretion. After all, in a case of discretion there is a duty under the statute to exercise a free and unhindered discretion”.369

Even though this affirmation is still true to some extent, it does not reflect the modern case law on the subject which now allows that a public body may be bound by estoppel in certain circumstances. A good example is the case of *Aurchem Exploration Ltd v. Canada*.370 This case concerns an application for the registration of six mining claims. The acting mining recorder refused to record the claims on the basis that they overlapped with existing recorded claims and, because they should have been filed as fractional rather than full claims, since they were not rectangular lots. Previously, for a period of six years, mining recorders had not refused to record claims because of failure to adhere the requirements of the Act in these respects, but rather had modified them and recorded them as appropriate.

Although statutory requirements were involved in this case, the plaintiff successfully invoked the doctrine of promissory estoppel to preclude the mining recorder from relying on the strict technical requirements.371 At first glance, this appears in direct

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370 *Supra* note 342.
371 This case also presents a slightly surprising analysis of the requirements for the application of promissory estoppel. As to the requirement of a pre-existing relationship, the conclusion of the Court is that it is fulfilled by the fact that there was a potential legal relationship between the prospector and the mining recorder because he was a prospective applicant for recording when he followed past practice and staked the claim as he did. (at 177) As for the dictum that estoppel cannot be used as a cause of action, the Court declared that it was not “a matter of disallowing the mining recorder from raising objections based on technical requirements of the act when he was through past conduct represented that such requirements would not be invoked, such representations leading to prospectors to stake and file claims as they have done in the past” (at 177).
conflict with previous authorities, particularly *Miller*372 which presented a similar factual pattern. However, Strayer J. distinguished the case in the following way: "[e]stoppel cannot preclude the recorder from enforcing the strict terms of the law simply because they have not been enforced in the past. But here the law leaves a discretion in the mining recorder to waive certain requirements which he has lawfully done in many occasions."373

Therefore, according to Strayer J., even though estoppel cannot operate to preclude a public authority from performing a statutory duty or from enforcing statutory requirements, it can, on the other hand, bind the exercise of a statutory discretion.

A similar ruling may be found in *Lever Finance Ltd v. Westminster (City) London Borough Council*,374 where Lord Denning held the planning authority to be bound by a decision of one of its officials as to whether a variation to a project was immaterial.

The circumstances in which a representation made by a public officer in the exercise of its discretionary power will be binding on the public body were well described by MacDonald, who after a thorough analysis of the case law, conclude the following.

If it can be said that a discretion is actually exercised at the time an undertaking is given, then to make the undertaking binding is not to estop that authority from exercising its discretionary power. The power is exercised in making the promise. What does estop a public authority from exercising its power is to bind it to something done or said otherwise than as a proper exercise of the discretion.

(…) Where the legislature confers a discretionary power, what it wants is not a particular result but an exercise of judgment. If the official has applied his mind to the facts of the particular case and has represented what course of action

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373 *Aurchem Exploration Ltd v. Canada*, supra note 342 at 177 (Strayer J).
374 *Supra* note 342 [hereinafter *Lever*].
Chapter 3  Prerogatives of the Crown

he will follow, then he may be held to that representation without denying effect to the provisions of the statute. Nothing in the nature of discretionary power requires that the official should be free to change his mind.

(…) A promise of future executive action is binding precisely because it necessarily involves a decision that the promised action is an appropriate exercise of the power.375

To confirm its conclusions, MacDonald refers to the decision of the Supreme Court in *Re Violi*.376 Two immigrants were ordered to be deported. However, as the Minister decided to review the cases, the deportation was deferred for a certain period, provided no unfavourable report was received during this period. Several month after the end of the grace period, the immigrants were arrested and ordered deported as the Minister had reviewed their cases and confirmed the deportation orders. A majority of judges concluded that the Minister had in fact exercised his power of review by granting the probationary period. In the absence of any event occurring during such period which would have justified his doing so, the Minister did not thereafter have the statutory authority to enforce the deportation orders.

The proper exercise of the discretionary power involved is not the only condition for estoppel to bind a public authority in such circumstances. One should keep in mind that the actions taken by the public body to hold on to its representations have to be compatible with this body’s purposes and public duties.377

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377 *R. v. Liverpool Corporation ex partem Liverpool Taxi Fleet Operators’ Association*, [1972] 2 W.L.R. 1262. The extent to which the performance of an undertaking may be compatible with a discretionary power has been studied *infra*, in the section on the fettering of discretion. The conclusions of this section may thus be applied here with the necessary adaptations. The case of *Laker Airways Limited v. Department of Trade*, [1977] 1 Q.B. 643, should be added to the list of cases on fettering of discretion. In that case, Lord Denning M.R. proposed a new approach to deal with cases involving estoppel and discretionary power. He declared that estoppel cannot prevent an authority from exercising its powers when it is properly doing so in the public interest, even if some injustice to an individual result. Lord Denning also precised that it would be an abuse of power, contrary to an estoppel, where the injustice to
These representations also need to be within the public body's authority, according to the *ultra vires* doctrine. As for the agent making the representations, he must have acted within the scope of his power. These two rules have been included in what has been called the *jurisdictional principle*.\(^{378}\)

### 3.3.2.2 THE JURISDICTIONAL PRINCIPLE

This principle originates from a controversy which arose out of the statements of Lord Denning in *Ministry of Pension v. Robertson*\(^{379}\). The appellant, Robertson, was an army officer who wrote to the War Office regarding a disability of his. The War Office replied by a letter stating that the appellant's disability was attributable to his military service. Relying on this statement, the appellant did not obtain an independent medical opinion. The Minister of Pensions, to whom most of the War Office's competence was transferred a few months before the War Office replied to the appellant, later decided that the appellant's disability was not attributable to war service.

Lord Denning declared that if the case were opposing two private parties, the assurance given in the letter from the War Office would be binding on its author. The case was thus one of estoppel by representation and Lord Denning referred to *Central

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\(^{378}\) This expression was put forward by M.A. Fazal in his article "Reliability of Official Acts and Advice", *supra* note 321.

\(^{379}\) *Supra*, note 227. This case has also been analyzed in the section concerning the *executive necessity* doctrine. However, after rejecting this doctrine, Lord Denning also considered the applicability of estoppel.
London Property Trust Ltd v. High Trees House Ltd\textsuperscript{380} as to promises or assurances intended to be binding and which are relied upon. On the issue of estoppel and the Crown, he set aside the issue in an expeditive manner: "[t]he Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded".\textsuperscript{381} But the most interesting point is Lord Denning's conclusion as to whether the Ministry of Pensions was bound by the War Office letter. As it was stated in the facts above, the Ministry of Pensions was the competent department to deal with the issue since the War Office had remained invested with a residual competence concerning certain injuries only, which did not include the appellant's disability. As the War Office did not refer the appellant to the Ministry of Pensions and assumed authority over the matter, Lord Denning declared that the appellant was entitled to assume that the Office had consulted with the appropriate departments.

