Federal Court  Cour fédérale

Date: 20140424

Docket: T-2010-11

Citation: 2014 FC 380

Ottawa, Ontario, April 24, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

COMMITTE FOR MONETARY AND ECONOMIC REFORM ("COMER"), WILLIAM KREHM, AND ANN EMMETT

Plaintiffs

and

HER MAJESTY THE QUEEN, THE MINISTER OF FINANCE, THE MINISTER OF NATIONAL REVENUE, THE BANK OF CANADA, THE ATTORNEY GENERAL OF CANADA

Defendants

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] This is a motion under Rule 51 of the Federal Court Rules, SOR/98-106 [Rules], appealing the Order of Prothonotary Aalto dated 9 August 2013 [Decision], which struck the Plaintiffs' Amended Statement of Claim [Claim] without leave to amend.

BACKGROUND

[2] The Plaintiff Committee for Monetary and Economic Reform [COMER] is an economic "think-tank" based in Toronto, which was established in 1970 and is dedicated to research and publications on issues of monetary and economic reform in Canada. The individual Plaintiffs are members of COMER who have an interest in economic policy.

[3] The Plaintiffs brought a novel proposed class action proceeding alleging that the Defendants have acted in ways that are unlawful, unconstitutional and tortious in their handling of monetary and budgetary policy and administration in Canada. In their Claim, the Plaintiffs sought a number of declarations that the Defendants are required by the Constitution and the *Bank of Canada Act*, RSC, 1985, c B-2 [Bank Act] to take, or refrain from, certain actions relating to their handling of fiscal and monetary matters, described further below. They also sought a declaration that the Defendants, along with certain international monetary and financial institutions, have "engaged in a conspiracy… to render impotent the Bank Act, as well as Canadian sovereignty over financial, monetary, and socio-economic policy…," with injurious consequences to the Defendants and all Canadians. On the basis of this alleged tortious conduct, Charter breaches, as well as alleged breaches of the Constitution, the Plaintiffs sought damages in the amount of $10,000 for each Plaintiff and, should the action be certified as a class action proceeding, $1.00 for "every Canadian citizen/resident" as determined by the last census.

[4] While the Claim was filed as a "Proposed Class Action Proceeding" (see Rule 334.12 (1)), to date, no motion for certification has been brought under Rule 334.12(2). Thus, at this stage, the matter before the Court is not a class proceeding. In the event that the Claim or some portion of it

were to survive the motion to strike, the question of certification would remain to be decided separately. If certification were to be denied, the Court would need to determine if the Claim should be permitted to proceed as an individual proceeding (see Rule 334.2). In this motion, however, the Court is concerned solely with the question of whether the Claim meets the legal requirements for a statement of claim.

[5] The nine declarations sought in the Claim relate to three basic assertions: first, that the Bank Act provides for interest-free loans to the federal and provincial, as well as municipal, governments for the purposes of "human capital expenditures," and the Defendants have failed to fulfill their legal duties to ensure such loans are made, resulting in lower human capital expenditures by governments to the detriment of all Canadians; second, that the government of Canada [Government] uses flawed accounting methods in describing public finances, thereby understating the benefits of human capital expenditures and undermining Parliament's constitutional role as the guardian of the public purse; and third, that these and other harms are the result of the fact that Canadian fiscal and monetary policy is being controlled by private foreign interests through Canada's involvement in international monetary and financial institutions.

[6] The pleadings describe human capital expenditures as those that promote the health, education and quality of life of individuals in order to make them more productive economic actors, through institutions such as schools, universities and hospitals. The Plaintiffs seek a declaration that s.18(i) and (j) of the Bank Act require the Minister of Finance [Minister] and the Government to request, and the Bank of Canada [Bank] to provide, interest-free loans for the purpose of such expenditures by all levels of government (federal, provincial and municipal). They further seek

declarations that the Minister, the Government and the Bank have abdicated their statutory and constitutional duties by failing to request and make these interest-free loans, and that this has had negative and destructive impact on Canadians through the disintegration of Canada's economy and its financial institutions, an increase in public debt, a decrease in social services, a widening gap between the rich and the poor and the continuing disappearance of the middle class.

