

Revisiting the Self-Authorizing Agent

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This article considers the concept of a “self-authorizing” agent given modern forms of commercial dealings, particularly those involving projects characterized by extensive functional specialization. The article begins by reviewing *Canadian Laboratory Supplies* and, more specifically, Chief Justice Laskin’s dissenting opinion at the Supreme Court as the starting point for revisiting the self-authorization question in Canadian agency law. The article then considers two recent cases decided at the Federal Court of Appeal before extending their facts to contemplate a hypothetical (but perhaps not far-fetched) illustration of how the problem might arise in a contemporary setting involving public infrastructure procurement. With this scenario in mind, the case law on apparent and implied authority is examined with reference to the prospect of agent self-authorization. Recent English authority, in particular, may have provided some impetus to return to the prospect of a self-authorizing agent. The article follows by contemplating the acquiescence or passivity of the principal in face of the would-be agent’s conduct as well as the related possibility of a finding that the principal’s conduct has ratified the agent’s earlier behaviour. The article concludes by noting that, to the extent any common position emerges from a discussion of what has historically been a rare situation in the case law, it is that the courts will strive to protect the ‘innocent’ party in such scenarios, but if there is no innocent party at hand, it would seem that there is little to protect.

Dans cet article, on examine le concept d’agent « auto-autorisé » dans le cadre des formes modernes de transactions commerciales, particulièrement celles qui ont trait à des projets caractérisés par une vaste spécialisation fonctionnelle. Dans cet article, l’auteur commence par examiner l’arrêt *Canadian Laboratory Supplies* et, en particulier, l’opinion dissidente du juge en chef Laskin à la Cour suprême à l’époque, comme point de départ pour revisiter la question de l’auto-autorisation dans le droit de la représentation au Canada. L’article se penche ensuite sur deux arrêts que la Cour d’appel fédérale a récemment jugés avant de les appliquer à leurs faits pour finalement aboutir à une illustration hypothétique (sans pour autant être utopique) de la manière dont le problème pourrait surgir dans un cadre contemporain impliquant des marchés d’infrastructure publique. Dans l’optique de ce scénario, on analyse la jurisprudence relative au pouvoir implicite et apparent par rapport à la perspective de l’auto-autorisation de l’agent. Une jurisprudence récente provenant d’Angleterre pourrait, en particulier, avoir insufflé un certain élan en faveur du retour de la notion d’agent « auto-autorisé ». L’auteur poursuit en s’interrogeant sur le consentement ou la passivité du mandant vis-à-vis de la conduite de l’agent potentiel et sur la conclusion possible que la conduite du mandant équivaille à une ratification de la conduite antérieure de l’agent. L’article conclut en faisant observer que, dans la mesure où une position commune émergerait d’une discussion sur ce qui, en général, est une situation rare dans la jurisprudence, on peut s’attendre à ce que les tribunaux s’efforcent de protéger la partie « innocente » dans de tels scénarios, mais en l’absence de partie innocente, il y aurait alors peu à protéger.

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I. INTRODUCTION

Is the tried and tested common law of contract capable of adapting its venerable principles to new situations that emerge in the course of commercial dealings in a modern economic age? Is the common law capable of the subtle adjustment necessary to readdress itself to complex contractual arrangements entered into in a setting characterized not only by the globalization of organizational structures and supply chains, but also by a significant (and controversially growing) role for multiple levels of government? At first blush, questions of this sort seem unnecessary, even silly. Of course the common law can adapt; that is what makes it the common law. But the last several years have certainly introduced a new, pervasive uncertainty into public and private organization, producing concomitant ambiguity about the way forward and the creation of novel structures as actors, both public and private, try to proceed in their businesses. It is interesting to note, though, that whether the common law adapts and how it does so are very different matters.

Assuming the former, then, this article focuses on the latter in one very particular area that is well explored in jurisprudence: agency. As this article will strive to suggest, ever greater functional specialization introduces ever larger numbers of parties into transactions, heightening the prospect that some of the parties will (or may appear to) act on behalf of others. The reality that in some such cases a party will choose to take a course of action for its own perceived benefit that potentially affects another party over whom it may carry the authority to bind in contract is far from new, but some of its manifestations may well be so. It is in this vein that the article considers the prospect of a “self-authorizing” agent.

It is worth establishing at the outset the definition of agency that carries through Canadian law. Following Fridman, “[a]gency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal’s legal position in respect of strangers to the relationship by the making of contracts or the

disposition of property.”¹ Most agency relationships will arise from an agreement of some form between the principal and the agent.² This means that the principal and agent will both “agree to the creation of the relationship” and that the agent will be able to “exercise certain authority on behalf of the principal in dealings with third parties.” Beyond Fridman’s definition, though, it should be added that agents can also create liability for their principals beyond contracts with third parties, such as under tort and criminal law.³

Yet to note that most agency relationships are created by virtue of an agreement between the principal and the agent is to avoid almost all of the interest in the common law of agency.⁴ This is to say, before the common law can be relied on to resolve a dispute where agency concerns are relevant, it will first be necessary to establish that such a relationship existed between the parties.⁵ Agents whose authority arises from agreement are said to be endowed with the *actual* authority of their principals. Although agency can also arise by virtue of statute and by the principal’s later ratification of the unauthorized agent’s earlier deeds, perhaps the most fascinating problems arise under what is sometimes called “agency by estoppel,” referring to situations in which an “agent” acts with the *apparent* or *ostensible* authority of the principal.⁶ A subspecies of this category covers those situations where the agent acts with the principal’s *implied* authority. The relevant question to establish agency in such a case is to ask what the principal and/or agent must do in order to buttress the creation of the relationship. In particular, can the putative agent’s own conduct suffice in some circumstances to lead to a finding of agency, or must the implication come by necessity from the would-be principal?

It is important to remember what is at stake here. The fact that the alleged agency is founded on *apparent* authority is not itself the source of any difficulty; instead, the question before a court will be whether the facts bear out the appearance of the agency as pleaded. As Tan observes, “[a]s its name suggests, apparent authority involves the appearance of authority, not the existence of it. Thus apparent authority can arise not only when an agent exceeds authority or the

1 GHL Fridman, *The Law of Agency*, 7th ed (Toronto: Butterworths Canada, 1996) at 11 (emphasis in original).

2 JL Montrose similarly noted many years ago that the term “agent” is only properly used with reference to a person in connection with the relationship, not the person *per se*. The word is a kind of shorthand for referring to “the character in which a person acts.” See JL Montrose, “The Basis of the Power of an Agent in Cases of Actual and Apparent Authority” (1938) 16:10 Can Bar Rev 757 at 759.

3 See e.g. Cameron Harvey & Darcy MacPherson, *Agency Law Primer*, 4th ed (Toronto: Carswell, 2009) at 1-2.

4 Munday remarks in this way that although agency relationships in modern commercial matters are typically (if not almost invariably) founded upon a contract between the principal and agent, there is actually no need for such a contract to exist. See Roderick Munday, *Agency: Law and Principles* (Oxford: Oxford University Press, 2010) at 35.

5 See e.g. GHL Fridman, “Recent Developments in Canadian Law: Commercial Law” (1990) 22:1 Ottawa L Rev 425 at 429 [Fridman, “Recent Developments”].

6 Montrose observes that “[a]pparent authority is really equivalent to the phrase ‘appearance of authority.’” See *supra* note 2 at 764.

authority has been terminated, but also where a person who has never been an agent is allowed to appear as agent.” In such a situation, “[n]otwithstanding the absence of real authority, the agent may bind the principal where the third party has acted on the faith of such appearance of authority, usually by entering into a contract with the agent.”⁷ The tension within the common law is very clear in this area: Should the law seek to limit the principal’s liability or instead provide maximum protection to the third party? If one is to attempt to seek a sensible compromise between these two extremes, how does one arrive at a reasonable allocation of risks?⁸

As the later discussion in this paper will establish, it is quite clear that the traditional position has been to reject any “self-authorizing” conduct on the part of an “agent” to serve as a basis for contractually binding the “principal.” Reconsideration of this stance, however, was provoked somewhat by a dissenting opinion rendered by then-Chief Justice Laskin at the Supreme Court of Canada in a 1979 case, *Canadian Laboratory Supplies v Engelhard Industries of Canada*.⁹ Nevertheless, in the years following the case it appeared that the theoretical provocation had not led to any significant departures from orthodoxy, and scholarly commentary was essentially in conformance with the view that any movement to allow for agency on the basis of self-authorization would be an undesirable judicial innovation. On the basis of more recent developments, though, one might well ask whether the opening created by Chief Justice Laskin was simply somewhat ahead of its time. It is on this basis that this paper will revisit the so-called self-authorizing agent, in particular by examining the problem with reference to a hypothetical case study.

The remainder of the article, therefore, proceeds as follows. In Part II, the facts of *CanLab*, and more specifically the statement of Chief Justice Laskin in his dissenting opinion is reviewed as the starting point for consideration of self-authorization in Canadian agency law. The paper continues with a description of two recent goods and services tax (“GST”) cases, *The Queen v Merchant Law Group*¹⁰ and *The Queen v City of Calgary*,¹¹ where agency was an issue. These decisions provide a springboard for considering self-authorizing agency in the context of public procurements or public-private partnerships (“P3s”), in the guise of a hypothetical case study. These contexts are a ripe potential source for future self-authorizing agent cases given the imminent motivating combination of severe government budgetary shortfalls and sharp public infrastructure needs. The case law on apparent

7 Cheng-Han Tan, “Unauthorised Agency in English Law” in Danny Busch & Laura J Macgregor, eds, *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge, UK: Cambridge University Press, 2009) 185 at 188.

8 See generally Ian Brown, “The Agent’s Apparent Authority: Paradigm or Paradox?” [1995] J Bus Law 360.

9 [1979] 2 SCR 787, 97 DLR (3d) 1, rev’g in part (1977), 16 OR (2d) 202, 78 DLR (3d) 232 (Ont CA) [*CanLab*, cited to SCR].

10 2010 FCA 206, 405 NR 41, rev’g 2008 TCC 337, [2008] GSTC 130-1, leave to appeal to the SCC refused, [2011] 1 SCR viii [*Merchant Law Group*].

11 2010 FCA 127, 403 NR 41, rev’g 2009 TCC 272, [2009] GSTC 85-1, aff’d 2012 SCC 20, 429 NR 330 [*City of Calgary*].

and implied authority as a basis for agency is then examined in Part III, with reference to the prospect of agent self-authorization and the seeming acquiescence or passivity of the principal in face of the would-be agent's conduct. Part IV explores the scope of a potential departure from the conventional view that self-authorization is not possible in more recent English cases, including, most notably, the Court of Appeal's decision in *First Energy (UK) v Hungarian International Bank*.¹² The paper will then consider a challenge to the view that First Energy really changed much, in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*,¹³ a 2011 decision of the Singapore Court of Appeal. Part V considers ratification as an alternative way of establishing the principal's liability to the third party. Finally, the article concludes in Part VI by noting that, to the extent any common position emerges from a discussion of self-authorization in the case law, it is that the courts will strive to protect the "innocent" party in such scenarios. It is interesting to question here, however, whether the courts' objective assessment of the apparent authority of the "agent" might be compatible with an evaluation of the reasonable carriage of the risks created or encouraged by the principal, and whether this prospect might encourage the would-be principal to be slightly more cautious when embarking on novel forms of commercial transaction.

II. REVISITING THE "SELF-AUTHORIZING" AGENT PROBLEM

A. *CanLab*, Chief Justice Laskin and Self-Authorization

Can a would-be agent "self-authorize" such that its purported principal becomes bound by its actions? If not, can the principal's passivity when faced with the agent's conduct be read in some circumstances as ratification of the would-be agent's conduct? There might be a close analogy here to the relationship between lawyers and their clients, where, as Harvey and MacPherson note, "[c]ertainly the client who mutely stands by, either before or after litigation has been commenced, while his lawyer makes a settlement in his presence, is bound either by ratification or on the basis of the lawyer acting with apparent authority."¹⁴ Such (implied) ratification or apparent authority is problematic because it raises as a countervailing consideration the legitimate interests of third parties. The common law of contract and agency gives effect to the reasonable expectations of honest parties in many instances "notwithstanding the existence of unauthorized agency."¹⁵

To even contemplate these types of issues under Canadian agency law requires review of *CanLab*, a 1979 decision of the Supreme Court of Canada. The case revolves around fraud committed by a sales clerk of Canadian Laboratory Supplies

12 [1993] Lloyd's LR 194 (CA) [*First Energy*].

13 [2011] SGCA 22 [*Skandinaviska*].

14 *Supra* note 3 at 91.