In my opinion if a government department in its dealing with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it binds the Crown also; and as the Crown is bound, so are the other departments, for they also are but agents of the Crown. The War office therefore binds the Crown, and, through the Crown, it binds the Minister of Pensions.\textsuperscript{382}

Robertson was, and still is, highly criticized as being too broad by including the cases where the public body enjoyed no authority on the subject-matter.\textsuperscript{383} The comment with the most important impact is found in the decision of the House of Lords in

\textsuperscript{380} Ministry of Pensions v. Robertson, supra note 227.
\textsuperscript{381} Ibid. at 231.
\textsuperscript{382} Ibid. at 232.
Chapter 3 Prerogatives of the Crown

Howell v. Falmouth Boat Construction Co.\textsuperscript{384} a case in which Lord Denning, then a member of the Court of Appeal, had invoked the principle of wrongfully assumed authority that he had previously developed in Robertson. The House of Lords refuted that principle on the basis that estoppel could not give the authority powers which it does not possess.\textsuperscript{385} Lord Simonds also stated that "the illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a government officer".\textsuperscript{386}

This was also acknowledged by Spencer Bower and Turner, who tempered their previous statement on the binding effect of estoppel by commenting on Robertson as follows.

It is suggested that modern government practice cannot logically any longer support, except possibly in exceptional cases, a broad statement that the Crown (as distinct from a department of State) is estopped by the representation of a civil servant even acting within the scope of express authority from his own department, if that department lacks the statutory authority to deal with the particular subject-matter involved.\textsuperscript{387}

This introduces the first rule of the jurisdictional principle which states that estoppel cannot allow the Crown or any public body to extend the scope of its statutory powers and duties. Therefore, it is necessary that a representation made by an agent of a public body must be \textit{intra vires} of the public body in order for the doctrine of estoppel

\textsuperscript{384} [1951] A.C. 837.
\textsuperscript{385} This could also be considered as an aspect of the principle of the supremacy of the legislation explained above.
\textsuperscript{386} Howell v. Falmouth Boat Construction Co, supra note 384 at 845 (Lord Simonds).
\textsuperscript{387} G. Spencer Bower and A.K. Turner, \textit{The Law relating to Estoppel by Representation}, supra note 317 at 122.
to apply. This condition was well explained and justified by a dictum of Lord Greene M.R.:

[t]he power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the whole doctrine of ultra vires if it was practicable for the donee of the statutory power to extend its power by creating an estoppel.

It is also illustrated by the decision in Minister of Agriculture and Fisheries v. Matthews where the Minister took possession of land under its statutory power which did not including the granting of a lease. The Minister agreed afterwards to let another private party take possession of the land. Following a claim of tenancy by that party, the Minister was not estopped from denying that he had granted a lease for the reason that the statute only authorised the granting of a licence. Consequently, no agreement for a lease could be binding on the Minister.

In A.G. for Ceylon v. Silva, the Crown was also declared not to be bound by a contract of sale erroneously passed by a Crown servant in an auction, as the servant had no power to sell Crown property.

The second aspect of the jurisdictional principle is that the agent who made the representations must have had actual or ostensible authority to make these representations. This question depends on the law of agency. Such a question is however always subsidiary to the previous question of whether the representation is

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390 Ibid.

intra vires of the public body, which depends on the statutory dispositions regulating the public body in question.\(^{392}\)

Since the decision of the Supreme Court of Canada in *Verreault*,\(^{393}\) the ordinary rules of agency may now be applied to public officers to determine the scope of their authority. This includes the application of the doctrine of apparent or ostensible authority,\(^{394}\) which applies when the official is within his jurisdiction, but was not authorised to act. However, for the doctrine to apply, there must have been some representations on the part of the Crown to allow the representee to believe that the agent had the authority to bind the Crown.\(^{395}\)

*Lever*\(^{396}\) presents a good example of a ruling to this effect. In this case, even if the planning officer did not have the actual authority to decide whether or not the variation was material, the past practice of the planning authority to allow its officer to make such determinations created an apparent authority.\(^{397}\) The representations made by the officer were thus binding on the planning authority.

The case of *Southend-on-sea Corporation v. Hodgson (Wickford) Ltd*\(^{398}\) is also relevant in this matter as the officer did not have the authority to bind the planning authority

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\(^{392}\) P. Craig, *supra* note ?? at 398-99.

\(^{393}\) *J.E. Verreault & Fils v A.G. Quebec*, *supra* note ??.

\(^{394}\) Apparent authority may be defined as follows: "when a person by words or conduct, representents or permits it to be represented that another person is his agent, he will not be permitted to deny the agency with respect to anyone dealing on the faith of such representation, with the person so held out as his agent". (F.M.B. Reynolds, *Bowstead on Agency*, 15th ed. (London: Sweet and Maxwell, 1985) at 90).

\(^{395}\) See *A.G. for Ceylon*, *supra* note 339, in which it was established that a public officer does not have actual authority to act on behalf of the Crown in all matters which concern the Crown. Moreover, in that case, there was not any holding out of the officer or representation by the Crown that could have given rise to apparent authority.

\(^{396}\) *Supra*, note 342.

\(^{397}\) As to the difficulty related to the delegation in this case and its several interpretations, see J.M. Evans, "Delegation and Estoppel in Administrative Law" (1971) 34 Mod.L.R. 335; S.A. De Smith, L. Woolf and J. Jowell, *Judicial Review of Administrative Action*, *supra* note 17 at 566-68; P. Craig, "Representation by Public Bodies" *supra* note 388 at 405-406.