[7] The Plaintiffs also seek two declarations relating to the manner in which the Minister accounts for public finances. First, the Claim seeks a declaration that the Minister is required to list human capital expenditures, including infrastructure capital expenditures as "assets" rather than "liabilities" in budgetary accounting. The pleadings allege that so long as human capital expenditures are treated only as "liability" and "debt," with no corresponding asset value, governments will not invest in human capital infrastructure. Second, the Claim seeks a declaration that, in essence, the Minister is required not to net out tax credits in showing Government revenues in budgetary accounting. Rather, the Minister must list *all* revenues *prior* to the return of tax credits to individual and corporate tax payers, then subtract tax credits, and then subtract total expenditures in order to arrive at an annual "surplus" or "deficit." The Claim alleges that the Minister's accounting, by not setting out the total tax credits given back to taxpayers, is fallacious, inaccurate and *ultra vires*, and has the effect of foreclosing any real debate of budgetary matters by elected Members of Parliament because an accurate financial picture is not available or disclosed. The Plaintiffs allege that the Minister's accounting method breaches s. 91(5) of the *Constitution Act, 1867* (clarified in argument to be s. 91(6), "The Census and Statistics") because it results in "an inaccurate and unavailable 'statistic,'" and that it violates the "constitutional guarantee that the Crown can only imposes [sic] taxes, for the declared proposed expenditures, as set out in the throne

speech, upon the consent (over the taxing power) of the House of Commons." In argument, though not in the Claim itself, the Plaintiffs relate the latter proposition to ss. 53, 54 and 90 of the *Constitution Act, 1867*.

[8] Four of the declarations sought in the Claim relate to the assertion that the Defendants have unlawfully ceded control over Canada's monetary and fiscal policies to foreign private interests. First, the Claim seeks a declaration that s. 18(*m*) of the Bank Act and its administration and operation are unconstitutional, amounting to an abdication of the Defendants' duty to govern in matters of monetary, financial and socio-economic policy, and a ceding of control to international private entities whose interests are placed above those of Canadians. Second, the Claim seeks a declaration that the actions of the Governor of the Bank of Canada [Governor], in keeping secret and not open to parliamentary and public scrutiny the minutes of meetings with other central bank governors, has acted contrary to s. 24 of the Bank Act and the Constitution. Third, the Claim seeks a declaration that Parliament has abdicated its constitutional duties and function under s. 91(1A), (3), (14), (15), (16), (18), (19) and (20) of the *Constitution Act, 1867*, as well as s. 36 of the *Constitution Act, 1982*, by allowing the Governor to keep the nature and content of his meetings with other central bankers secret, by not exercising Parliament's authority under s.18(i) and (j) of the Bank Act, and by enacting s.18(m) of that Act. Finally, the Claim seeks a declaration that the Defendants' officials are:

> wittingly and/or unwittingly, in varying degrees, knowledge, and intent, engaged in a conspiracy, along with the [Bank of International Settlements, Financial Stability Board, and International Monetary Fund], to render impotent the Bank Act, as well as Canadian sovereignty over financial, monetary, and socio-economic policy, and in fact by-pass the sovereign rule of Canada, through its Parliament, by means of banking and financial systems, which

> conspiracy and elements of such tortious conduct are set out, in ***inter alia, Hunt v. Carey Canada Inc.*** **[1990] 2 S.C.R. 959**…

[9] In this regard, the Claim alleges that:

- the Bank was set up in the 1930s as a vehicle to provide interest-free loans to federal and provincial governments for infrastructure and human capital expenditures, and for maintaining sovereign control over credit and currency with the purpose of asserting domestic and public control of monetary and economic policy;