15 Tan, *supra* note 7 at 187-8.

(“CanLab”), Cook. Starting in 1962, Cook ordered platinum from Engelhard Industries (“Engelhard”), supposedly for his employer. In the ordinary course of business, CanLab would purchase minerals from Engelhard, sell them to its customers, repurchase their used materials and then resell these to Engelhard. CanLab supplied materials to universities, hospitals and laboratories, and Engelhard was a refiner of precious metals. The two companies had been doing business since 1941.¹⁶

Under his fraudulent scheme, Cook arranged to buy platinum on behalf of CanLab and to sell it to a fictitious customer, “Giles.” Cook obtained the platinum after its delivery from Engelhard. In the guise of Giles, Cook then returned the scrap platinum to Engelhard a few days later, receiving the money directly from Engelhard on the resale.¹⁷ By October 1966, Engelhard became concerned that it was paying Giles immediately for the waste platinum but was paid only some time later by CanLab for the original purchase. Inquiring with CanLab, Engelhard’s sales manager was referred to Cook on the basis that Cook was the CanLab employee dealing with Giles as a customer. Cook suggested that Engelhard send a letter to CanLab’s controller about the matter, which Engelhard’s manager did.¹⁸ Cook intercepted the letter, however, and wrote back to Engelhard, replying (falsely) that CanLab’s controller had handed him the letter to respond to.¹⁹ In any event, Cook reassured Engelhard and arranged for the payments from CanLab to be sped up.²⁰

Some two years later, a senior officer at Engelhard made further inquiries, but as before these were directed within CanLab to Cook. Cook apparently told the senior officer that he would look into the matter on Engelhard’s behalf and get back to the company, but he never did.²¹ After another year had passed, CanLab’s Vice President of Operations looked into the matter and at last Cook’s fraud was discovered. By this point, Engelhard had paid more than \$800,000 to “Giles” (really Cook). The plaintiff, CanLab, then sued Engelhard for conversion of the platinum, asserting that CanLab properly had title to the platinum ordered from Engelhard for “Giles” and that Engelhard unlawfully received the platinum back from “Giles.” At trial, CanLab argued that the platinum at issue belonged to it, while Engelhard argued that there was a contract that transferred the property from CanLab back to it.²² If this contract (established in fraudulent circumstances by Cook) was valid, then there would be no conversion of the property.

The majority of the Ontario Court of Appeal held that there was no conversion on the original sale (*i.e.*, from Engelhard to CanLab) because the purchase

16 *Supra* note 9 at 790.

17 *Ibid.*

18 *Ibid* at 810.

19 *Ibid* at 793.

20 *Ibid* at 815.

21 *Ibid* at 805-6.

22 *Ibid* at 791.

orders were signed as per the ordinary course.²³ But what of the second series, the purported sale back from CanLab to Engelhard? Here, the majority asserted that CanLab “had permitted Cook to assume a position where he had apparent authority to conduct and arrange the three combined transactions with Engelhard.”²⁴ It was clear that Cook had represented to Engelhard that he had sufficient authority to purchase the platinum from it originally, sell it to CanLab’s customer and then to arrange for the repurchase by Engelhard. Per the majority of the Court of Appeal, because Engelhard relied on these representations and because CanLab had cloaked Cook with the apparent authority to act, CanLab became estopped from denying Cook’s representations. This meant that Cook’s dealings on behalf of CanLab were upheld.²⁵ Justice Lacourcière in dissent held that until Engelhard’s last round of inquiries to CanLab, CanLab had not made any representations; instead, Cook made statements as to his own authority which could not serve to bind CanLab if Cook did not in fact have the authority he claimed.²⁶

On appeal, Justice Estey for the majority of the Supreme Court held that CanLab had made no representations to Engelhard as to Cook’s authority until the referral was made (to Cook) after Engelhard’s original inquiry in October 1966 about the timing of payments, thereby equipping Cook with ostensible authority to act from that point on. Accordingly, Engelhard was to bear the costs of the fraud until that point and CanLab thereafter.²⁷

Dissenting in part, Chief Justice Laskin held that because CanLab initially did nothing after the last inquiry, this amounted to a silent act of representation that Cook in fact had the necessary authority to carry out the transactions.²⁸ Abstracting to a more general position, Chief Justice Laskin added that “[t]here is, of course, no doubt in my mind that if an agent, in the exercise of an admitted authority in him in respect of his ordinary duties acts for his own benefit, his principal cannot deny liability for contracts he purports to make on behalf of the principal.” Moreover, “[i]t is only in such circumstances or where there is a representation from the principal that puts the agent in a position to act beyond the authority reposed in him that the principal can be bound.”²⁹ So far, this is uncontroversial. However, the Chief Justice then goes on to say that it is possible for an agent to make representations as to his own authority, and perhaps therein to bind his principal:

In saying this I do not subscribe to the proposition, in so far as it purports to be a general statement of the law, that a representation

23 *Canadian Laboratory Supplies Ltd v Engelhard Industries of Canada Ltd* (1977), 16 OR (2d) 202 at 213, 78 DLR (3d) 232 (Ont CA) [cited to OR].

24 *Ibid* at 215.

25 *Ibid*.

26 *Ibid* at 205.

27 *CanLab*, *supra* note 9 at 819.

28 *Ibid*.

29 *Ibid* at 797.

by an agent himself as to the extent of his authority cannot amount to a holding out by the principal. It will depend on what it is an agent has been assigned to do by his principal, and an overreaching may very well inculcate the principal. This, however, does not help Engelhard in the present case.³⁰

It is interesting to observe here that Chief Justice Laskin's somewhat unusual digression as to the possibility of self-authorizing conduct on the part of an agent was not unquestioningly accepted at the time of his decision, even as a statement that self-authorization could be possible on a future set of facts but was not made out on those of the case at bar. Fridman observed that "[t]he language of Laskin C.J.C., it is respectfully submitted, is obscure and ambiguous. It could lead judges faced with this problem into tortuous paths." Accordingly, for Fridman, "[i]t is to be hoped that the Supreme Court will have an opportunity to elucidate this *dictum* of the Chief Justice and to make quite clear how far, if at all, an agent can alter the nature of his apparent authority without any intervention by his principal."³¹ Fridman was clearly worried that the courts in future cases might seize on the remark made by Chief Justice Laskin to "greatly enlarge" the concept of apparent authority.³² While the jurisprudence in the more than three decades following the *dictum* of Chief Justice Laskin has not fully taken up Fridman's challenge, this is perhaps not surprising given how seemingly unusual the facts would have to be to produce a situation where a court would even consider a question of self-authorization, let alone decide a case on that basis. Yet, as will be explored at greater length below, economic forces now at work in both the public and private sectors may be progressing (inexorably) to a state where the courts will unavoidably be confronted with such a situation. What will they make of it when it arrives?

B. The Centrality of the Agency Relationship: An Outline Emerges

Given the groundwork laid by *CanLab* and Chief Justice Laskin's unusual remark in his dissent in the case, it is worth situating the authorization problem in light of two recent decisions of the Federal Court of Appeal in a GST context. These recent cases are notable for a number of reasons (not the least of which is the appellate status of the Court). Especially interesting are *Merchant Law Group's* focus on the importance of the agent's ability to affect the principal's contractual relations with third parties and the example provided by *City of Calgary* of how the self-authorization problem could arise from procurement situations. With this framing in place, it will then

30 *Ibid* at 800.

31 GHL Fridman, "Annual Survey of Canadian Law: Commercial Law" (1981) 13:3 Ottawa L Rev 571 at 589. See also GHL Fridman, "The Abuse and Inconsistent Use of Agency" (1982) 20:1 UWOL Rev 23 at 44.

32 *Ibid.*

be possible to restate the relevance of the problem in a more contemporary fashion, with reference to complex P3 infrastructure projects.

As the Canada Revenue Agency (“CRA”) explains in a published GST Policy Statement, whether a person is acting as agent of another can be relevant in determining the manner in which the rules found in the *Excise Tax Act*³³ will apply to a given situation. As the CRA observes, when one person acts as an agent in making a supply on behalf of another person, it will be the principal who is required to collect and account for the GST on the supply. Similarly, if a person acquires a supply on behalf of another person, it is the principal who will be entitled to any input tax credits (“ITCs”) for the tax that is paid or payable on that supply. As a result, the facts of a particular situation should be examined in light of the common law of agency to determine where the GST will apply in respect of that situation.³⁴

In this vein, at issue in *Merchant Law Group* was the tax treatment of disbursements made by a law firm in the course of providing legal services to clients. The disbursements consisted of such items/services as searches, courier costs, transcript production, etc. that the law firm acquired from third parties in the course of providing legal services. If the law firm had acted as agent for its clients when incurring these costs, it would not have to collect and remit GST on them. The Crown argued that the disbursements were taxable supplies in the sense that they were consideration for legal services, and the law firm therefore had an obligation to collect and remit GST in respect of those supplies. The Tax Court concluded that the law firm had met its burden to establish that it had incurred these disbursements as an agent.³⁵

On appeal to the Federal Court of Appeal, Justice Dawson explained that if the law firm can be viewed as the agent of its client, the lawyer on a file is not providing a supply when the firm incurs the costs of a disbursement; the lawyer is simply acting as a conduit of his or her principal, the client. It is then the client’s obligation to pay for the disbursements, and the lawyer pays for them on the client’s behalf. This situation may be contrasted with the scenario where the expense of a disbursement is properly that of the lawyer working on a file, and while the client may ultimately reimburse the law firm for its expense, the client really has no obligation to pay the third party for the cost of the disbursement.³⁶

33 RSC 1985, c E-15.

34 See Canada Revenue Agency, *GST/HST Policy Statement: P-182R, Agency* (July 2003), online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/E/pub/gl/p-182r/p-182r-03e.pdf>>.

35 *Merchant Law Group v The Queen*, 2008 TCC 337, [2008] TCJ No 265 at para 23 [*Merchant TCC*]; *Merchant Law Group*, *supra* note 10 at paras 1-3.

36 *Merchant Law Group*, *supra* note 10 at paras 12-14. In this case, because the disbursements were acquired for use in the course of providing legal services, the law firm or lawyer may claim ITCs so as to remove the GST from the original disbursement. When the disbursement is then charged to the client’s bill, GST may be levied on the entire amount owing, including the disbursement. If the client is engaged in commercial activities, then, it may similarly be in a position to claim the GST paid as ITCs.

In contemplating the agency question in this case, the Federal Court of Appeal turned to the CRA's Policy Statement on situations where one person acts as an agent for another.³⁷ Specifically at issue in this case, the Court of Appeal noted, was the "essential quality" of whether the purported agent (the law firm) had the authority to affect its principal's legal position (that of the client).³⁸ In its decision, the Tax Court held that the disbursements should not have been subject to GST, noting for instance that the client ultimately owned any reports or certificates produced, and the law firm did not add on or alter these items once they were prepared by the third parties.³⁹

In its analysis, the Federal Court of Appeal observed that if it could determine that the putative agent did not have the authority to affect the legal position of the alleged principal, then there would be no agency relationship. On the facts of the case at bar, Justice Dawson then pointed out that the Tax Court had overlooked whether the law firm or its client was liable under the agreements with the third parties to pay for the items supplied by those parties. The Court of Appeal emphasized that the absence of any evidence to support the conclusion that it was the law firm's clients who were bound to the contracts with the third party suppliers meant that it could not meet its onus to establish that the firm was acting as an agent when it incurred the disbursements.⁴⁰ Accordingly, the Federal Court of Appeal allowed the appeal, holding that the law firm should have collected and remitted GST on the disbursements. *Merchant Law Group*, then, stands as an important reminder that a central feature supporting a finding of an agency relationship will be the alleged agent's ability to affect the would-be principal's legal position with a third party.⁴¹

In *City of Calgary*, a 2010 decision by Justice Pelletier for the Federal Court of Appeal, at issue was whether the City of Calgary was entitled to ITCs for the GST it incurred in the course of constructing transit facilities pursuant to certain agreements that the city had in place with the province of Alberta. The city's argument was that in acquiring, constructing and making public the new transportation facilities in Calgary, what it was really doing was making a taxable supply to the province that was separate from its provision of the exempt municipal transit services to the public. Therefore it was entitled to ITCs on the basis that

37 *Ibid* at paras 15, 16, 19.

38 *Ibid* at para 28. This position is consistent with the observation that in seeking the distinctive or essential elements of an agency relationship, the first such element is that the agent enjoys the power to alter the legal relationships of the principal with third parties. See e.g. Munday, *supra* note 4 at 9-10.

39 See *Merchant TCC*, *supra* note 35 at paras 21 and 23 and *Merchant Law Group*, *supra* note 10.

40 *Ibid* at paras 22, 24, 26 (this being a tax matter, the burden was on the taxpayer to refute the Crown's assumptions of fact).