\(^{398}\) *Supra*, note 368.
who never represented that the officer as having the power to make binding statements regarding the requirements of a planning permission. The same conclusion may be found in *The King v. Toronto Terminals Railway Company*\(^3\) where the Crown could not be estopped from recovering taxes paid in excess of the lease as the Crown officer had no authority to bind the Crown to pay taxes beyond those authorized by the lease.\(^4\)

In *Churchill*, Goodridge J., speaking generally on the issue of estoppel and the Crown, also recognized in *obiter* that if a minister was authorized to enter into contracts with certain classes of persons relating to certain matters, and having concluded such a contract, he or someone on his behalf had, by his conduct invited the contracting party to believe that a certain situation exists and that party relied on it, it may well create an estoppel against the Crown.\(^5\)

Generally speaking, the recent tendency of Canadian courts, has been to rule that estoppel was applicable to the Crown and to narrow the scope of the exceptions (*Kenora, Aurchem Exploration, Lidder and Granger*). However, some of the later cases to go before the Federal Court are puzzling as to the evolution of the issue. In three recent decisions,\(^6\) the Federal Court considered the cases as if private parties were involved, simply ignoring the whole issue of the particular rules regarding the applicability of estoppel to the Crown. It is then left to wonder if it was a deliberate

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\(^3\) [1948] Ex.C.R. 563.

\(^4\) Some of the cases previously mentioned may also be explained by the notion of the extent of the agent's authority. For example, in *R. v. Gooderham & Worts Ltd* supra note 341, the acts of the customs agents could not be binding on the Crown for the purpose of the exemption of the goods under the *War Revenue Act*, as those agents were not authorized to act under that Act. In *A.G. for Trinidad and Tobago v. Bourne*, supra note 339, the authority was rightfully bound by its representations since it had the full authority to proceed with the sale of the land. See also *The King v. Royal Bank of Canada*, supra note 341, where even though Cameron J. made a statement on the application of ostensible authority to the Crown that was later denied in *Verreault*, his conclusions are still valid since he declared that according to the facts, there had not been any representation on the part of Crown holding out the officer as having the authority to cash the checks.

omission of the Court who considered that these were cases where none of the exceptions mentioned above were applicable and thus, where the Crown was bound by estoppel, or if the issue had simply not been raised in the arguments presented by the parties.

In two of these cases, however, the issue of estoppel and the Crown would not have had a great impact since the Court, after having analyzed the facts, concluded that there was no sufficient basis for estoppel. As for the last case, *Mentuck v. Canada*, the facts were as follows. The plaintiff moved off a reserve after he was led to believe by a representative of the Minister of Indian and Northern Affairs that he would be compensated by the Federal Crown for his relocation costs and the costs of reestablising his farming operations. The role that the doctrine of estoppel played in this case is anything but clear. The Court held that the government had to compensate Mentuck for the move off the reserve, but the grounds on which the decision is based is hard to identify. The following extracts from the judgment of McNair J. seem to indicate that the basis for the liability of the Crown was simply the binding agreement rather than the doctrine of estoppel, although it played a role in the decision.

The expectation implicit in the offer or inducement and the reasonable reliance based thereon and consequent alteration of position served to bolster the concept of an enforceable agreement and dispel any illusion of a mere “agreement to agree”.

(...) In my view, the doctrine of promissory estoppel must be perceived as playing an important supplementary part in reinforcing the leading roles of expectation and reliance.

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- 132 -
(...) In the result, I am of the opinion that the defendant committed a breach of its agreement with the plaintiff and is liable in damages for the consequences thereof.\footnote{404}{Mentuck v. R., supra note 402 at 96-97 (McNair, J.).}

Regardless of the absence of an argument to that effect and of the actual impact of estoppel in the decision, this case should be considered as one where estoppel should have bound the Crown as the representations made to the plaintiff were \textit{intra vires} of the Minister of Indian and Northern Affairs and within the actual or ostensible authority of its agents.\footnote{405}{Ibid. at p. 94-95.} It is thus consistent with the principles developed by the previous Canadian and English authorities on the subject.

The particular rules by which estoppel is applicable to the Crown mark a noticeable difference between the Crown and an ordinary contracting party and changes considerably the rules of liability and reliance. For example, as noted by O'Byrne, the principle of the supremacy of the legislation will have a determinate impact on government contractors through statutory contracts.

It means that in every statutory contract, estoppel cannot lie against the State. Indeed, because the terms and conditions of a statutory contract are legislative, any State representation which does not align is contrary to law and so unenforceable. Statutory contracts are by no means unusual. They dominate in all industries involving the exploitation of State-owned natural resources and are made in the context of State-run insurance and pension schemes.\footnote{406}{S.K. O’Byrne, “Public Power and Private Obligations: An Analysis of the Government Contract” supra note 29.}

The rules will also be different in the context of the negotiation of regular government contracts, as several requirements are statutory.\footnote{407}{See infra section 2.4.} Consequently, no representations as to the waiving of those requirements will be binding on the Crown. Although the
rules concerning the authority of public officers have been loosen since the Verreault case, the proof that the Crown held out one particular officer has having sufficient authority is still not an easy task, as shown by the decisions of the courts in Gooderham and Royal Bank. Private parties dealing with the government should thus be very careful before relying on representations or promises made by government agents and make sure that those agents are acting within their jurisdiction and the scope of their authority, and that such representations do not interfere with statutory duties or requirements. A special attention should thus be paid to the statutory dispositions that regulate the matter and the public body by whom the promise is made, as the point will often turn on these pieces of legislation.
CHAPTER 4: THE LEGISLATIVE POWER

The fact that the Crown enters into contracts in the public interest is now established as a distinctive element of government contracts.\textsuperscript{408} The contractual tool is one way through which the government in place may express its view of what is in the public interest. The government will make choices in establishing specific contracting policies, which will favour certain groups of the society or give preference to national enterprises. The government also expresses its views by selecting whether or not certain goods or services will be provided by the private sector through a contractual process. However, legislation is the ultimate means by which a government will implement its policies. This means is the most effective and powerful one, as the only limits to the legislative power are the Charter of Rights and Freedoms and the Constitution.

As opposed to the principles explained in the previous chapters, the power to make legislation is not a static characteristic of the Crown. It is rather an instrument by which the Crown may affect persons, property and rights. This of course includes contractual rights and obligations.

In accordance with the principles of liberal capitalism, the legislature will rarely interferes with contractual relationships between individuals. Generally, such interventions occur in extreme situations and will be justified by social or political reasons.\textsuperscript{409} Contractual relationships may also be affected by major reforms of contract law, when parts thereof are applicable to contracts already in force.\textsuperscript{410} As this latter kind of intervention applies to all contracts generally, the implications are

\textsuperscript{408} See the discussion on this issue in section 2.1.

\textsuperscript{409} See M. Tancelin, Source des obligations, l'acte juridique légitime, (Montreal: Wilson et Lafleur, 1994) at 159-160. This author gives the example of statutes concerning rent control during the war and to force reintegration of striking employees.