- the Bank provided interest-free loans to federal, provincial and municipal governments in its "early and middle existence," but stopped doing so in 1974 - after joining the Bank of International Settlements [BIS] - in favour of interest-bearing loans from foreign private banks;

- the BIS, which purports to facilitate co-operation and serve as a "bank for central banks," in fact formulates and dictates policies to central banks;

- the BIS is not accountable to any government and its annual meetings are secret;

- policies such as interest rates are set by the Bank in consultation with, or at the direction of, the Financial Stability Board [FSB], established in 2009 after the "G-20" London Summit and linked to the BIS. The FSB also operates in a secretive and unaccountable fashion;

- the Bank is the only central bank among the G-8 countries that is a "public" bank created by statute and accountable to the legislative and executive branches of

Government, with the others all being "private" banks not directly governed by legislation or directly accountable to the legislative or executive branches of their respective countries;

- the Bank was completely independent of international private interests before joining the BIS in 1974, but since then the Bank and Canada's monetary and financial policy have gradually come to be largely dictated by private foreign financial interests;

- after Canada's entry into the BIS, an agreement or directive was reached within that organization that the member central banks would not be used to create or lend interest-free money, but rather governments would obtain loans from and through the BIS;

- the ceding of control to foreign private interests is unconstitutional and the agreement or directive not to make interest-free loans to governments is contrary to the Bank Act; and

- these unlawful actions have had severe detrimental effects for Canadian citizens, including the development of a spiralling schism between the rich and the poor, the elimination of the middle class, and a corresponding rise in crime related to poverty.

[10] The Claim also seeks a declaration that what the Plaintiffs characterize as "the privative clause" in s.30.1 of the Bank Act either: a) does not apply to prevent judicial review, by way of action or otherwise, with respect to statutorily or constitutionally *ultra vires* action, or to prevent the recovery of damages based on such actions; or b) if it does prevent such review and recovery, that it is unconstitutional and of no force and effect, as breaching the Plaintiffs' constitutional right to

judicial review and the underlying constitutional imperatives of the rule of law, Constitutionalism and Federalism.

[11] The Plaintiffs further allege that the unlawful actions described above violate the rights of every Canadian under s.7 of the Charter, through a reduction, elimination or delay of health care, education and other services, as well as Canadians' equality rights under s.15 of the Charter, the underlying constitutional right to equality, the underlying constitutional principle of federalism, the equalization provisions in s.36 of the *Constitution Act, 1982*, and the constitutional right not to have statutes rendered impotent through Parliament's *de facto* abdication of its duty to govern.

[12] The Defendants brought a motion to strike the Claim on the grounds that, *inter alia*:

i) the Claim fails to disclose a reasonable cause of action against the Defendants, or any one of them;

ii) the Claim is scandalous, frivolous or vexatious;

iii) the Claim is an abuse of process of the Court;

iv) the Claim fails to disclose facts which would show that the action or inaction of the Defendants, or any one of them, could cause an infringement of the Plaintiffs' rights under the Charter or the Constitution;

v) the causal link between the alleged action or inaction of the Defendants or any one of them, and the alleged infringement of the Plaintiffs' rights is too uncertain, speculative and hypothetical to sustain a cause of action;

vi) the Claim seeks to adjudicate matters that are not justiciable;

vii) the Claim concerns matters outside the jurisdiction of the Federal Court.

[13] The parties' submissions on the motion to strike were heard on 5 December 2012, and on 9 August 2013 Prothonotary Aalto granted the motion, striking the Claim in its entirety without leave to amend. On 16 August 2013, the Plaintiffs brought this motion under Rule 51(1) appealing the Prothonotary's decision.