41 See Robert G Kreklewetz & John Bassindale, "Crown GST Wins Provide Lessons" (2010) 18:10 Can Tax Highlights 10 at 11; see also *Wagner v The Queen*, 2012 TCC 59, 212 ACWS (3d) 1058. For a discussion on the "essential character" of agency, see also FE Dowrick, "The Relationship of Principal and Agent" (1954) 17 Mod L Rev 24 at 36.

the goods and services were acquired in the course of its commercial activities. According to the Crown, the goods and services were acquired by the city in the course of its making a single exempt supply of municipal transit services. By way of background, legislation in Alberta required the City of Calgary to develop plans for public transit that would be funded by the city. The city was obligated to submit its plans for the province's approval. At the time of granting such approval, the province offered to share the costs of the transit project with the city. That is what happened in this case, as the city and the province entered into cost sharing agreements ("CSAs") for a municipal transit service.⁴²

Providing a municipal transit service is itself an exempt supply under the *Excise Tax Act*, which means that no ITCs can be claimed by the provider of the service for any GST paid on the purchases related to making the supply. The city's argument was that the construction of the transit system and its operation were separate supplies, with the construction being a supply to the province for the consideration received under the CSAs. Associate Chief Justice Rossiter for the Tax Court agreed with this position, finding that the construction of the municipal transit system and its operation were separate commercial activities, with the city contractually bound to the province in the CSAs to provide taxable supplies.⁴³

Associate Chief Justice Rossiter also considered the argument made by the city that in developing the transit facilities, it was acting as the "quasi-agent" for the province. The Tax Court rejected this argument, stating that "notwithstanding the high degree of control exercised by the province over the development of the transit facilities, the [city] was not acting as its agent." The effective independence of the city was evident under the province's legislation which left "the choice whether to proceed with the construction of any given facility" to the city.⁴⁴

The Crown appealed to the Federal Court of Appeal, arguing that the Tax Court had misinterpreted the CSAs and therefore reached the wrong legal conclusions. Justice Pelletier for the Federal Court of Appeal first reviewed the provincial legislative context before turning to the nature of the CSAs in place between the City of Calgary and the province of Alberta. Under these contracts, the Court of Appeal noted that if the city, for whatever reason, did not apply for funding from the province, it would nevertheless remain responsible for the establishment of the transit system and its cost. Therefore, Justice Pelletier concluded that the city was not required to construct a transit system, but rather that the city was required to construct those portions of the system for which it received funding.⁴⁵

42 *Supra* note 11 at paras 1-4. The legislation was the *City Transportation Act*, RSA 2000, c C-14. The transportation facilities covered by the CSAs in this case related to the extension of the city's Light Rail Transit system as well as refurbishments to existing transit equipment and the acquisition of communications and signalling equipment (*ibid* at para 11).

43 *Ibid* at para 22. See also *City of Calgary v The Queen*, 2009 TCC 272, 2009 GTC 969 at paras 68 and 73.

44 *Ibid* at para 57.

45 *City of Calgary*, *supra* note 11 at para 44.

As the Court of Appeal described the arrangement, there was nothing in the CSAs that “requires the City to construct anything whatsoever. The agreement is a funding agreement which provides for the creation of a fund from which the City may fund certain approved transportation projects.”⁴⁶ It would be an error, then, “to construe these agreements in such a way so as to make the City the Province’s general contractor for the construction of a municipal transit system.”⁴⁷

The *City of Calgary* case is interesting in that it lays out some of the types of law and facts that could combine in a future case to directly raise the self-authorizing agent problem. While also involving an ultimately unsuccessful taxpayer, *Merchant Law Group* more directly raises the issue of agency, emphasizing that the common law mandates that the putative agent’s ability to bind its principal be on the basis of some form of authority. Indeed, given the Federal Court of Appeal’s decision in the case, it is worth asking what additional facts might be needed to transform the law firm in *Merchant Law Group* into an apparent agent of its client as it incurred disbursements. Perhaps most intriguingly, can the law firm act in such a way as to become an agent in the eyes of the third parties supplying the various items to the law firm? It is also fascinating to contemplate, in this way, what might happen in a future case that, to some extent, coalesces around an extended version of the factual milieu of *City of Calgary*, with an agency scenario that raises the supposed agent’s authority on behalf of its principal. One might suppose here, for instance, that the *City of Calgary* case dealt with a specific infrastructure project for which the province entered into a CSA. If, in the course of the construction phase, the city were to make certain representations to third party suppliers, might these be capable of binding the province? Would it matter if the third party dealing with the city knew that there was a CSA in place between the city and province, but was not familiar with its terms? Undoubtedly, other potential situations involving what appears to be self-authorizing agency could be envisioned, such as those involving more straightforward public or private procurements. It is perhaps worth focusing the discussion here on P3s because these projects are often highly visible, typically involve an array of different actors with sometimes mixed motivations, and feature quite large sums of money. These arrangements may also raise the prospect of agency in new fact patterns more complex than those previously considered under the common law in the 19th and 20th centuries.

46 *Ibid* at para 52.

47 *Ibid* at para 53. The Supreme Court upheld the Federal Court of Appeal’s decision in *City of Calgary* on the basis of the distinction between the provision of a single exempt supply and the provision of two supplies—a taxable one to the province as well as the exempt supply. Rothstein J for the Court concluded that in order to deliver a municipal transit service, the city had first to construct the transit system, meaning that the purchases at issue in this case were properly viewed as inputs to the single supply of the municipal transit service. Rothstein J’s decision affirming the Federal Court of Appeal was largely expected, and the Court did not comment on the agency issue dealt with at first instance by Rossiter ACJ (2012 SCC 20 at para 3, 429 NR 330).

C. Case Study: Self-Authorization in a Public-Private Partnership

As an imagined example of where a self-authorizing agent problem may arise in a contemporary situation with high stakes, one might consider a scenario where there is a widespread consensus on the need for a particular new investment in public infrastructure, for instance, a new multi-lane road/highway facility. P3 projects present an interesting nexus of the types of facts that yield what could be regarded as self-authorizing behaviour on the part of public or private actors, as the discussion below should illustrate. Given that large amounts of federal government stimulus spending are still in recent memory, one might imagine the federal government and a provincial government entering into a cost-sharing agreement to develop the new transportation infrastructure. To make this slightly more concrete, suppose that a province issues a formal request for proposals (“RFP”) for interested parties to bid on the right to design, build, operate and maintain a new road that runs through a particular city (or cities).⁴⁸ Perhaps in the interests of operating cost recovery, the RFP states that the province would permit the successful bidder to operate at least part of the road as a toll facility and that, to this end, the province shares with bidders the results of a survey it commissioned of expected facility use. Now, further suppose that by the time the province’s initial study on anticipated traffic is completed, the RFP is issued, parties prepare and submit their bids, a successful party is chosen and the “final” negotiations are entered into, some considerable time has elapsed. As a result, although the need for the infrastructure investment is pressing, prevailing economic conditions and local socio-demographics have changed enough such that the bidders’ original estimates of toll revenue look to be significantly overstated and the operation appears to face a real shortfall.

The wildcard is the city’s conduct at this point. Of the three governments involved (in some capacity) in this project, it is the city that is “closest to the people” and faces the strongest and most immediate need to have construction begin on the new infrastructure. Just to clarify the proposed facts, while the city is not a party to the CSA with the federal and provincial governments and did not run the RFP process,⁴⁹ the city’s cooperation with the successful bidder is obviously essential to the project’s completion. As such, the RFP may have contemplated access and other similar types of agreements with the municipality. But when faced with the prospect of further lengthy delays waiting for circumstances to change or possibly scrapping the project plans altogether and starting again, the city reasonably decides that it is in its self-interest to provide the successful bidder with a facility use guarantee

48 This being a hypothetical, it really does not matter which province and city (cities) are in mind. A contrast between the province of Ontario and the City of Toronto is interesting, however, in that it raises a possible situation, like that seen in recent years, where the municipality and the province (and indeed the federal government) are run in effect by three different political parties, with sometimes quite different priorities.

49 Or perhaps the municipalities involved were parties to the CSA but the terms of this agreement are not known to the public or to the private sector actors who respond to the province’s RFP.

on top of whatever toll revenue the operator is able to attract. The city might even expect that it would have to pay little or nothing on such a top-up guarantee to the private operator of the new infrastructure.

In so doing, a potential problem emerges: Has the city changed the terms of the original infrastructure procurement to the detriment of the other bidders? If so, it is not the city that would face the prospect of litigation, as it was not a party to the issue of the RFP.⁵⁰ Instead, the province would bear the brunt of any claim that the city, acting as the province's agent in the implementation of the build, has unfairly changed the terms of the original request for proposals after-the-fact. How seriously should the province regard this new risk? After all, it wants to have the new infrastructure built for its own reasons, and it may be privately quite content to allow another government to provide the guarantee to the operator. Can the city, acting in its own stead, seemingly authorize itself as agent of the province such that its actions would risk introducing a lack of fairness into the procurement process? As Busch and Macgregor have recently asserted in this context, "[i]t seems almost unarguable that, of the three actors involved in agency situations, third parties are the most deserving of the law's protection."⁵¹ Still, when public procurement is married with alleged agency, the situation becomes further complicated, given that the complaining parties in the presented scenario are not the successful bidder—the third party who deals directly with the "agent"—but are rather the unsuccessful respondents to the original request for proposals.

The sample situation presented here could be contrasted with a similar one in which the government authority has specifically included in the RFP that it reserves the right to engage in subsequent negotiations with the successful bidder following the bid evaluations. As McGuinness and Bauld note, it is entirely conceivable that the tendering public authority in the case of an RFP would wish to reserve a right to negotiate with one (or more than one) of the bidders following the conclusion of the tendering competition. Provided that such negotiations are provided for in the terms and conditions of the RFP/tender documentation, they will generally be acceptable.⁵² On the other hand, McGuinness and Bauld also remark that although a later right to negotiate might be consistent with the creation of limited rights under the initial tender, it would also seem to be open to a court to insist that the later negotiation be conducted in strict accordance with the original terms of the RFP. The authors' example is that if an RFP provides for the later negotiation with a preferred proponent selected through evaluation, there seems to be an implicit

50 For a discussion of the fairness obligations arising in public procurements, see Paul Emanuelli, *Government Procurement*, 3d ed (Markham: LexisNexis Canada, 2012).

51 Danny Busch & Laura Macgregor, "Introduction" in Danny Busch & Laura J Macgregor, eds, *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge, UK: Cambridge University Press, 2009) 1 at 2.

52 See Kevin McGuinness & Stephen Bauld, *Municipal Procurement*, 2d ed (Markham: LexisNexis Canada, 2009) at 319, citing *Elite Bailiff Services Ltd v British Columbia*, 2003 BCCA 102, 223 DLR (4th) 39.

undertaking that the later negotiations will not take place between the public authority and another bidder whose bid was evaluated at a lower level.⁵³ The authors also analogize this to amending the original contract (say for 100,000 widgets) to take into account new circumstances prevailing after the bidding process has closed (say with conditions now supporting an order for 115,000 widgets).⁵⁴

However, leaving open the possibility of later negotiations with the selected bidder in order to take into account changing economic conditions still fits entirely within the public procurement context and does not yet raise the issue of agency. In contrast to a straight procurement problem, it might be tempting to suggest that situations in which one party seemingly authorizes itself to bind another in the fashion discussed above are likely to be quite rare—indeed they probably are—as most conceivable cases can be dealt with quite effectively under the long-developed common law of agency. But public works projects and government stimulus spending, in general, may fairly be described as provoking the problem under certain fairly ordinary circumstances: There is a sharp need to get project construction underway *now* (projects are to be “shovel ready” by a near point in time or no funding contributions will be forthcoming) and the assorted parties involved might be willing to sort out (or think about) any agency or relationship issues that might arise *later*. One might generalize further to suggest that the more complicated public procurements become, the more likely they would be to raise these types of agency concerns. The same might also be said about private procurements or outsourcing arrangements, where corporations operate through a dense web of affiliates and subsidiaries to work on a deal. Alternatively, perhaps the self-authorization problem emerges as a result of the disaggregation of the supply chain into its separate, functionally distinct parts.⁵⁵ It is reasonable to anticipate that improvements to

53 McGuinness & Bauld, *supra* note 52 at 319. If the original documentation raised a right for the province, for example, to negotiate with the successful bidder, does this mean that the *city* is free to enter into whatever forms of agreement it wishes, purely on its own volition?

54 *Ibid* at 320. Arguably this would not be problematic, as the change in prevailing conditions after the bidding process has closed would have affected whichever bidder happened to be selected as having had the best bid. Accordingly, it would not be unfair to those unsuccessful bidders to change the contract on offer to the winner in this way. In the hypothetical, do the changes away from the assumptions made in the facility use survey to the prevailing conditions in place as of the time of the negotiations with the successful bidder qualify as this kind of change that would have affected any bidder selected under the RFP? This might pose an interesting question in a procurement context; however, it is not important for present purposes, so it will not be dealt with in the agency discussion that follows.

55 The recognition of this prospect goes back many decades, although it was not stated in this way at the time. In JL Montrose, “Liability of Principal for Acts Exceeding Actual and Apparent Authority” (1939) 17:10 Can Bar Rev 693 at 699, Montrose observed that in the case of a partnership, “[a]s between active partners, restriction of authority is generally merely a division of function: their separate functions together cover everything usually done in the business, and, of course, jointly they can do anything.” It is not much of a step beyond this type of functional division within one business (such as Montrose’s partnership) to contemplate the functional division by project, with the various functions performed by specialized entities. Brown for his part notes somewhat similarly that it is at least arguable that the archetype of the apparent authority doctrine is “both inadequate and inapt when applied to the complexities of organisational behaviour in the late twentieth century” (*supra* note 8 at 362).

productivity and developments in new information and communication technologies will permit ever greater disaggregation and specialization. In the hypothetical, then, the province may be acting as the coordinating entity in the infrastructure procurement, where there are several government bodies and an array of private and/or third sector actors involved. The point here is that this landscape of ever greater numbers of actors combining in various ways to design, build, operate and maintain infrastructure creates ripe opportunities for potential agency issues to arise.