\textsuperscript{410} See e.g. An Act Respecting the Implementation of the Reform of the Civil Code, S.Q. 1992, c.57.
of less impact. However, the problem is different when the statutory changes particularly affect, directly or indirectly, a contract to which the Crown is party. The question is thus whether or not such interference may be considered as a breach of contract, and consequently, if the private contractor is entitled to compensation.

4.1 Indirect Impairment of Performance

The phenomenon of indirect impairment arises when the performance of a contract is rendered more expensive following a change in the legislation or regulation. In this case, the interference with the performance results from "an act of government not explicitly directed to the variation of the contract".\(^{411}\) However, the consequences on the performance of the contract will flow from a change in the circumstances which were considered by the parties at the time of the signature of the contract. In this type of intervention, the courts ruled that the Crown does not have compensate the private contractors who must perform the contract at a higher cost.

This principle is illustrated by an English precedent: *William Cory & Sons Ltd v. London Corporation*.\(^{412}\) In this case, the plaintiff had contracted with a public authority, the London Corporation, for the removal of refusal from a certain wharf. Twelve years later, the Corporation, in its quality of port health authority, adopted new by-laws regarding the disposal of refuse in the concerned area. One of these by-laws was far more onerous on the plaintiff as for the requirements concerning the barges than the contract itself. Lord Asquith ruled that there had been no breach of contract by the London Corporation. The reasoning of Lord Asquith was based on the principle that it could not be implied from the contract that the London Corporation would not perform its duty to make by-laws to promote public health

\(^{411}\) C. Turpin, *Public Contracts*, supra note 17 at 4-55.
\(^{412}\) *Supra* note 173
so as to lay on the contractor burdens other and more severe than those provided for in the contract. Such an implication would be contrary to the no-fettering rule and therefore invalid. Accordingly, the Corporation was under no obligation to pay compensation to the plaintiff.

More recently, in *Agence de Sécurité Générale Inc v. The Queen*\(^{413}\), a private contractor was unsuccessful in trying to obtain compensation following a rise in the minimum wage, which had increased the cost of performing his contract with the Crown. In this case, the plaintiff had entered into a three-year contract with the Department of Transport for providing parking services at the Quebec City airport. The contract was concluded following the acceptance of the plaintiff's bid, which explicitly indicated an amount for fees and salaries calculated at the minimum wage in effect at that time. When an increase in the minimum wage occurred, the Department of Transport analyzed the contract and concluded that the plaintiff was not entitled to the reimbursement of any wages beyond the amount contracted for. The Court agreed with the Department and ruled that the plaintiff was not entitled to any compensation as the terms of the contract were clear in relation to the amount which had to be paid for salaries: “there was a contract; its terms are clear and were not subsequently amended either expressly or by implication. The terms and conditions which it contains, onerous though they may be, are still “the law of the parties”.”\(^{414}\) The conclusion of the Court was therefore that although the performance of the contract had been affected by the change in the regulation, the parties were still bound by its terms.

The situation is different in cases where there is an explicit reference to a regulation in the contract. As was decided by the Quebec Court of Appeal, if the contractor is under the obligation to perform according to a regulation which is different from the

\(^{413}\) [1980] 2 F.C. 223. See also *Continental Asphalte Inc v. R.*, supra note 178.

\(^{414}\) *Agence de sécurité générale v. R.*, supra note 413 at 231 (Marceau J.).
one mentioned in the contract, then he is entitled to claim damages for breach of contract.\textsuperscript{415} However, significant distinctions must be made between this case and the two decisions analyzed above as the factual context is particular. When the appellant submitted its bid to the municipality, the documents which shall be included in the contract to be concluded between the municipality and the appellant explicitly referred to the by-law which was then in force in the municipality. The appellant began to perform its duties under the contract before it was officially signed. Prior to the signature, a new by-law was adopted by the municipality which made the performance of the contract more expensive for the appellant. At the time of the signature of the contract, the municipality tried to include the new by-law in the agreement. However, following negotiations between the parties, the contract was amended in order to make a reference to the old by-law. Therefore, it was a breach of the contract for the municipality to compel the appellant to perform the contract according to the new regulation, which was adopted prior to the finalization of the contract, as the municipality, fully aware of both by-laws, made the choice to include the old one as a term of the contract. This situation is different than the one where performance is impaired due to the passing of new by-law after the conclusion of the contract.

A distinction should also be made between cases where performance of the contract becomes impossible following the change of regulation as in \textit{William Cory & Sons Ltd v. London Corporation}\textsuperscript{416} and those where the performance remains possible, although such performance had become more expensive on the contractor, as in \textit{Agence de sécurité générale Inc v. R.}\textsuperscript{417} In the former case, the contract became commercially impossible to perform following the coming into force of the new by-

\textsuperscript{415} \textit{Caron v. Ville de Haute-Rive}, C.A. Quebec 200-09-000143-864, 30-10-1989 (JE 90-30).
\textsuperscript{416} supra note 173.
\textsuperscript{417} supra note 413.
laws. This led the court to conclude that the contract had been frustrated as from the date of the coming into force of the by-laws.\textsuperscript{418}

The fact that contracts between private parties may be frustrated following a change in legislation or an action of the government rendering performance legally impossible is generally admitted.\textsuperscript{419} For example, a contract with a real estate agent for the sale of a property was considered frustrated when the property was expropriated.\textsuperscript{420} The unavailability of a person following a conscription was also considered as a cause of frustration.\textsuperscript{421} Finally, a change in the regulation applicable to the natural gas industry discharged a purchaser from having to buy a minimum quantity of gas which had been stipulated in the contract.\textsuperscript{422}

In other respects, when the Crown is itself confronted, as a contracting party, to a supervening event rendering the performance of the contract impossible, the same rules apply. The contract is discharged and the consequences on the parties will be determined in accordance with the \textit{Frustrated Contracts Act},\textsuperscript{423} as this statute is binding on the Crown like any other contracting party.\textsuperscript{424}

A singular situation arise when the Crown is party to a contract which is discharge by frustration caused by its action as a public authority. In such a case, it seems that the Crown would be precluded to invoke its own action as a ground of

\textsuperscript{418} \textit{William Cory & Sons Ltd. v. London Corporation, supra} note 173, at 483 (Lord Asquith) and 487 (Harman J.).
\textsuperscript{423} R.S.O. 1990, c. F-34.
\textsuperscript{424} \textit{Ibid.} at s. 1 "contract".
frustration, as it would be considered as self-induced.\textsuperscript{425} This would be the case even if the act is not itself a breach of the contract.\textsuperscript{426} As for the other contracting party, the Crown's action may still be successfully invoked as a valid ground of frustration, as it is not, from the contractor's perspective, self-induced.\textsuperscript{427}

However, a close look at the case law shows a different picture. In \textit{William Cory & Sons Ltd v. London Corporation},\textsuperscript{428} the frustrating event was brought about by the public authority which contracted with the plaintiff. When the latter argued that such a conduct would constitute self-induced frustration, Harman J. had the following comment.