DECISION UNDER REVIEW

[14] Prothonotary Aalto noted that, on a motion to strike, the allegations in a statement of claim are accepted to be true, and the issue for determination was whether the Claim was so fatally flawed as to be bereft of any chance of success (citing *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441 [*Operation Dismantle Inc.*] at para 27, *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 [*Hunt*], and *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 [*Imperial Tobacco*] at paras 17, 21 and 25). He characterized the Claim as having three core elements:

1. The Bank and Crown refuse to provide interest-free loans for capital expenditures;
2. The Crown uses flawed accounting methods in describing public finances, which provides the rationale for refusing to grant interest-free loans; and
3. These and other harms are caused by the Bank being controlled by private foreign interests.

[15] He looked first at whether the tort of misfeasance in public office had been made out in relation to the allegation that the Defendants have abdicated their responsibility to enforce legislation. He noted that each essential element of the tort must be clearly pleaded, and that vague generalizations are insufficient. Rather, the Claim must be particularized (citing *Adventure Tours Inc v St. John's Port Authority*, 2011 FCA 198 [*St. John's Port Authority*]). He found that the

allegations relating to the abdication of responsibility and ceding of control to foreign entities were "general statements of economic policy and argument" and "do not support a cause of action." The allegation of misfeasance in public office was found to be bereft of any chance of success and was struck.

[16] Prothonotary Aalto also found that the allegation of conspiracy was bereft of any chance of success. He found that, as drafted, there was no particularization of the parties alleged to be involved in the conspiracy, and he noted the generality of the statement that the "defendants' (officials) are wittingly and/or unwittingly, in varying degrees, knowledge, and intent, engaged in a conspiracy." He found that the tort of conspiracy requires an agreement between two or more persons who intend to injure by unlawful means, and that there were no material facts pleaded to support such a claim.

[17] With respect to s.15 of the Charter, Prothonotary Aalto found that a successful claim under this provision requires that there be differential treatment between the claimants and others, or substantive inequality (citing *Withler v Canada (Attorney General)*, 2011 SCC 12 [*Withler*] at paras 41 and 63), and that the Claim in the present case did not plead any distinction based on enumerated or analogous grounds. Noting that the claim was asserted on behalf of all Canadians, he cited the finding in *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 [*Richardson*] at para 161 that "[p]rovided the federal government treats all people within the country equally, it does not discriminate." On this basis, he found that the s.15 claim should be struck.

[18] Prothonotary Aalto also found that s.7 of the Charter was not engaged because no causal connection was pleaded between the impugned Government economic policies and actions and an infringement of the right to life, liberty and security of the person. The Claim alleged only that this right was breached "by a reduction, elimination and/or fatal delay of health care services, education and other human capital expenditures and services." He applied the statement in *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 [*Blencoe*] at para 59 that "[i]t would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state." He also found, based on *Gosselin v Quebec (Attorney General)*, 2002 SCC 1484 [*Gosselin*] at para 213, that s.7 rights do not encompass positive rights. Rather, a s.7 claim must arise "as a direct result of a determinative state action that in and of itself deprives the claimant of the right to life, liberty or security of the person," and since no negative infringement or state prohibition of a s.7 interest had been pleaded, this aspect of the Claim had to be struck.

[19] Prothonotary Aalto then turned to the question of the Court's jurisdiction to consider the Claim. He rejected the Defendants' position that the Court has no jurisdiction to entertain tort claims against Federal authorities, finding that the wording in ss. 2, 17, and 18 of the *Federal Courts Act*, RSC, 1985, c F-7 is broad enough to capture such claims against federal actors and Crown servants. He found that it is not plain and obvious that the Court does not have jurisdiction to entertain claims seeking declaratory relief.

[20] With respect to the Plaintiffs' standing to bring the Claim, Prothonotary Aalto found that it was not clear from the pleadings that there had been interference with a private right resulting in

damages so as to give rise to private interest standing. However, taking a flexible, liberal and generous approach as required by current jurisprudence, he concluded that it could not be said at this stage that COMER does not meet the test for public interest standing. If the allegations in the Claim were to be sufficiently amended to satisfy the rules of pleading, they would meet the element of a serious issue to be tried. Moreover, he found that COMER has a genuine interest in economic policy, and there appeared to be no alternative reasonable and effective means to bring the matter to Court. As such, the remainder of the Claim was not struck on the basis of standing.