III. AGENCY IN THE CASE LAW

A. Apparent and Implied Authority

To the extent that the principles of agency law are relevant to this procurement process at all, it would be through the city (in the example above) acting on the apparent authority of the province. As Waddams explains, where the agent is in fact expressly or impliedly authorized to contract with a third party and the third party knows of this and deals with the agent on that basis, there is no difficulty in determining the nature of the contractual relations between the parties.⁵⁶ Beyond this, the general tenet of agency law is to protect the reasonable expectations of the third party rather than the intentions of the promisor.

There are three seemingly essential elements to a finding of agency by way of apparent authority: (i) representation by the principal to the third party; (ii) reliance on that representation by the third party; and (iii) a change in the position of the third party based on that reliance.⁵⁷ The first of these elements is what is at issue for present purposes. As Harvey and MacPherson explain, “[o]rordinarily, a third party cannot rely on a representation that comes from the agent.”⁵⁸ The authors point to *AG for Ceylon v Silva* as the commonly quoted authority for this point: “no representation by the agent [as to the extent of his authority] can amount to a ‘holding out’ by principal.”⁵⁹ Fridman adds that an agent cannot confer apparent authority on himself by virtue of his own act, “in the absence of some act on the part of the one alleged to be his principal that gives the outside world dealing with the ‘agent’ the impression that he is an agent and possesses the relevant authority.”⁶⁰

The facts of the present case are somewhat unusual in terms of how agency law would view them, however. In most cases of apparent authority, the third party deals with the alleged agent on the presumption that it has been

56 SM Waddams, *The Law of Contracts*, 5th ed (Aurora, ON: Canada Law Book, 2005) at para 256.

57 Harvey & MacPherson, *supra* note 3 at 68. But see Tan, *supra* note 7 at 197 for a critique of the second and third elements.

58 Harvey & MacPherson, *supra* note 3 at 68.

59 *Ibid*, citing *AG for Ceylon v Silva*, [1953] AC 461 at 479, [1953] 2 WLR 1185 (PC) [*Silva*]; for a recent example, see *4414790 Manitoba Ltd et al v Nelson et al*, 2003 MBQB 183, 176 Man R (2d) 188 [4414790 *Manitoba*]. 4414790 *Manitoba* is discussed further below.

60 Fridman, “Recent Developments”, *supra* note 5 at 437.

authorized by its principal; in the hypothetical, the successful bidder (and the other respondents to the RFP) first had a relationship with the province and *then* the city arrived on the scene to deal with the successful respondent. The concern is over how the unsuccessful respondents might view the city's role in the infrastructure development process.⁶¹ Of course, what is a flawed procurement process instead of post-contractual administration is a matter of judgment. In any event, a duty to award the contract as initially responded to forms a core part of how the courts will deal with a procurement process, so any finding that the city has been acting as agent of the province could be problematic.

Following *Silva*, there would seem to be a general presumption against an agent's "self-authorization," on the basis that permitting agency to arise by such behaviour would tend to contradict the essential nature of agency.⁶² If the city on the sample facts has not claimed to be acting on behalf of the province (and in fact asserted the contrary), self-authorizing conduct as a foundation for establishing agency would appear unlikely. Fridman remarks that "[i]f an agent did not have ostensible authority to enter into a transaction . . . then such an agent cannot confer authority upon himself to enter into such a transaction by indicating to the third party that the requisite assent by his principal has been given by and through the agent himself."⁶³

In addition, if a third party (such as an unsuccessful respondent to the RFP) has notice of the fact that the alleged agent has neither actual nor apparent authority, or the third party ought to have been alert to the lack of such authority, then the third party will not be able to rely on agency to make the purported principal liable.⁶⁴ This would seem to suggest that if the successful bidder's rival bidders were made aware that the city is engaged with the infrastructure development on the basis of the city's own interests—possibly in parallel to the province's procurement—then they would have little resort when they later learn that the city has made certain concessions outside of the scope of what was originally contemplated in the RFP, albeit possibly in return for obtaining new items of value from the successful bidder in exchange.⁶⁵

61 The relevant risk here is not necessarily that the city would face liability; rather, an unsuccessful rival bidder challenging a formal procurement might in some circumstances be able to resort to the Canadian International Trade Tribunal, which has the authority to order the *federal* government to restart what the Tribunal has found to be a flawed procurement process or to award damages for lost profits. That said, the CITT's mandate extends to hearing complaints related to the award of federal procurement contracts and not to complaints over post-award contractual administration. See Emanuelli, *supra* note 57 at 51.

62 Fridman, *The Law of Agency*, *supra* note 1 at 125.

63 *Ibid.* See also GHL Fridman, *Canadian Agency Law*, 2d ed (Markham: LexisNexis Canada, 2012) at 85-87.

64 Fridman, *The Law of Agency*, *supra* note 1 at 124.

65 But what if the would-be agent's conduct that raises the spectre of agency also raises a doubt in the mind of the third parties who originally knew that there was no agency but now, seeing the same conduct that raises that very prospect, consider it possible? A one-time statement of disavowal of agency may not suffice.

Further, if the province (as opposed to the city) were to make it known that the city's role in the infrastructure development was really as an independent third party acting in parallel to its original RFP process, it would be difficult to see how the rival bidders might later claim that the city's involvement has led to a breach of the province's duty of fairness owed to the RFP respondents. As one American case put it, "[a]pparent authority loses all of its apperency when the third party knows that actual authority is lacking."⁶⁶

Therefore, the only way that any relationship of agency could arise on the sample facts would be by way of the province's endowment of the city with implied authority. Generally, the customary use of an *implied* or apparent authority basis for agency is to assert that an agent who was actually appointed with some limited express authority has also been provided with additional apparent authority, upon which the third party plaintiff has transacted business with the agent.⁶⁷ Agency on the basis of estoppel does not depend in this way on an actual relationship between the would-be "principal" and its "agent," but rather how that relationship is represented to third parties. The Ontario Court of Appeal has remarked that agency by estoppel is based on the perception left with a third party: "Agency by estoppel... only serve[s] to prevent the principal from denying the agency relationship where his conduct ha[s] reasonably led a third party to believe that the relationship existed. The doctrine [runs] between the principal and third party and not between the principal and the person found to have apparent authority to act on the principal's behalf."⁶⁸ As was noted in a Canadian case (which followed *Silva* on this point) some decades ago, in the absence of a representation by the principal itself (or by someone who else who has the authority to bind the principal), there can be no apparent authority and no basis for estoppel.⁶⁹

Busch and Macgregor observe that this representation may be very weak, however, simply consisting of placing the "agent" into the appropriate position.⁷⁰ This situational weakness carries at least in part the implication that apparent authority operates as a bar for third parties where the "principal" might after-the-fact try to disown the agent's action. The essential point is that, classically under the common law, the apparent authority can be traced back to an act or omission of the principal. In an influential older article, Seavey explained on this point that "a principal is bound where the agent acts in the exercise of his power, although without authority,"

66 *Home Owners Loan Corp v Thornburgh* (1940), 187 Okla 699 at 512 (Supreme Court Okla), cited in FMB Reynolds, *Bowstead and Reynolds on Agency*, 18th ed (London, UK: Sweet & Maxwell, 2006) at §8-023.

67 Fridman, *The Law of Agency*, *supra* note 1 at 128.

68 *CMLQ Investors Co v Cajary Building Corp et al* (1999), 127 OAC 284, 92 ACWS (3d) 908 (Ont CA) at para 2.

69 See *Hollytex Carpet Industries Ltd v Canadian Acceptance Corp* (1979), 16 AR 588 (available on QL) (AB SC), cited in Fridman, "Annual Survey of Canadian Law: Commercial Law," *supra* note 31.

70 Danny Busch & Laura Macgregor, "Apparent Authority in Scots Law: Some International Perspectives" (2007) 11 Ed L Rev 349 at 357.

with special emphasis placed on the word “power.”⁷¹ It is notable, though, that for Seavey, while agency is centred on a *grant* of power, what is significant about this is that it could be described as “consensual.” The law finds an agency relationship upon the existence of a voluntary act by the principal.⁷² Does this mean that Seavey would not have countenanced agent self-authorization? He might have; note his comment that “[t]he representation may be made in a great variety of ways, and so also the communication.”⁷³

That said, the principal’s conduct can in some circumstances amount to an indirect or implied representation that a person has authority to act as agent. Harvey and MacPherson specifically make note of situations that feature “the principal standing by mute while someone deals with a third party apparently on behalf of the principal,” although the authors remark that such cases would be extremely rare.⁷⁴ The authors name two older English cases as establishing apparent authority from the principal’s silence⁷⁵ and two Canadian cases in which standing by *plus* other factors led to the finding of apparent authority.⁷⁶ The Supreme Court of Canada, in a recent discussion of estoppel by representation, explains that it is difficult to found such estoppel on the silence of a party unless that party was under a duty to speak. “Silence or inaction will be considered a representation if a legal duty is owed by the representor to the representee to make a disclosure, or take steps, the omission of which is relied upon as creating an estoppel.”⁷⁷ Again, this sets a high threshold before a court will take a party’s apparent silence or seeming acquiescence to amount to a representation.

On the present facts, then, given the city’s role in the infrastructure development, the question is whether the province’s seeming acquiescence to the city’s role implies an agency relationship. In general, when a business represents someone to be its agent by way of acquiescing in similar contracts made for it by the apparent agent in the past, it will not then be able to deny the existence of agency, as the principal will have effectively been ‘holding out.’⁷⁸ As Munday suggests, following recent reminders of this kind by the English courts, the doctrine of apparent authority is really based on estoppel by representation, with the principal

71 Warren A Seavey, “The Rationale of Agency” (1919) 29 Yale LJ 859 at 861. Seavey’s definition is that “[a]gency is a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other” (*ibid* at 868, footnote omitted).

72 *Ibid* at 863.

73 *Ibid* at 875. On the other hand, Seavey also “assumed that A is not authorized to make the representations as to the extent of his powers” (*ibid*).

74 Harvey & MacPherson, *supra* note 3 at 70.

75 *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd*, [1964] 1 All ER 630, 2 WLR 618 (CA) [*Freeman*] and the trial judgment in *Hely-Hutchinson v Brayhead Ltd*, [1967] 3 WLR 1408 (CA).

76 *Gillies v Gibson* (1907), 7 WLR 243, 17 Man R 479 (Man KB); *Calgary Hardwood & Veneer Ltd v Canadian National Railway*, 100 DLR (3d) 302, [1979] 4 WWR 198 (Alta CA) [*Calgary Hardwood*].

77 *Ryan v Moore*, 2005 SCC 38, [2005] 2 SCR 53 at para 76.

78 See *Doiron v Devon Capital Corp*, 2003 ABCA 336, 232 DLR (4th) 732.

representing or causing it to be represented to a third party that some other person has the authority to act on its behalf, followed by the third party dealing with this person on the basis of this representation.⁷⁹ For Munday then, apparent authority is not authority as such: “Rather, the law gives effect to the illusion of authority.”⁸⁰ The point to be made is that the relevant acts (or omissions) that have the effect of holding out are those of the purported principal,⁸¹ the province in the present hypothetical.

B. Passivity and Acquiescence

Mere acquiescence rarely provides a basis for a positive obligation. In a recent edition of *Bowstead and Reynolds on Agency*, the venerable text asserts that in the doctrine of apparent authority, “[t]here must be a representation, or in *Restatement, Third* terms a *manifestation*.”⁸² In this way, while agency on the part of the city could be inferred from a course of dealing, the implication would only seem possible where there is some external, objective foundation in the course of dealing to support it. Put more simply, a positive act on the part of the principal would normally be required. Moreover, in terms of acquiescence, *Bowstead and Reynolds* holds that apparent authority on the basis of the agent’s own conduct can only arise where the principal “put the agent in a position where he appears to be authorised to make [the representation].”⁸³

Fridman explains that “[h]istorically and conceptually, the position of the agent has been defined and limited by reference to the powers entrusted to him by the principal.”⁸⁴ Whatever the nature of the “authority” invoked by a court to support the finding of agency, the ultimate source of that authority is some act or statement on the part of the principal. “It is not what the agent purports to do or say that governs his relationship with a third party, nor the latter’s relationship with the principal. It is the effect of the principal’s behaviour that determines such matters.”⁸⁵ It is for this reason that Fridman remarks that any suggestion that the agent, “by his own acts or statements, can alter or affect the existence, nature or scope of his authority, and, by so doing, make significant changes to the character of his agency, is both startling and disquieting.”⁸⁶

The starting point in the Canadian jurisprudence for any recognition of self-authorizing agency is the dictum of Chief Justice Laskin in *CanLab*, considered above in Part II. In the course of his remarks in that case, the Chief Justice stated:

79 Munday, *supra* note 4 at 60, citing *ING Re (UK) Limited v R & V Versicherung AG*, 2006 EWHC 1544 at para 99, [2006] 2 All ER (Comm) 870 (QB).

80 Munday, *supra* note 4 at 60.

81 See Reynolds, *Bowstead and Reynolds on Agency*, *supra* note 66 at §3-005.

82 *Ibid* at §8-017 [emphasis added].

83 *Ibid* at §8-022.

84 GHL Fridman, “The Self-Authorizing Agent” (1983) 13 Man LJ 1 at 1.

85 *Ibid*.

86 *Ibid* at 2.