The making of the new by-laws has been looked upon by both parties as a supervening event not contemplated by either of them when the contract was made, and, therefore, producing what is usually called frustration. From this point of view it is irrelevant that the supervening even was brought about by the corporation itself in another capacity. The argument seems to me an attempt to import into the doctrine of frustration the doctrine of anticipatory breach. In my judgment, this attempt fails because the two cannot be married in the way suggested.\textsuperscript{429}

A similar reasoning may be found in \textit{Reilly v. R.}.\textsuperscript{430} In this case, the appellant, having been appointed as a member of a federal appeal board, and having lost this position following the repeal by the Parliament of the statutory provision which had created the board, claimed damages for breach of contract. The Privy Council found that the performance of the contract had been made impossible by statute and

\textsuperscript{427} \textit{Ibid.}
\textsuperscript{428} \textit{Supra} note 173.
\textsuperscript{429} \textit{Ibid.}, at 487-88 (Harman J.).
\textsuperscript{430} [1934] A.C. 176.
that the contract was discharged.\textsuperscript{431} Therefore, there was no breach of contract on which to found damages and the petition of right was dismissed, although it would have been a clear case of self-induced frustration..

An interesting explanation of the non-applicability of the self-induced frustration principle in such cases was given by Craig, in his treaty on administrative law.

\textit{The suggestion that the public body's action in this type of case should be deemed to be self-induced frustration is misconceived. The premise behind this concept is that a party cannot rely on frustration brought about by his or her own conduct, act or election. The party will still be liable to perform the contract or pay damages for breach because he or she has deliberately, or perhaps negligently, without legal constraint, brought about the event in question. A public body has no freedom in this sense. Either it is exercising a statutory duty with which the contract is incompatible, or it has decided \textit{intra vires} to exercise its statutory powers in a particular way with the same result. The action, unlike that of the private individual, is done under these legal constraints and thus cannot be deemed self-induced frustration.}\textsuperscript{432}

These cases show that as statutory or regulatory changes do not imply a breach of contract, frustration can be invoked by both parties to discharge them from their contractual obligations that were rendered impossible to perform by statute. The only requirement seems to be that the frustrating event had not been contemplated by both parties at the time the contract was made. However, when performance remains possible at a higher cost, the parties are still bound by the terms of the contract and the contractor is not entitled to compensation.

\section{4.2 Statutory Alteration/Termination of Contracts}

\textsuperscript{431} \textit{Ibid.} at 180 (Lord Atkin).
The previous section was concerned with cases where an action of the legislature had interfered with the performance of a contract, although such was not the purpose of the intervention. There are however situations where the legislation will be directed to the contract itself.

As a basic principle, statutory provisions will prevail over any contractual terms, legislation being superior to contract.\(^{433}\) Therefore, the government, through its majority in Parliament, may modify or terminate contracts to which it or any public authority is a party by the enactment of a statute, without any liability for breach of contract. For example, the Quebec legislature intervened in one case to expressly authorize the Montreal Transit Commission to amend contracts committing it to certain municipalities on the Island of Montreal in order to re-organize the common transit system on the island.\(^{434}\)

The legislatures may interfere with contractual agreements in two different ways: there may be a specific statutory provision nullifying or modifying a precise contract, or a general power of modification may be given to a public body. For example section 34 of the *Environment Quality Act*\(^{435}\) reads as follows.

\begin{quote}
34. (...)Upon application of anyone interested, the Municipal Commission may cancel or alter a contract or regulation
\end{quote}

\(^{432}\) P. Craig, *Administrative Law*, supra note 40 at 704.


\(^{434}\) *Cité d’Outremont v. Commission de transport de Montréal*, *Ibid*. See also Reilly v. *The King*, supra note 430; *Wicks v. A.G. of British Columbia* (1975), 4 W.W.R. 283 (B.C.S.C.) and the obiter dicta of Lord Watson in *Windsor and Annapolis Railway Co. v. The Queen* (1886) 11 A.C. 607 at 616: "[i]f the effect of the Canadian Act of 1874 had been to make it imperative duty of the government to terminate their agreement with the appellant, and to give possession of the Windsor Branch to the Windsor County Rwy Cie, the Crown would have incurred no liability to the appellant by performing that statutory duty".

\(^{435}\) R.S.Q. c. Q-2.
relating to a waterworks, sewer system or water treatment plant, if the applicant establishes that the conditions are abusive.

Another example, this time favourable to the contractor is found in the former Post Office Act, where section 33 provided the following.

33. Where there is a substantial increase or alteration in the service required under a mail contract necessitating additional expenditure by the contractor, the Postmaster General may increase the amount stipulated in the contract, but the increase in payment shall bear a fair relation to the amount payable under the contract.

An important remark must however be made as to the statutory instrument used by the government when the main purpose of such instrument is to affect a valid contract. A contract may not be modified or terminated by way of regulation, unless there is a provision allowing this kind of process in the applicable statute. In La Compagnie de chemin de fer des rues de Québec v. La Cité de Québec, the City of Quebec was precluded to impose a higher fee on the operating of a railway within its territory, as the applicable fee had been determined in the contract with the railroad company. The Court clearly stated that the City could not pass a by-law which would alter a valid contract, in the absence of a statutory provision authorizing such action. However, it must be kept in mind that a contract will be affected by a regulatory change, if such a change does not aim directly at the contract.

The existence of such a power to modify and terminate contractual agreements has led some authors to the conclusion that, ultimately, the Crown will only be bound

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437 (1889), 16 Q.L.R. 11 (Que. S.C).
438 Supra p.136.
by a contract if it wishes to be. The legislative power has thus been qualified as the Crown’s ultimate recourse in furtherance of public policy and therefore, considered a major argument against any special power which are or could be granted to the Crown for the protection of the public interest. Legislation is always a means to which the Crown can resort to terminate contracts which are considered against the public interest or to suppress or reduce the effects of a judgment which awarded damages considered as an intolerable burden on a public policy.