“I do not subscribe to the proposition, in so far as it purports to be a general statement of the law, that a representation by an agent himself as to the extent of his authority cannot amount to a holding out by the principal. It will depend on what it is an agent has been assigned to do by his principal, and an overreaching may very well inculpate the principal.”⁸⁷

Fridman explains that when the facts in a given case are such that they entitle a court to determine that one person has been “held out” by another in a manner sufficient to permit a third party to conclude that the latter person was the agent of the former, “in accordance with general principles that have long been established, the one who has held out the other is estopped from denying that the latter was not truly an agent.”⁸⁸

Historically, the circumstances where a party has even attempted to make an argument of self-authorization typically fall into a few relatively narrow classes of cases, such as those dealing with insurance or the sale of property. In *Berryere v Fireman’s Fund Insurance Co.*,⁸⁹ an insurance company was held liable where its agent had issued a temporary “pink card” to the plaintiff. Significantly, before the company had actually made any decision about whether to provide the coverage, its agent told the plaintiff that he had been approved. The majority of the Manitoba Court of Appeal decided that the insurance company held out the agent as having the necessary authority to issue pink cards, and for this reason the plaintiff was entitled to believe that the agent in fact had this authority.⁹⁰ Fridman emphasizes that a material factor in the majority’s decision was that the insurance company had cloaked its agent with the impression that he was permitted to issue the temporary coverage. For this reason, even when the agent self-authorized himself to make a determination (which he really had no power to make), he was still acting consistently with the company’s earlier holding out of his authority.⁹¹

Berryere may be usefully contrasted with another case, *Jensen v South Trail Mobile Ltd.*⁹² In *Jensen*, the plaintiff entered into a contract to purchase a trailer and to trade-in a model that he owned. The defendant company held out its agent as having the authority to sell its trailers, but the agent’s actual authority was limited in that he was not permitted to conclude transactions until they had been approved by head office—a limitation the plaintiff was aware of because the agent had told him. After having reached the oral agreement on the trade-in and purchase deal, the agent was unable to obtain the necessary head office approval, but nevertheless told the plaintiff that he had obtained it. The majority of the Alberta Court of Appeal held that since the plaintiff was aware of the agent’s limitations and there was no evidence

87 *CanLab*, *supra* note 9 at 800. See also the discussion of this passage in Fridman, “The Self-Authorizing Agent,” *supra* note 84 at 2.

88 See Fridman, “Recent Developments,” *supra* note 5 at 436.

89 (1965), 51 DLR (2d) 603, 1965 ILR 1 (Man CA) [*Berryere*].

90 *Ibid* at 611-2.

91 See *ibid* at 611; see also Fridman, “The Self-Authorizing Agent,” *supra* note 84 at 6.

92 28 DLR (3d) 233, [1972] 5 WWR 7 (Alta SC (AD)) [*Jensen*].

that the defendant had ever indicated that this had been modified, the transaction could not be sanctioned. The critical factor for the majority was that there was no evidence of any act of the company that could be construed as a holding out to the plaintiff of the agent's authority.⁹³ The question at issue, then, was whether the agent's representation to the plaintiff that he had received the requisite approval bound the defendant. The majority asserted that the agent's own authorization that his principal had approved the deal could not bind the principal when it had not vested the agent with the authority to do so by any act or omission.⁹⁴

*Cypress Disposal Ltd v Inland Kenworth Sales (Nanaimo) Ltd*⁹⁵ is another case similar to *Berryere* and *Jensen*. In *Cypress Disposal*, the defendant company's salesman forged a document in the deal with respect to a material term and the issue was whether the plaintiff could rely on this term (a penalty clause) in suing the defendant for non-compliance. The majority of the British Columbia Court of Appeal held that because the parties had not actually agreed on a contract containing the penalty, there was no meeting of the minds and hence no ability for the plaintiff to rely on that contract. The majority noted that the only representation by the principal to the plaintiff was that the salesman had no authority to contract; statements made by the salesman to the contrary could not themselves change that.⁹⁶ The minority dissented on the treatment of the same point made in *Berryere* and *Jensen*—that is, that the issue was not whether the salesman had purported to accept the offer; rather, the issue was whether the salesman had told the plaintiff that the offer had been accepted by the defendant company.⁹⁷ The minority argued that it did not matter that the agent had in fact not been authorized to do the particular act, citing to an old British case that noted: "It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."⁹⁸ The bottom line for the minority of the Court of Appeal was that "the power to communicate acceptance may be found in an agent that is not permitted to decide that the [contract] should be accepted."⁹⁹

93 *Ibid* at 240.

94 *Ibid* at 241-242.

95 54 DLR (3d) 598, [1975] 3 WWR 289 (BCCA) [*Cypress Disposal*].

96 *Ibid* at 601.

97 *Ibid* at 605-606.

98 *Ibid* at 606, citing *Barwick v English Joint Stock Bank* (1867), (1866-67) LR 2 Ex 259 at 266, (1867) 36 LJ Ex 147 per Willes J. On a similar matter, Virtue J of the Alberta Court of Queen's Bench decided in a case from the early 1990s that the Court could not accept the defendant's argument that when the would-be principal turns over a document to one officer of a corporation in order for it to be executed by all of the firm's officers, the officer becomes clothed with authority to alter the alleged principal's position. It could not be said that the "agent" was endowed with authority simply by virtue of being placed in the position of carrying out the firm's business. See *Royal Bank v Highfield Corp* (1992), 123 AR 235 at para 22, 83 Alta LR (2d) 144 (QB).

99 *Cypress Disposal*, *supra* note 95 at para 45. It is interesting to contemplate whether, in light of the more recent English cases discussed below and the concept of "self-authorization" developed in this article, the treatment of this point could lead to a different outcome for these cases. See Part IV, below.

Significantly for present purposes, the House of Lords usefully considered the respective *dicta* in *Berryere, Jensen, and Cypress Disposal in Armaqas Ltd v Mundogas SA*¹⁰⁰ and came to some clarifying statements that appear to have held sway subsequently in Canadian courts. Lord Keith for the Law Lords observed that an agent's ostensible authority may arise where the agent has had a course of dealing with a particular third party and the agent's principal has acquiesced to the dealing and has honoured transactions that have previously arisen from it. Importantly, however, Lord Keith maintained that "it is very difficult to envisage circumstances in which the estoppel could arise from conduct only in relation to a one-off transaction."¹⁰¹ In such a case, no representation by the agent himself can help the plaintiff; the plaintiff must be in a position to rely upon some representation made by the purported principal as to the agent's authority.¹⁰² Lord Keith then turned to the Canadian trio of cases and emphasized that "[i]t may well be that *Berryere's* case was rightly decided on its facts, having regard to the wide powers ostensibly given to the agent to bind the insurance company."¹⁰³ However he sharply disagreed with the stress placed in the Canadian cases on the fact that while the agent did not have ostensible authority to enter the contract, the agent did tell the third party that he had obtained actual authority to do so.¹⁰⁴

As Lord Keith then asserted, "[i]t must be a most unusual and peculiar case where an agent who is known to have no general authority to enter into transactions of a certain type *can by reason of circumstances created by the principal* reasonably be believed to have specific authority to enter into a particular transaction."¹⁰⁵ In *Rand v MacDonald*,¹⁰⁶ then, Justice Forget of the Ontario Divisional Court reflected on the state of the jurisprudence following the statement of Chief Justice Laskin (on this point) in *CanLab*. Justice Forget summarized the developments in the case law by citing to *Freeman*:

Although passive acquiescence may amount to a holding out or a permitting so as to create ostensible authority, that can only happen, in the absence of a direct representation by the principal, when the agent is in the course of his ordinary duties: "*There is no 'permitting' in the sense of binding the principal where the agent is not in the course of his ordinary duties or where there is no representation at all from the principal or from someone in a directory capacity to act for a corporate principal.*"¹⁰⁷

100 [1986] 2 WLR 1063, [1986] AC 717 (HL) [*Armaqas* cited to AC].

101 *Ibid* at 777.

102 *Ibid* at 778.

103 *Ibid* at 779.

104 *Ibid*. As will be seen below, later courts and commentators have reflected somewhat differently on this point.

105 *Ibid* [emphasis added].

106 (1995), 45 RPR (2d) 239 (available on QL) (Ont Gen Div).

107 *Ibid* at para 40, quoting from *Freeman*, *supra* note 75 and *CanLab*, *supra* note 9 [emphasis added].

Alternatively, as a later Alberta Court of Appeal decision put it, to hold the principal liable for the purported agent's conduct in the absence of a positive representation "would be to emasculate the requirement" for the principal to acknowledge the agency at all.¹⁰⁸ A more recent Manitoba case, *4414790 Manitoba*,¹⁰⁹ cited to Fridman, who relied on the speech of Lord Keith in *Armagas* to make the point explicitly: "*the relevant representation must come from the principal: it cannot come from the agent himself.*"¹¹⁰ The court in *4414790 Manitoba* continued on to state: "I do not see how [the alleged principal's] failure or refusal to participate in the negotiations can translate into her having held out ... that her husband had authority to sell the property on her behalf."¹¹¹ It seems at least arguable, then, that the principal's passive acquiescence to the alleged agent's self-authorization does not serve to support the implication of an agency relationship. An active (or "positive") act of holding out by the principal would have been required to endow the agent with apparent or implied authority to act on her behalf.¹¹²

As the Provincial Court of Saskatchewan (Civil Division) put it in another recent case where agency by estoppel was borne out, the defendant allowed the person at issue to hold himself out as the defendant's agent; based on this act on the part of the defendant, the plaintiff expended considerable time and money relying upon the alleged agent's instructions. The defendant, having led the plaintiff to believe in the authority of the "agent" by permitting him to play a "prominent role," could not later deny responsibility for work done pursuant to the agent's directions.¹¹³

In this way, *4414790 Manitoba* would appear determinative, perhaps all the more so given its reliance on *Armagas*. The policy evident in the decision also appears to be easily supported. Tellingly, Fridman's response to the conduct of a purported agent amounting to self-authorization was that this "view of the law, if ultimately it prevails, would be illogical, against principle, and potentially disastrous

108 See *Century Services Inc v Multi-Corp Incand Lobsinger*, 1998 ABCA 345 at para 23, 228 AR 41.

109 *4414790 Manitoba*, *supra* note 59.

110 *Ibid* at para 21, citing Fridman, *The Law of Agency*, *supra* note 1 at 114-115 [emphasis in original].

111 *4414790 Manitoba*, *supra* note 59 at para 26.

112 A ready example of sorts comes in the form of the indoor management rule in corporate law. Section 19(d) of the *Business Corporations Act*, RSO 1990, c B-16, provides that a corporation cannot assert against a person dealing with the company that a document issued by one of its officers or agents with the actual or usual authority to issue the document is not valid except "where the person has or ought to have, by virtue of the person's position with or relationship to the corporation, knowledge to that effect." A recent case illustrates the point: In *Molson Sports & Entertainment v Quattro Communications Inc* (2007), 27 BLR (4th) 163 at paras 21-24 (available on QL) (Ont SCJ), the Vice-President Finance of a company agreed to guarantee a debt of the company's subsidiary and, significantly, he asserted that he had authority to bind the parent company. Unfortunately for all involved, the Vice-President did not in fact have the necessary authority and the creditor sought to enforce the guarantee against the parent company upon the subsidiary's default. Because of the Vice-President's role, the Superior Court of Justice had no difficulty in finding against the parent company. The indoor management rule can be viewed in this way as a (rebuttable) statement that the defendant company had held out the putative agent as authorized by virtue of his position.

113 *Horne's Electric Ltd v Fix Building Products 2000 Ltd*, 2006 SKPC 13, 280 Sask R 300 at para 28.

in its practical consequences.”¹¹⁴ To the extent that a court might be called on to revisit whether an agency relationship can arise merely on external appearances and apparent passive acquiescence of the alleged principal, Fridman’s vociferous policy objections would still hold. It is not a stretch to insist that the impugned conduct of the “principal,” said to amount to the holding out, must be clear and unequivocal. Moreover, “to suggest that an agent can achieve such a result by his own, *unsupported*, unauthorized act, is to negate the very fundamentals of agency as it has been developed in what may be called ‘classical’ common law.”¹¹⁵

And yet while such a move might be traditionally quite challenging under the common law, the legal systems of civilian countries do not always share the common law’s reluctance. As Busch and Macgregor relate, a noteworthy element of Dutch law, for instance, is the possibility to “move beyond the principal’s conduct as the sole touchstone of liability.”¹¹⁶ Instead, a finding of agency may be based on the “risk principle” by which factors within the principal’s “sphere of risk” are relevant to the determination. These factors could include the place of the agent in an organization’s hierarchy, the non-transparent structure of the organization, or the particular kind of transaction involved.¹¹⁷ The basic task under the risk principle is to determine who should bear the risk for creating the impression of the agent’s power of representation.¹¹⁸

As Busch explains elsewhere, the general rule in Dutch law is that the effect of the unauthorized acts of an “agent” are that neither the principal nor the third party are bound under a contract concluded by the agent; the contract (or other act performed by the agent) is considered to be invalid.¹¹⁹ Apparent authority is founded upon the principle of the protection of reasonable beliefs. In Dutch law (and consistent with the foregoing discussion of the common law), the appearance of authority is established by the principal itself—*i.e.*, by means of its word or deed. However, here the conduct of the principal may also consist of inaction where the principal would have had a duty to inform the third party that the agent was unauthorized.¹²⁰ The interesting question, then, in Dutch law is how far this “of the principal’s own doing’ principle” can be said to extend. According to the “risk principle,” a third party will be protected not only where the appearance

114 See Fridman, “The Self-Authorizing Agent,” *supra* note 84 at 2.

115 *Ibid* at 15 [emphasis added].

116 Busch & Macgregor, *supra* note 70 at 367.

117 *Ibid*.

118 The authors add that while the provision in the Dutch Civil Code on apparent authority does stipulate that the reasonable belief held by the third party with respect to the existence of authority in the agent must arise from the principal itself, it is possible to identify a trend in Dutch legal commentary and in the decisions of the Dutch Supreme Court towards more of an emphasis on the risk principle (see *ibid* at 371).

119 Danny Busch, “Unauthorised Agency in Dutch Law” in Danny Busch & Laura J Macgregor, eds, *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge, UK: Cambridge University Press, 2009) 136 at 142.

120 *Ibid* at 149.

of authority has been created by the principal, “but also where it is due to other circumstances that come within the ambit of the risks borne by the principal.”¹²¹

Contemplating the risk principle is instructive because, as will be seen below, some of the more recent case law on agency has struggled with exactly how far the courts can go in classifying “conduct” as that of the principal such that a traditional agency law analysis can operate. Perhaps conceptual clarity would favour a more direct acknowledgment of the possibility for self-authorization in some circumstances.

IV. RECENT JURISPRUDENCE: THE COURTS GRAPPLE WITH SELF-AUTHORIZATION

A. The *First Energy* Case and Contemplating Departure from the Orthodoxy

Indeed, despite the doctrine’s longevity, the theoretical underpinnings of apparent authority are not as easily determined as one might think.¹²² Reynolds famously points out, for instance, that in the context of agency, the concept of estoppel relies on a rather different meaning from its customary usage in the common law; that is, the representation (from the “principal”) may be “very general indeed” and in fact the detriment suffered may be quite small.¹²³ Reynolds suggests that while the doctrine of apparent authority may depend on estoppel, it is probably better understood as being based on the same reasoning as that which holds contracting parties to the objective appearances of intention that they create.¹²⁴ In *Armagas* itself, Lord Keith explained that, in the ordinary case, an agent’s authority will itself be general in character, normally arising when the principal has placed the agent in a position that—to the outside world—can commonly be regarded as carrying authority to enter into transactions of the kind in question.¹²⁵

Nevertheless, the orthodoxy in agency matters is still very much that the representation upon which a third party relies must have been made either by the principal itself or by some other person already possessing the authority to represent the principal, and not by the “agent” itself.¹²⁶ Munday points out, however, that in some instances the English courts have strayed from this orthodox

121 *Ibid* at 150. Interestingly, there is Dutch authority that the function of a representative *within* the organization of the principal can lead to an appearance of authority which may be invoked by the third party (see Busch, *ibid* at 152). This may not sound so different from the common law cases where apparent authority is founded on the position (or title) of the agent *within* his employer’s organization. Query, though, whether a focus on the ‘agent’ having a place within the principal’s own organization matters in an age of outsourcing of non-core corporate functions, such that the agent’s place within the functional network created by the principal would be sufficient.

122 See e.g. Munday, *supra* note 4 at 61.

123 See Reynolds, *supra* note 66 at §§-029.

124 FMB Reynolds, “The Ultimate Apparent Authority” (1994) 110 LQ Rev 21 at 21-2.

125 *Armagas*, *supra* note 100 at 777.

126 See e.g. *Freeman*, *supra* note 75, as the classic expression of this principle.

position.¹²⁷ Thus, in *United Bank of Kuwait Ltd v Hammoud et al*,¹²⁸ third parties were allowed to rely on a solicitor's (false) statement that funds belonging to the defendant were shortly to come under the law firm's control. The solicitor undertook, with no actual authority, to transfer the funds to the defendant's account with the plaintiff. On the security of this undertaking, the plaintiff advanced a loan to the defendant, which was not repaid. In his judgment for the English Court of Appeal, Lord Staughton stated:

It is elementary law that an agent cannot hold himself out; the holding out must come from his principal, or from some agent duly authorised by the principal. So one might think that what Mr. Emmanuel himself said about the two transactions in which he was engaged could not by itself demonstrate that they were part of the ordinary business of solicitors, and thus within the authority which he was held out as having. But the defendants in these appeals do not take that point; and in my judgment they are right not to take it.¹²⁹

Lord Donaldson concurred with the reasons of Lord Staughton and the disposition of the case. To these, however, he added the emphasis that the false representations in question were made by a solicitor, a type of commercial actor with a particular responsibility in society. What matters in this context is his ostensible or apparent authority in the eyes of an "acute, experienced and suspicious" banker. Once the bank had duly established that the individual in question was in fact a solicitor in practice with the firm he purported to be a member of, the "burden of proof ... changes dramatically" for the reason that "[p]ractising solicitors are not to be regarded as potential fraudsters or accomplices to fraud."¹³⁰ The suggestion, accordingly, is that by virtue of being made by a solicitor, the act of self-authorization goes further than it would in another context where a greater "degree of confirmation" or "cross-checking" might be called for.¹³¹

Perhaps the most challenging case here is *First Energy*, a 1993 decision by the English Court of Appeal.¹³² In this case, the Court of Appeal considered a situation where a company arranged for an *ad hoc* financing through a senior manager of a bank while awaiting the establishment of a more permanent facility. The borrower

127 See *supra* note 4 at 74-6. Busch and Macgregor have made a similar observation. See Busch & Macgregor, *supra* note 70 at 370.

128 [1988] 3 All ER 418, [1988] 1 WLR 1051 (CA) [cited to WLR].

129 *Ibid* at 1064.

130 *Ibid* at 1065. Moreover, "[n]o person is admitted to the Roll of Solicitors unless The Law Society has been satisfied not only that he or she has complied with the training regulations, i.e. that they are competent lawyers, but also that, as individuals, they are of a suitable character to be members of a learned and respected profession" (*ibid*).

131 *Ibid*. See also Munday, *supra* note 4 at 76.

132 *Supra* note 12.

had previously dealt with the particular bank manager and knew that he did not have the authority to agree to the financing. Moreover, the borrower knew that the bank's decision would be communicated to it by a signed letter that bore two signatures. The senior manager prepared and signed the letter himself, informing the company that the bank had approved of the financing. This was not true, however, and the bank later sought to repudiate the arrangement. Interestingly, despite the fact that the company had notice that the bank's manager lacked the authority to act on his own, the Court of Appeal held that he did possess apparent authority. While this unusual case at first seems to undermine the traditional position that an "agent" cannot confer authority upon himself by misrepresenting his ability to act, Lord Steyn for the Court stated that "[o]ur law does not recognise, in the context of apparent authority, the idea of a self-authorising agent."¹³³

The Court of Appeal's decision gives a very wide berth for the doctrine of apparent authority. The defendant bank argued chiefly on the basis of the House of Lords' decision in *Armagas*. Lord Steyn responded that if the Court was to accept the bank's argument, this would, in his view, "frustrate the reasonable expectations" of the parties and would be based on an "unreal premise" as to the way commerce takes place.¹³⁴ For the Court of Appeal, it was common ground that apparent authority could only be based on a holding out, or a representation, by the principal as to the agent's authority. Yet "[a] principal may clothe an agent with apparent authority in more than one way."¹³⁵

On the facts of the case at bar, Lord Steyn noted that the issue revolved around the existence of a "general apparent authority arising from the position" that the bank had placed its manager into.¹³⁶ Moreover, for the Court of Appeal, what Lord Keith did not say in *Armagas* was also noteworthy—he did not say that, as a matter of law, apparent authority can never arise where there is no authority in the agent to enter into the transaction on his own. Instead, what Lord Keith observed was really in the nature of a prediction—in particular, that it would be somewhat rare for a principal to be regarded as having authorized his agent to communicate on his own as to whether he has authority to act.¹³⁷ In light of this, Lord Steyn stated, "[i]t seems to me that the law recognises that in modern commerce an agent who has no apparent authority to conclude a particular transaction may sometimes be clothed with apparent authority to make representations of fact."¹³⁸ Accordingly, the Court of Appeal concluded that the position of the bank's senior manager was such that he was clothed with the ostensible authority to act as he did in communicating that the head office had rendered its approval for the facility set out in the commitment letter.¹³⁹

133 *Ibid* at 540.

134 *Ibid* at 534.

135 *Ibid* at 540.

136 *Ibid* at 542.

137 *Ibid*.

138 *Ibid* at 543.

139 *Ibid* at 544.

It is interesting to examine the basis for the *First Energy* decision. Brown writes that the basis on which Lord Steyn distinguished *Armagas* from the situation before the Court in *First Energy* was the seniority of the agent in question. That is, in *First Energy* it would have been unrealistic and unreasonable for the plaintiff company to question the general apparent authority with which the bank had endowed its senior manager.¹⁴⁰ Munday observes that later English cases have had some difficulty in identifying the basis on which the Court of Appeal reached the result that it did.¹⁴¹ One reading is that the bank's manager was held out as having had the authority to communicate the bank's decision to customers.¹⁴² However, perhaps more relevant for present purposes is the way *First Energy* was later explained by the Court of Appeal in *Sun Life Assurance Company of Canada v CX Reinsurance Company Ltd*:

[A] manager, who, lacking actual authority to authorise and offer a particular loan facility to the plaintiff, nonetheless did so by sending him a letter of offer which he accepted. In that case the court held that, albeit the manager lacked actual authority to make the loan and that no other person in the bank had held him out as having such authority, *by reason of his very position* he was a person who would ordinarily have authority to communicate the decision of more senior members of the bank who were authorised to make and/or approve such a loan and that the plaintiff was accordingly entitled to rely upon the offer which he had received.¹⁴³

In a later Court of Appeal decision, *Primus Telecommunications PLC v MCI WorldCom International Inc*, Lord Mance for the Court of Appeal accepted the proposition of Lord Steyn in *First Energy* that the law recognizes that in modern commercial situations an agent who has no actual authority may be clothed with apparent authority to make representations of fact.¹⁴⁴ Munday, similarly, suggests that *First Energy* can be viewed as elevating the protection given to third parties by assessing the authority of the agent according to the way in which a third party would have apprehended the situation.¹⁴⁵ Moreover, for Munday it is conceivable that the extension of an agent's apparent authority to cover situations where it is the agent himself who makes the relevant representation (and possibly even to situations where the third party has notice that the agent lacks the relevant authority) is an intimation that a climate may develop in the future that is even

140 Brown, *supra* note 8 at 364.

141 See Munday, *supra* note 4 at 76.

142 See *Sea Emerald SA v Prominvestbank-Joint Stockpoint Commercial Industrial and Investment Bank*, [2008] EWHC 1979 (Comm), [2008] All ER (D) 75 (Aug) at para 107.

143 [2003] EWCA Civ 283 at para 39, [2003] All ER (D) 79 (Mar) [emphasis added].

144 [2004] EWCA Civ 957 at para 25, [2004] 2 All ER (Comm) 833.

145 See Munday, *supra* note 4 at 79.

more benevolent to third parties, who may be more or less helpless in the modern commercial environment to discover the true scope of an actor's authority.¹⁴⁶

Brown asserts that, although the reasoning in *First Energy* has been criticized as incompatible with the “orthodox rules of apparent authority,” the Court of Appeal got it right in deciding the case as it did.¹⁴⁷ Comparing the decision to the “indoor management rule” in corporate legal matters, Brown simply notes that Lord Steyn unequivocally preferred the *bona fide* third party's perspective to that of the principal.¹⁴⁸ Reynolds, for his part, states that the limitation that holds that the representation or manifestation must always come from the principal (which is equivalent to saying that the agent must never be permitted to authorize its own conduct) cannot be an absolute rule. If the reasoning in *First Energy* is correct, then, Reynolds remarks that “some modification of the existing theoretical basis of apparent authority” may be needed, and this may well be appropriate.¹⁴⁹ For Brown, *First Energy*'s “realistic approach” meshes well with “[l]ate twentieth century business practices,” which do not “enable a facile classification of stereotypical agents with concomitant, standardised authorities.”¹⁵⁰ That is, while it is clear that the conventional rules of agency are sufficient to deal with most challenging cases, it is nevertheless unsatisfactory to resort to manipulating those rules in order to apply them successfully to modern fact patterns.¹⁵¹ In this way, *First Energy* arguably stands as an early example of the type of situation to which the “self-authorizing” agent of Chief Justice Laskin may extend the common law of agency.

B. *Skandinaviska* and its Challenge to the Would-Be Heretic

Skandinaviska is a highly notable recent decision of the Singapore Court of Appeal on a fact pattern that harkens back to the earlier cases that provoked the question of agent self-authorization. The case is also notable for its treatment of the *Armagas-First Energy* divide. In brief, Chia, an individual described by the Court of Appeal as an “inveterate gambler,” was hired as the “finance manager” of Asia Pacific Breweries (“APB”). Using his position as APB's finance manager, Chia devised and implemented a scheme to cheat a number of foreign banks out of more than S\$117 million. The issue, of course, was whether the duped banks or Chia's employer would bear the losses. The banks argued that they lent the sums to APB that had authorized Chia to borrow, whereas the position of APB was that Chia had no authority whatever to borrow money on its behalf.¹⁵² The Court of Appeal, in its reasons for judgment, makes it clear that Chia was able to carry on his fraud for more than four years because

146 *Ibid* at 79-80.