There are precedents of this type of “ex post facto” interventions which have been sanctioned by the courts. The Burmah Oil case is the most well-known case in this regard. In 1942, the British military authorities ordered the destruction of a company’s installations, fearing that they might fall into enemy hands. The company asked for damages which were granted by the Courts. Parliament reacted by adopting An Act to Abolish Rights at Common Law to Compensation in Respect of Damage to, or Destruction of, Property Affected by, or on the Authority of, the Crown during, or in Contemplation of the Outbreak of War. Accordingly, the company whose property has been destroyed did not receive any compensation.

Other examples may be found in the Canadian case law. In the Woodward case, the Minister of Finance of British Columbia established the amount of succession duties to be paid following a gift to a charitable foundation which had been

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441 A. Lajoie, Contrats administratifs: jalons pour une théorie, supra note 24, at 128.
442 Ontario Law Reform Commission, supra note 440.
established by the testator. The Minister assessed the gift as if it was a gift to a person unrelated to the testator. The executors challenged this decision of the Minister before the courts. However, before the final decision of the Court, the legislative assembly of British Columbia modified the *Succession Duty Act* by adding a second paragraph to the applicable section of the Act, which now reads as follows:

5(2) For the purpose of subsection (1), the Minister, in his absolute discretion, may determine whether any purpose or organization is a religious, charitable, or educational purpose or organization.

_The determination of the Minister is final, conclusive, and binding on all persons and (...) is not open to appeal, question or review in any court, and any determination of the Minister made under this subsection is hereby ratified and confirmed and is binding on all persons._

(Emphasis added)

The Supreme Court upheld the statute, but noted: "[t]he latter part of this provision is unlike any other which had previously been considered by the Courts". The Court concluded that it was "not the function of this court to consider the policy of legislation validly enacted. Such legislation must be enforced in accordance with its terms".

However, this type of legislation is not without its limits. Two recent cases which raised much controversy in the legal community and in the media draw attention to the problem of the validity of legislation affecting contractual rights without compensation: the Churchill Falls case and the Pearson Airport case. This issue,

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446 An Act to Amend the *Succession Duty Act*, S.B.C. 1970, c. 45, s.5.
and the new developments brought about by these recent cases, will be the purpose of the next section.

4.3 Validity of Legislation affecting Contractual Rights

4.3.1 The Charter of Rights and Freedoms

The provisions of the Constitution and the Charter of Rights and Freedoms provides limits for any piece of legislation enacted by the Parliament or any of the legislative assemblies of the provinces. In the case of a statute expropriating private rights without compensation, the most natural inclination would be to look for protection in the Charter. But the Charter does not provide any general protection for private property or any general prohibition on retroactive laws (section 11 prohibits retroactive penal laws, but no other kinds). The courts have made it clear that the terms "life, liberty and security of the person" found in section 7 of the Charter do not include economic benefits. Therefore, unlike the United States Constitution, there is no guarantee for property rights to individuals. Any claim for compensation pursuant to the taking of private interest by the Crown must depend upon a statute giving the individual such right.

The Crown can thus affect private rights without incurring an obligation to pay compensation. However, it must be clear from the terms of the statute that there is no intention to provide for compensation as there is a rule of statutory construction

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450 See Sisters of Charity of Rockingham v. The King, [1922] 2 A.CD. 315 at 322; Re McDowell and Town of Palmerston (1892), 22 O.R. 563.
which provides that “a statute is not to be construed so as to take away the property of a subject without compensation”.\(^{451}\)

In a recent case from the British Columbia Court of Appeal,\(^{452}\) Lambert J.A. precised the meaning of this rule and how a statute taking away private rights was to be interpreted in accordance with such rule.

The rule is not a purely mechanical matter of examining the legislation and asking whether there is an express written reference to the fact that the taking is to be without compensation, in words, that say “without compensation of any kind”, or some equivalent; and that failing such words, compensation must be paid. Rather it is the intention of the Legislature that is being sought. The Legislature will to be presumed to have countenanced an injustice, unless the contrary intention appears. But the rule does not override the legislative intention. It is not a device by which the courts can enable a claimant to outwit the Legislature.\(^{453}\)

**4.3.2 The Provisions of the Constitution**

As long as the legislative authorities are acting within the scope of their powers, the Constitution, just like the Charter, does not provide for any general rule against the taking of private rights without compensation. However, when provincial legislatures are involved, there is one important limit to the exercise of such a power: no property or rights situated outside the province may be affected.\(^{454}\)


\(^{453}\) *Ibid.* at 573 (Lambert J.A.).

\(^{454}\) S. 92(13) of the *B.N.A. Act*, 1867.
This rule was applied in the now well-known case of Churchill Falls (Labrador) Co (hereinafter CFLCo). In 1961, the Province of Newfoundland adopted a statute which authorized the government to lease to the Churchill Falls (Labrador) Co. the right to exploit the hydro-electric potential of Churchill Falls. In 1969, CFLCo came to an agreement with Hydro-Quebec by which the latter agreed to buy virtually all the power produced at Churchill Falls except a small amount that could be claimed by the government of Newfoundland. By 1974, the government realized that its need for power were greater than anticipated and requested CFLCo to supply more energy to the province. CFLCo refused because of its contractual commitments to Hydro-Quebec. The Legislature of Newfoundland thus adopted in 1980, the *Upper Churchill Water Rights Reversion Act*\(^{455}\), providing for the reversion to the province the right to use the waters and the water power rights described in the lease with CFLCo. The Act also provided for the expropriation of the CFLCo’s fixed assets used in the generation of electric power. Compensation was limited to creditors and shareholders.

The case came to the Supreme Court in 1984 with the validity of the *Reversion Act* as the main issue to be decided by the Court.\(^{456}\) The principal attack made against the statute was that the Act interfered with civil rights existing outside the Province of Newfoundland, these rights being those of Hydro-Quebec under its contract with CFLCo.\(^{457}\)

The Court firstly concluded that the correct state of the law regarding the validity of a statute which affected civil rights outside the province was to be found in the case of *Ladore v. Bennett*.\(^{458}\)

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\(^{455}\) S.N. 1980, c. 40.
\(^{457}\) The question of whether or not the Legislature of Newfoundland was competent to expropriate property within its boundaries was not argued before the Court; *Id* at 327 (McIntyre J.).

- 148 -
Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*.\(^{459}\)

After analyzing the *Reversion Act* and the circumstances of the case, the Court ruled that the statute was unconstitutional as its pith and substance was to interfere with the rights of Hydro-Quebec under the contract with CFLCo to receive an agreed amount of power at an agreed price. This right to the delivery in Quebec of Churchill Falls power was situated outside the Province of Newfoundland\(^{460}\) and thus beyond the territorial competence of the Newfoundland Legislature.