147 Brown, *supra* note 8 at 364.

148 *Ibid* at 364-5.

149 Reynolds, *supra* note 124 at 25.

150 Brown, *supra* note 8 at 367.

151 *Ibid* at 370.

152 *Skandinaviska*, *supra* note 13 at paras 1-4.

his superiors left him to run the company's finance and accounting department without any supervision, while the foreign banks simply failed to exercise due diligence "relying merely (and almost entirely) on representations made by Chia."¹⁵³

The Court of Appeal observed that the title "Finance Manager" is not an established title in a corporate setting, such as "Finance Director" or "Chief Financial Officer." The Court accepted that the banks were aware that Chia's position *prima facie* only connoted managerial and not executive functions.¹⁵⁴ In any event, the banks' knowledge of Chia's functions and responsibilities was based on what Chia told them. In essence, the banks were misled into granting credit facilities to APB on the basis of Chia's fraudulent representations as to his authority as finance manager. Amongst other things, Chia also repeatedly forged directors' resolutions.

The judge at first instance disagreed with the banks that APB had held Chia out as having the authority to represent to them that it had accepted the credit facilities they had offered. Of course, Chia did not have actual or express authority, and the documents he presented to the banks were fraudulent. No authorized person had held Chia out as having authority to enter into credit facilities, and perhaps more to the point, the banks did not lead any evidence as to whether APB had acquiesced to what Chia did. The case, then, boiled down to whether Chia's own "representation" was sufficient to warrant the genuineness of the false board approvals. The judge concluded that, on the evidence presented, the banks had willingly accepted the false documents, and therefore took the risk of forgery and Chia's own lack of authority.¹⁵⁵

The banks' case rested largely on *First Energy* and an assertion they argued flowed from that case: a "rigid requirement for a holding out in the form of an unequivocal and express representation" was wholly inadequate "when applied to the complexities of transacting with impersonal corporate structures" in today's commercial world. More to the point, the banks argued that *First Energy* meant that the traditional need for a clear representation from the principal to the third party had shifted to the objectively founded reasonable expectations of third parties. *First Energy*, then, was said by the banks to be decided in accordance with the principle of "fair risk allocation."¹⁵⁶

The Singapore Court of Appeal's starting point in responding to these arguments, however, was to reassert the "established principle"—one not directly disputed by the banks—that the law does not recognize the "self-authorizing" agent. *Armagas*, however, left the door open slightly to the "unusual and peculiar case" where

153 *Ibid* at paras 1, 5.

154 *Ibid* at para 7. An interesting question—that is somewhat beyond the scope of this paper—is whether the proliferation of titles now employed by many firms (for a number of varied reasons) carries any implications in an agency law setting. See e.g. "The perils of panflation," *The Economist* 403:8779 (7 April 2012) 18.

155 *Skandinaviska*, *supra* note 13 at para 33.

156 *Ibid* at para 37.

the agent, known to have no general authority, is nevertheless somehow equipped by circumstances created by the principal to possess a specific authority (somewhat reminiscent of Chief Justice Laskin in *CanLab*). In *First Energy*, the English Court of Appeal was said to have found just such a case.¹⁵⁷

The Court of Appeal pointed to what it identified as the distinguishing facts between the two cases: *Armagas* involved a situation where it was not difficult for the third party to check with the principal regarding the would-be agent's authority, whereas in *First Energy*, it would be impractical to expect each third party to check with the principal's head office. Moreover, *Armagas* involved an agent who had limited authority, whereas *First Energy* involved an agent who effectively had a wide-ranging authority for a number of items, including that of conveying his principal's approval of the transaction at issue.¹⁵⁸ The Court concluded that, in *First Energy*, the decision was based on the specific finding that the principal had held out its agent as having authority to make representations of the kind that the agent actually made. On the facts of that case, "it made good commercial sense that a customer" of the bank's local branch could rely on what was conveyed to him by its manager. In *Skandinaviska*, though, Chia was merely the finance manager of APB, a position said not to indicate that he possessed any specific authority. At the same time, Chia's superiors were "within easy reach" of the foreign banks.¹⁵⁹

In light of its finding that APB did not provide the holding out as argued by the foreign banks, the Court of Appeal concluded that the principle established in *First Energy* "that an agent who has no authority, whether actual or apparent, to conclude a particular transaction on his principal's behalf may nevertheless have apparent authority to represent that his principal has approved the transaction" had no application to the facts of *Skandinaviska*.¹⁶⁰ This was sufficient to dismiss the foreign banks' case against APB. However, in *obiter*, the Court made a number of additional statements given the importance of the subject matter. First, the Court noted that *First Energy* had been subject to a fair amount of criticism by commentators for its departure from the "traditional conceptual basis" of apparent authority. At the same time, one way to read *First Energy* such that it presents no divergence from the well-established law would be that the English Court of Appeal had found that the agent with ostensible authority to represent that the bank's head office had approved the purported loan agreements.¹⁶¹ What the Singapore Court of Appeal seems to be saying here is that, by virtue of his position and role, the branch manager in *First Energy* was placed in such a position not to enable him to make whatever self-authorizing representations he found useful, but rather to make a more limited

157 *Ibid* at paras 38-41.

158 *Ibid* at para 47.

159 *Ibid* at para 51.

160 *Ibid* at para 54. See also Wai Yee Wan, "Fraud, Unauthorised Transactions and Vicarious Liability in Singapore" [2011] 8 J Bus L 800 at 801.

161 *Skandinaviska*, *supra* note 13 at paras 57-58.

sort that gave him the basis to inform the third party that his principal had in fact approved something that it had not. For the Singapore Court of Appeal, it is the representation as to the principal's approval of a transaction that goes to the heart of an agency relationship:

To argue that an agent has authority to represent that his principal has approved a transaction—which is, in effect, authority to bind the principal to the transaction—because he (the agent) has authority to make general representations about the transaction and, hence, also has authority to represent that his principal has approved the transaction is contrary to the established principle that there cannot be self-authorisation by an agent. Of course, if an agent has been conferred authority, whether actual or ostensible, to make the *specific* representation that his principal has approved a transaction (which authority Mr J was found to have in *First Energy*), he would also have been vested with at least ostensible authority to enter into the transaction on his principal's behalf.¹⁶²

Skandinaviska thus reads *First Energy* as having been decided on the basis of the wide-ranging authority that the senior branch manager was found to have in that case. The court noted that “[d]ifferent kinds of agents have different authority in different settings,” and, on the facts of the case at bar, it would be wrong to find that Chia had the same extent of authority as the branch manager in *First Energy*.¹⁶³

This is logically consistent on these facts, but the Court of Appeal in *Skandinaviska*, in its intent to emphasize the traditional view that self-authorization is not possible, did not have to grapple with circumstances where something that at least looks like self-authorization provides the basis for a claim of agency. On the other hand, if what is significant for present purposes is an assessment of the circumstances under which the conduct of the principal serves to place the putative agent in a position such that it would be reasonable to regard it as having been endowed with at least some authority, then this distinction between *First Energy* and *Skandinaviska* may be instructive after all. That is, perhaps the Court of Appeal is right to say that there cannot be any true “self-authorization.” However, one might extend the Court's reasoning slightly to suggest that where the principal, through act or omission (or something in between), has placed the agent in a position of some importance vis-à-vis a definable group of third parties, then what the principal has really done is to imply the specific authority to bind the principal on the narrow point at issue.

162 *Ibid* at para 59.

163 *Ibid* at para 61

Perhaps, then, the better explanation on the facts of a case like *First Energy* or *Skandinaviska* would be to recognize that what has generously been referred to as placing the agent in a position to enable the self-representation that it has authority to communicate the principal's acceptance is really something like the risk principle at work.¹⁶⁴ As Busch and Macgregor consider, the risk principle can be regarded as a less "artificial method of imposing liability," which makes certain factors explicit where they have been implicitly used by the courts when conducting analyses as to apparent authority. Because of its "more nuanced approach", it could enable the courts to reach solutions more tailor-made to the facts of the case.¹⁶⁵ Seavey, perhaps along the lines of the distinction asserted in *Skandinaviska*, agrees "[t]hat 'the authority of the agent cannot be proved by the agent's statement of it,' is true; but there may be a power based upon statements which the principal has authorized the agent to make."¹⁶⁶ Moreover, for Seavey, in the statement made by the principal that a person is its agent, the only important part to a third party would be that the agent has the power to establish certain contractual relations between the third party and the principal. Seavey notes that "[t]his representation may be made, of course, by any action which indicates to a normal person" that the agent has the power in question.¹⁶⁷ While this may suggest an objective evaluation wholly familiar to a contract law analysis, Seavey adds that where one professing to be an agent has no power, it is clear that this person is actually not a party to a contract because there was no agreement to that effect.¹⁶⁸ That is, while there may be a need for an objective assessment of the principal's words and deeds vis-à-vis the presumptive agent, this analysis is not contractually founded.¹⁶⁹ All of this is to posit, then, that while a broad "self-authorization" would seem to be impossible, a more focussed sort could be compatible with both *First Energy* and *Skandinaviska*. It is this more limited understanding of self-authorization that could be applicable in the hypothetical case considered in this paper.

164 For a similar account with respect to *First Energy*, see Andrew Griffiths, "The Economic Implications of Validating Unauthorised Contracts Made by Corporate Agents" (2003) 4:1 European Business Organization Law Review 51 at 76.

165 Busch & Macgregor, *supra* note 70 at 373.

166 Seavey, *supra* note 71 at 875.

167 *Ibid* at 874. See also Paula J Dalley, "A Theory of Agency Law" (2011) 72:3 U Pitt L Rev 495 at 498, who argues for a "cost-benefit internalization" theory for agency law based on the moral and economic principle that a person must bear the foreseeable consequences of her voluntary action.

168 Seavey, *supra* note 71 at 885.

169 Busch and Macgregor have made a similar observation. See Busch & Macgregor, *supra* note 70 at 365, 370-71. Tan notes as well that "there must be some manifestation of authority moving from the principal from which either the principal is estopped or, alternatively, the principal is bound because liability should be determined objectively by what has been manifested rather than what the principal subjectively intended" (Tan, *supra* note 7 at 196-97). See also Ernest J Weinrib, "The Fiduciary Obligation" (1975) 25 UTLJ 1 at 11-12.

V. RATIFICATION

As a final, and perhaps alternative, way to view the problem, it is worth considering whether the principal's mere silence as to the alleged agent's conduct can amount to an act of ratification. The principal's ratification of the agent's conduct can be formally expressed by the principal or implied in its conduct. "A principal will not be held to have ratified an unauthorized act of an agent unless the principal has full knowledge of all material facts."¹⁷⁰ Moreover, for conduct to amount to implied ratification, it must be "clear and unequivocal"¹⁷¹ and "inconsistent with any other intention."¹⁷²

It appears to be clear that, in cases where an agency relationship already exists but the agent's act exceeds her or his actual authority, the principal's passivity may be read as assent. As Harvey and MacPherson state it, ratification "will be inferred from the principal's act of standing by; in other words, if a principal knows of an agent's unauthorized act, the principal has an obligation to repudiate forthwith the unauthorized act."¹⁷³ In one case, the Alberta Court of Appeal held that the principal had ratified the agent's conduct because the principal was "estopped from denying that his conduct must be treated as a ratification." The Court stated that it was possible to come across "ratification or adoption without intention but in consequence of conduct which makes it inequitable to deny ratification",¹⁷⁴ which Harvey and MacPherson suggest can be read that, "in standing by and doing nothing to investigate and repudiate, the principal should be deemed to have ratified."¹⁷⁵ In a more recent English case, ratification was implied where the principal knew that it was regarded by the third party as having accepted that the agent had not exceeded his authority and where the principal took no action to dispute that authority within a reasonable amount of time.¹⁷⁶ It would seem theoretically possible, then, for the principal's acquiescence or silence to amount to ratification in some circumstances.¹⁷⁷ These, however, would depend heavily on the facts of the

170 See Harvey & MacPherson, *supra* note 3 at 57, citing, *inter alia*, *DC Cameron and W Moffatt Jr v Paxton, Tate & Co* (1888), 15 SCR 622 (available on QL) and *Crown Manufacturers Ltd v Texas Refinery Corp of Canada Limited* (1984), 31 Sask R 266, [1985] 2 WWR 666 (QB).

171 Harvey & MacPherson, *supra* note 3 at 58, n 212, citing *Bueneke v Bueneke* (1966), 56 DLR (2d) 365 at 368, 55 WWR 175 at 178 (Sask CA).

172 *Ibid* at 58, citing *Crown Manufacturers Ltd*, *supra* note 170 at para 42.

173 *Ibid* at 60, citing, *inter alia*, *Community Savings Credit Union v UA Local 324*, 2001 BCSC 413, 91 BCLR (3d) 105 at paras 47-57, *aff'd* 2002 BCCA 214, 22 BLR (3d) 313.