### 4.3.3 The Rule of Law

The previous section was concerned with the specific provisions of the Constitution and their impact on legislation affecting private interest without appropriate compensation. Until very recently, these were the only limits, along with the Charter, which would restrain Parliament's actions. However, the events

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\(^{459}\) *Re Upper Churchill Water Rights Reversion Act, supra* note 456 at 332 (McIntyre J.).

\(^{460}\) The Court noted that there was a general assumption that the rights of Hydro-Quebec were situated in Quebec. But the Court still made the following remarks as to the determination of the situation of the contractual rights: "[t]he fact, of course, is that Hydro-Quebec has the right under the Power Contract to receive delivery in Quebec of hydro-electric power and thereafter to dispose of it for use in Quebec or elsewhere as it may choose. If these facts are not sufficient for the purpose of the constitutional characterization of the *Reversion Act*, it may be noted in any event that ordinarily the rule is that rights under contracts are situate in the province or country where the action may be brought ...It will be recalled that the Power Contract provided that the courts of Quebec would have jurisdiction to adjudicate dispute arising under it and it is, therefore, the Province of Quebec where enforcement of the contract may be ordered and where the intangible rights arising under the contract are situate" (at 334, McIntyre J.).
surrounding the redevelopment of Pearson International Airport brought a new lighting to the issue.

In August 1993, an agreement was concluded between the federal government and a private consortium for the redevelopment of terminals 1 and 2 of Pearson International Airport in Toronto. Shortly after, following pressure from diverse group during the campaign, the liberal government asked for a review of the transaction. This review was conducted by Robert Nixon, who issued a written reports in November of 1993. Mr Nixon concluded that the transaction did not serve the public interest and that it should be cancelled. The reasons invoked were that there were suspicions of patronage in the awarding of the contract and that the revenues which would have been provided to the government were insufficient compared to those of the private consortium. Accordingly, on December 3, 1993, the government cancelled the contract. In the following spring, Bill C-22 was introduced in the House of Commons to settle the issue of compensation. This Bill purported to declare that the contract had not come into force and had no legal effect and provided that all existing legal recourse or entitlement to compensation from the Crown was negated.

However, the Bill met some resistance when it got to the conservative Senate. Before the Bill was officially by the Senate, hearings were held by a special Senate committee. Several constitutional law experts testified before this committee on the validity of Bill C-22. Some of them expressed the view that the Bill was invalid as it was contrary to the Rule of Law, which is included in our Constitution. To limit Parliament’s powers by the Rule of Law was a fairly new concept, as no court of law has ever invalidate a statute on this basis. Even if Bill C-22 never came into

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462 An Act respecting Certain Agreements Concerning the Redevelopment and Operation of Terminals 1 and at Lester B. Pearson International Airport, (First Session, Thirty-Fifth Parliament, 42-43 Elizabeth 11, 1994).
force, the issue which were raised by its provisions are still a current and fundamental debate.

Although Patrick Monahan was not one of the experts who testified in favour of the invalidity of the statute on the basis that it was contrary to the Rule of Law, he later wrote a detailed article in which he explains why he now thinks that the Rule is a true limitation to Parliament’s power, as well as government’s power.

Monahan argues that the Rule of Law is a fundamental principle which underlies the whole of the Constitution, including the provisions giving jurisdiction to the legislatures. It flows from this that the legislatures in Canada must conform to the Rule of Law when enacting statutes, so as to protect the citizens against arbitrary treatment from state officials. According to Monahan, one important way to prevent arbitrariness is through giving access to court. He concludes that the “Rule of Law must impose some limits on the ability of Parliament to prevent or abolish access to the courts for the purpose of holding government responsible”. Applied in a contractual context, these observations led Monahan to the conclusion that the government does not necessarily have to perform a contract which is believed to be in the public interest. However, if the government chooses to cancel or modify a contract, the private contracted must be able to seek redress before a court of law. “It is the denial of court access, rather than the decision to repudiate the contract which is contrary to the Rule of Law”. Therefore in the case of the Pearson Airport transaction, Monahan’s view is that Bill C-22 was invalid as it

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precluded the private consortium whose rights were affected to seek redress through the courts.

This reasoning based on the Rule of Law as an implied limit on Parliament’s powers is still controversial amongst authors. The main argument invoked against Monahan’s position is based on the fact that the Rule of Law is a constitutional principle, not a constitutional provision and that only a violation of the latter may be a ground to invalidate a statute. It is also Dicey’s view that the Rule of Law does not constrain the sovereignty of Parliament.

As for the courts, the issue was argued recently before the Ontario General Division in a case involving former Premier Bob Rae. The facts of the case were as follows. The plaintiff was a company who wanted to establish a new waste disposal site within the Niagara escarpment. In this process, the plaintiff’s attorney wrote a letter to the defendant, then Premier of Ontario to obtain his support in favour of the plaintiff’s right to a fair hearing and a decision on the merit by the Joint Board. The defendant replied that the government would respect the environmental assessment process, which was independent from the government’s actions. Shortly after, a new private member’s bill (Bill 62) was introduced by a member of the government. This bill purported to ban any new waste disposal site in the Niagara escarpment. The chances that the plaintiff’s site would be approved were thus nullify. The plaintiff sued the Premier and the government on the basis that the

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467 Id at 434.
468 This is according to section 52 of the 1982 Constitutional Act which provides that any law which is inconsistent with the provisions of the Constitution is of no force or effect.
471 Bill 62 was adopted by the Ontario Legislature as Environmental Protection Amendment Act (Niagara Escarpment), S.O. 1994.
Premier’s letter amounted to a negligent misrepresentation or an actionable “non-bargain contract”.

The particularity of this case comes from the defendant’s main argument which was based on the immunity clause contained in Bill 62 which provides the following:

1(4) No proceeding directly or indirectly based upon the prohibition in subsection (2)\(^{472}\) may be brought against the Crown in right of Ontario, the Government of Ontario, any member of the Executive Council or any employees of the Crown or Government.

In response, the plaintiff raised the inapplicability of section 1(4) to his claim and its invalidity on the ground of its inconsistency with the Rule of law.

As to the applicability of the immunity clause, the Court ruled in favour of the plaintiff in concluding that the clause did not bar the plaintiff’s action. Based on the principle that a statutory provision limiting the right to bring legal proceedings is to be strictly construed,\(^ {473}\) the Court found that s.1(4) did not seek to prohibit actions based upon a breach of promise or a negligent misrepresentation made at an earlier date. Any other interpretation would have given the statute a retrospective application, which is possible only in the presence of clear and unambiguous language.

The impact of such a finding was to render any ruling of the Court on the constitutional issue \textit{obiter dicta}. However, the Court still made the following observations.

\(^{472}\) S. 2 read as follows: “Despite subsection (1), no person shall use, operate, establish, alter, enlarge or extend a waste disposal site in the Niagara Escarpment Plan Area as set out in the Niagara Escarpment Plan, unless the Director has issued a certificate of approval or a provisional certificate of approval before this subsection comes into force”.

\(^{473}\) Berardinelli \textit{v. Ontario Housing Corporation} (1979), 1 S.C.R. 275 at 280.
The principle of the "rule of law" is implicit to the Constitution of Canada. The "rule of law" principle constitutes an implied limitation on the exercise of all legal authority under the Constitution of Canada, including the legislative authority of the provinces. (...) My view is that the "rule of law" principle implicit to the Constitution of Canada is not offended by s.1(4) of Bill 62.\textsuperscript{474}

Given the Court’s finding on the applicability of the challenged section of Bill 62 to the plaintiff’s action, the conclusion of Cumming J. on the Rule of Law as an implied limit on legislative powers cannot be considered as a strong precedent on the issue. However, it is a clear indication that the courts are ready to consider such arguments favourably.

4.3.4 The Canadian Bill of Rights

The Canadian Bill of Rights, which is only applicable to federal laws, does not expressly declare the right of an individual to be compensated for property of which he has been deprived by an Act of Parliament. The Bill confers a right to "enjoyment of property" and the right not to be deprived thereof except "by due process of law".\textsuperscript{475} The extent of such a protection was discussed in the case of \textit{R. v. Appleby}\textsuperscript{476}. In this case, the New Brunswick Supreme Court Appeal Division rejected the view that s.1(a) of the Canadian Bill of Rights. confers the right to compensation on the deprivation of property. Furthermore, as the Bill of Rights creates no new rights and merely protects those which existed at the time of its enactment,\textsuperscript{477} the Court concluded that it could not be interpreted as to protect an individual from a loss of his property if the loss is a consequence of legislation of

\textsuperscript{474} \textit{Reclamation Systems Inc.} v. The Honourable Bob Rae et al, supra note 470 at 435 (Cumming J.).
\textsuperscript{476} (1976), 76 D.L.R. (3d) 110 (N.B.A.D.).
\textsuperscript{477} \textit{R. v. Miller and Cockriell} (1976), 70 D.L.R. (3d) 324, at 343 (Ritchie J.).
the Parliament of Canada. Therefore, no protection may be found in the *Bill of Rights* against statutes which affect private interests without providing for compensation, if such statutes have been validly enacted.

This concludes the analysis of the impact of legislation in government contracting. Although the Crown may indirectly affect a contract by changing the legislation or the regulation which is applicable to its performance, there is no obligation to pay compensation to the contractor whose performance is rendered more expensive. This will the case, of course, in the absence of a specific provision of the contract providing for compensation in such event. In cases where the performance of the contract will be made impossible, the contract will be discharged, the legislative or regulatory change being seen as a supervening event unforeseen by the parties at the conclusion of the agreement. Where such a change is directed specifically at a contractual agreement between an individual or private corporation and the Crown, it was shown that there is almost no protection for the affected contractor. As for now, the only sure protection are directed towards extra-provincial interests which are affected by a provincial statutory change. However, the recent developments regarding the possible applicability of the Rule of Law to the legislative powers are most interesting to the extent that this principle would preclude the Parliament and the provincial legislatures from restraining access to the courts.
CONCLUSION

As was demonstrated by this study, although government contracts are basically subject to the same legal framework as private contracts, they feature several particularities which make them substantially different from the latter.

Most of these particularities arise from the State's special mission to pursue the collective goal and the public interest. The considerable importance of this mission justifies a preferential treatment of the State over the private contractor, thereby causing a deviation from the principles of contract law: equality between the parties. This inequality is firstly noticed in certain interpretation rules applicable to government contracts. These rules favour the State by allowing the courts more flexibility so as to declare valid covenants which would be illegal in a totally private setting, while providing for more severity in assessing contractors' defaults.

The imposition of various formalities at the time of the conclusion of the contract, also aiming at the protection of the public interest causes inequalities as well. Almost all of these formalities provide for grounds of invalidity of the contract if they are not strictly observed, imposing thereby a formalism unknown to the private law of contract and forcing the contractor to be fully aware of all applicable statutory provisions in order to know if there was compliance with every requirements and restrictions.

The public interest also limits the nature of contractual agreements that the State may enter into so that contracts will not unduly restrain the State from taking actions which it thinks serve the public interest, from achieving its public policy objectives or from duly exercising its discretion. These limits go as far as to allow the State to terminate contractual agreements with private contractors when they
interfere with executive decision, the whole without any form of compensation for
the contractor.

The prerogatives and immunities of the State are another attribute of the State which
gives it a fair advantage. They have a considerable impact in the balance of the
contract as they allow the State to shield itself from certain statutory obligations,
from injunction, specific performance, execution of judgments and estoppel, in
specific circumstances. Although there is a noticeable tendency among authors and
in the decisions of the courts to limit these immunities from unreasonably protecting
the State, they are still attributes of the Crown which can only be abolished by
statute and which otherwise remain applicable, even in a contractual context.

The ultimate particularities which preclude the State from being considered as an
ordinary contacting party is the fact that it enjoys legislative powers which bears
only very limited restrictions. In the case of legislation overriding or affecting
contractual agreements, these restrictions are almost non-existent. Neither The
Charter of Rights and Freedoms nor the Canadian Bill of Rights provide protection
for contractors adversely affected by legislative intervention. As for the
Constitution, its provisions may be used only in cases where extra-provincials rights
are involved. The rule of law as a constitutional principle has been recently relied
upon as an argument for the invalidity of statutes affecting contractual rights,
without providing for any possibility to claim damages. However, such argument
has not yet been officially accepted by a court of law.

All of these considerations clearly show that there is no balance between the
contracting parties when the State is one of them. The private contractor is thus
facing a totally different situation when entering into a contract with the State rather
than with a private corporation or individual. Several formalities which may lead to
a declaration of invalidity have to be observed, the contractor may wrongly rely on
representations made by public officers which may not be binding on the State, and most importantly, the contract may become inconsistent with the State's view of the public interest. These circumstances may have considerable adverse effects on the contractor, who most of the time, will not be entitled to proper compensation as the sanction is often the invalidity of the contract. Therefore, elements of uncertainty, inequity and even unfairness, which have no equivalent in private contracting, are found in government contracts and makes any comparison with the private law model unsound.