174 *McKay v Tudhope Anderson Company, Limited*, 14 Alta LR 131 at 139, [1918] 3 WWR 994 (Alta SC (AD)).

175 Harvey & MacPherson, *supra* note 3 at 61.

176 *Suncorp Insurance & Finance v Milano Assicurazioni SpA*, [1993] 2 Lloyd's Rep 225 (QB) at 241 (available on WL UK), as cited in Tan, *supra* note 7 at 200.

177 See *ibid* at 200. For a discussion of the same under the American Law Institute, *Restatement of the Law Third: Agency* (St Paul, MN: American Law Institute, 2006) [*Restatement (Third)*], see Deborah A DeMott, "The *Restatement (Third) of Agency* and the Unauthorised Agent in US Law" in Danny Busch & Laura J Macgregor, eds, *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge, UK: Cambridge University Press, 2009) 219 at 226.

specific case. The *Restatement (Third) of Agency* emphasizes here that the context of the principal's "manifestation" is critically important.¹⁷⁸

Still, when considering the prospect that the principal had impliedly endowed its "agent" with authority, there is some basis for the position that the courts will not infer such a representation simply on account of the appointment of a person to an office.¹⁷⁹ Recall that in *Jensen*, the majority of the Court of Appeal decided the case on the basis of the traditional *Silva* principle. Interesting for present purposes, though, is that the dissenting judgment in that case found that the defendant company had created the sales format, which involved the customer negotiating only with its agent, thereby creating an environment in which the third party would reasonably assume that the agent, in fact, had the authority to act on the principal's behalf.¹⁸⁰ Following *Skandinaviska*, one might contemplate whether what the minority of the Court of Appeal was picking up on in *Jensen* was the defendant company's placement of its agent into a position where he could make a representation that his principal had accepted a transaction (even if it did not actually do so). Turning back to *CanLab*, it is worth noting that the decision of the majority of the Court of Appeal in the case effectively adopted a very similar position (and, while Justice Lacourcière in dissent at the Court of Appeal and Chief Justice Laskin at the Supreme Court disagreed with the majority of the Court of Appeal on the facts, they did agree in principle on the concept).¹⁸¹

As Worthington remarks, the agent who knowingly exceeds its authority takes a large risk if it assumes that the principal will retroactively authorize its act. If the principal chooses not to do so (and the principal cannot be forced to authorize the agent's actions even based upon past practice), then the agent itself will generally be liable to the third party.¹⁸² Still, there is a particular danger here in public procurement matters. Ratification of an agent's actions beyond its express authority can itself be express or, alternatively, implied from the circumstances: "If the Crown entity acts like it has a contract with the third party, that could amount to ratification of an unauthorized agent." Specifically, "allowing the third party to commence work, commence delivery or be paid will be ratification of what was previously unauthorized."¹⁸³ Of course, ratification is predicated on there having been an agency relationship already in place at the time the "agent" dealt with the third party: "[N]on-agents cannot be retroactively authorized."¹⁸⁴

178 *Ibid* at 226, citing *Restatement (Third)*, *supra* note 177 at §1.03, comment *e*.

179 See Harvey & MacPherson, *supra* note 3 at 69, citing *Calgary Hardwood*, *supra* note 76 at 200-01. But see the brief discussion of the indoor management rule, *supra* note 112.

180 Harvey & MacPherson, *supra* note 3 at 69.

181 *Supra* note 25. See pages 317-318 of Section II-A, above, for the discussion.

182 See Robert C Worthington, *The Public Purchasing Law Handbook* (Markham: LexisNexis Canada, 2004) at 297.

183 *Ibid*.

184 *Ibid* at 296.

As previously mentioned, then, the province might consider representing, at the time of initial procurement, that the successful bidder's necessary dealings with the city do not amount to a holding out of the city as the province's agent. While an early representation in this way does not mean that the province's later conduct could not amount to such a holding out, it should make such a finding considerably less likely given that the mere passivity of the province then would be to acquiesce to the city's behaviour *in light of* the original disclaimer. It might even be possible to read the province's initial disclaimer in this way as suggesting to all of the bidders at the outset that it is conceivable that a non-party to the procurement, the city, may negotiate with the successful bidder in ways that improve upon the original deal.

The distinction in the consequences for the legal relations between the principal and agent should be noted at this point. If the principal's liability to the third party were based on ratification, the principal would not have a claim against the agent for the agent acting outside its authority. If, instead, the principal's liability were based on the agent having apparent authority, then the principal may be able to claim against the agent for acting outside of her actual authority.¹⁸⁵ As Harvey and MacPherson suggest, "If a person acts without actual authority, or an agent exceeds the actual authority delegated, but nonetheless the principal is liable to the third party because the court finds that the person or the agent acted with apparent authority, the person or the agent may well be liable to the principal."¹⁸⁶ The final point here is that this "strange" concept of ratification might, in some ways, bear closer resemblance to the foregoing discussion than it first seems. Seavey contends that "[s]o far from being the creation of a power in an agent, ratification is the exercise of a power created in one not a principal by one not an agent, but who purports to be one." The doctrine of ratification, Seavey suggests, is hard to explain logically, and the legal fictions it employs are quite extensive, but perhaps the concept can simply be justified by saying that it conforms to practical needs.¹⁸⁷ Thus, when one reflects about the doctrine of ratification, a long established (albeit controversially so) part of the law of agency, it is not necessarily much of a further step to contemplate agent self-authorization.

185 See e.g. Harvey & MacPherson, *supra* note 3 at 34.

186 *Ibid* at 65. Whether the situation is better characterized as the principal's inferred ratification of the agent's act or as the agent having acted with apparent authority will not matter to the third party involved, although the fallout between the alleged principal and agent would be different (see *ibid* at 72).

187 See *supra* note 71 at 886-87. Seavey adds in note 74, "[o]f course it is unimportant that the one acting is an agent for P in other matters; unless he has a power to create the particular contract involved, there is no agency for the purpose of ratification." Responding to Seavey's statement that the longevity of the doctrine of ratification can be regarded as indicative of its expediency and utility, Twerski replies that one can hardly be satisfied by *ex post* reasoning that does not explain why the concept actually works (Aaron D Twerski, "The Independent Doctrine of Ratification v The Restatement and Mr. Seavey" (1968) 42:1 Temple LQ 1 at 4). In the context of this article, one might say that a deeper examination of the theoretical bases under which the more complicated cases have been decided could lead to a broader and more nuanced investigation of the circumstances supporting the result reached, leaving room open for an acknowledgment that when an objective analysis of the risk environment is performed, "self-authorization" might indeed be possible.

VI. CONCLUSION

If there is a common aspect to those (older) cases where the courts have sanctioned an apparent agent's self-authorizing behaviour, it is that the courts have had to decide which "innocent" party should be forced to bear the loss caused by the agent's conduct.¹⁸⁸ It appears that this thrust explains much of the splits seen in the appellate panels in the Canadian cases cited above.¹⁸⁹ When faced with an individual plaintiff dealing with an apparent agent representing a larger firm (such as an insurer), the courts have favoured the "innocent" individual rather than the firm that endowed the agent with some limited authority (that the agent then transgressed). In any event, "the attitude of the law has been to protect the principal from liability (in contract at any rate), except where the principal's own conduct can be said to have been the cause, or a major contributing cause, of the ultimate reliance of the third party upon the authority of the agent."¹⁹⁰

This would appear to be a reasonable reading of the more recent English jurisprudence as well. While the representation that forms the basis of the apparent agency must come from the "principal" itself, this may take a very general form, and perhaps include working with the "agent" in a certain capacity. Indeed, in *First Energy*, Steyn LJ, for the Court of Appeal, began his judgment by observing: "A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected."¹⁹¹ Taking this a step further, while the courts, in some instances, have selected the party on whom the loss in the case at bar ought to fall, they have not always adequately explained why.¹⁹² It is submitted that something along the lines of the "risk principle" might be proffered to more usefully explain these types of decisions, and this could carry implications for situations involving self-authorization. As Busch and Macgregor suggest, "[i]t may be that the end result would not be markedly different from the current approach, in which the 'of the principal's own doing' idea is artificially extended."¹⁹³ A consideration worth mentioning against a judicial recognition of something resembling the risk principle in the common law would be the prospect of a large—and possibly unmanageable—increase in the principal's liability. Or, as Tan puts it, if an agent could make representations as to its own authorization, then "anyone with some nexus to the principal can claim to have authority to bind the principal and cause

188 See e.g. Gerard McMeel, "Philosophical Foundations of the Law of Agency" (2000) 116 Law Q Rev 387.

189 See e.g. *Cypress Disposal*, *supra* note 95 at 613. See also Fridman, "The Self-Authorizing Agent," *supra* note 84 at 16.

190 *Ibid* [emphasis added].

191 *Supra* note 12 at 533. See also Munday, *supra* note 4 at 196.

192 See e.g. Busch & Macgregor, *supra* note 70 at 369.

193 *Ibid* at 373. The authors add that while such a conception would depend on the manner in which the risk principle is applied by the courts, what the courts would be tasked with is the application of the judicial lens to the factors indicated by the case law to be significant to the exercise. The authors observe that the Dutch experience suggests that this process would be workable.

the principal to incur obligations to a third party.”¹⁹⁴ This is presumably the very concern expressed by Fridman when reacting to the *obiter* remarks of Chief Justice Laskin in *CanLab*.¹⁹⁵

Yet, perhaps this overstates the matter. If something along the lines of a risk principle were contemplated, bald assertions of authority on the part of the “agent” would not on their own make the formative difference; rather, there would have to be a fine analysis as to the risks reasonably envisioned by the principal in working with, or placing the agent in its place within, the principal’s functional network. Perhaps most instructively, by acknowledging the relevance of the “risk principle” or something like it in judicial decision-making about apparent authority in the context of “self-authorization,” cases might also serve as an incentive for a principal to ensure that its “agents” act within the confines of their respective authorities in future dealings.¹⁹⁶

Given the above discussion, could a party working within the framework of a business dealing set into motion by the principal engage in conduct that would serve to bind the principal? Turning back to the sample case posed in this article, can the city’s conduct serve to bind the province for the purposes of the procurement process? Tan summarizes the point at issue in this way: “If an agent can have implied actual authority by virtue of being appointed to a particular position, there is no reason why such an act cannot amount to a sufficiently unequivocal representation which would support an estoppel.”¹⁹⁷ In the present example, for reason of practical necessity, the successful bidder in the procurement process must work with the city to build the infrastructure. This was the required and natural result of the procurement process itself, as the province evaluated the responses and selected the winning bidder. Does the seeming acquiescence of the province, when faced with the city’s action at this stage of the procurement process, serve to equip the city with an aura of responsibility?

The hypothetical considered in this article does not seem to raise the “innocent party” concern, as the third parties have had no direct dealings with the purported agent, the city, at all on this matter.¹⁹⁸ Moreover, the example does not neatly fall into the types of cases where the courts have, to date, found that it makes sense to give effect to the third party’s reasonable expectations based on the agent’s self-authorizing behaviour. Again, since there has been no external or express self-authorization on the part of the city, the only basis for agency would arise with an implication based on the city’s conduct and/or the province’s acquiescence to the city’s role in the infrastructure development. To this effect, the existing case law

194 See Tan, *supra* note 7 at 189-90.

195 See Fridman, “Annual Survey of Canadian Law: Commercial Law,” *supra* note 31 at 589.

196 See Busch & Macgregor, *supra* note 70 at 373.

197 See *supra* note 7 at 198.

198 On the other hand, if the province in the example could have acted after-the-fact in a way that would have called the propriety of its procurement into question in a manner that might raise liability to the third parties, then its agent would seem to be able to act to the same end.

(in Canada) has been clear that the purported principal would have to hold out, or otherwise cloak the alleged agent with authority before the courts would even entertain the prospect of agency. Since there was no outward act on the province's part to do so on the sample facts, it appears that any risk of agency on the facts would be fairly remote. It is clear from the case law canvassed in this article that there is a strong reluctance in the common law to depart from agency orthodoxy and, as a result, it would seem that much of what can be regarded as "self-authorization" situations can be explained by traditional reasoning. However, this still leaves some room for problematic fact patterns in modern commercial dealings, such as that posed by the principal's purported acquiescence. It is suggested, therefore, that it may still be sensible practice for the would-be principal to insist on reasonable steps to ensure that the prospects for a finding that the principal has placed the agent in a position of viable self-representation would be as distant as possible.

Accordingly, many of the situations involving what appears to be self-authorizing agency will actually revolve around a (sometimes unstated) finding of apparent or implied authority, premised on the passivity or acquiescence of the principal. While circumstances that support apparent or implied authority based on such inaction are nonetheless likely to be rare, they are conceivable and may emerge from time to time. That said, the common law does not seem to have countenanced a strictly self-authorizing basis for agency—yet. However, the basis for any such future development would likely be to protect third party expectations in a manner consistent with the previous principles emerging from the case law.¹⁹⁹ Such development, in the face of increasingly complex fact patterns and perhaps based on something akin to the risk principle considered above, should certainly not be ruled out.

¹⁹⁹ Montrose concluded his 1939 article on agency in this way: "Perhaps the realization that a great many legal rules are only experimental, that many are only probabilities, that as such they are not eternal verities, is the most fruitful state of mind for legal development" (*supra* note 55 at 715).