[21] However, Prothonotary Aalto then found that the Claim was not justiciable, and struck the remaining portions of the Claim on that basis. He noted that justiciability refers to a matter's suitability for determination by a Court, with reference to the subject matter for determination, its presentation and the appropriateness of judicial determination (citing *Friends of the Earth v Canada (Governor in Council)*, [2009] 3 FCR 201 at paras 24-26, 31, 33-34, 38 [*Friends of the Earth*]; aff'd 2009 FCA 297). Prothonotary Aalto found that the issues in dispute in the Claim were "policy-laden," requiring consideration of economic policy, and asked: "What objective legal criteria can be applied to interpret these provisions when economic issues such as those raised are matters of government policy?" He found that the courts are not the proper vehicle for declaring that the Government must change a policy if no legislative imperative exists. He found that s.18 of the Bank Act is a permissive section providing that certain powers "may" be exercised, which allows for discretion and considerations of policy in the implementation of those powers. There is, he found, no requirement that interest-free loans for human capital be made.

[22] Prothonotary Aalto took note of the Plaintiffs' submission that there is "nothing in our constitutional arrangement to exclude 'political questions' from judicial review" where the Constitution is alleged to be violated (*Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791 at para 183 [*Chaoulli*]), and that all that is required for the Court to entertain a claim is a subject matter that has "a sufficient legal component to warrant the intervention of the judicial branch" (*Reference Re Canada Assistance Plan (B.C)*, [1991] 2 SCR 525 [*CAP Reference*]). However, he was not persuaded that the Claim was justiciable. He quoted portions of the Claim alleging that the reasons for the Minister's refusal of a loan were "financially and economically fallacious," and that "it is long recognized that investment and expenditure in human capital is the most productive investment and expenditure a government can make," and found that "[t]hese few examples from the Claim, of which there are many more, resonate with policy making implications not legal considerations."

[23] Since the Claim was found not to be justiciable, Prothonotary Aalto found that leave to amend would not cure its defects, and should therefore not be granted.

ISSUES

[24] The issue on this motion is whether the Claim, or any portion of it, should be revived on the basis that it is not plain and obvious that it cannot succeed.

STANDARD OF REVIEW

[25] According to precedent, I am required to consider this matter *de novo*. That is, I am required to take a fresh look at the issues, affording no deference to the findings in the Decision being appealed from. That is because this is an appeal from an order of a Prothonotary on an issue (the

striking of a claim) that is vital to the final determination of the case: *Canada v Aqua-Gem Investments Ltd.*, [1993] 2 FC 425 (FCA) at 463; *Merck & Co. v Apotex Inc.*, 2003 FCA 488 at para 19; *Merck & Co. v Apotex Inc.*, 2012 FC 454. I would note parenthetically that the Federal Court of Appeal has questioned (without deciding) on at least one occasion whether this rule should continue to apply: *Apotex Inc v Bristol-Myers Squibb Company*, 2011 FCA 34 at para 9. However, having had no argument from the parties on this point, and given that most, if not all, of the findings at issue are findings of law on which no deference would be shown under the normal standards of appellate review from *Housen v Nikolaisen*, [2002] 2 SCR 235, I do not consider this to be an appropriate case to revisit the issue.

STATUTORY PROVISIONS

[26] The following provisions of the Bank Act are applicable in these proceedings:

Powers and business	Pouvoirs
18. The Bank may	18. La Banque peut :
[…]	[…]
(i) make loans or advances for periods not exceeding six months to the Government of Canada or the government of a province on taking security in readily marketable securities issued or guaranteed by Canada or any province;	i) consentir des prêts ou avances, pour des périodes d'au plus six mois, au gouvernement du Canada ou d'une province en grevant d'une sûreté des valeurs mobilières facilement négociables, émises ou garanties par le Canada ou cette province;
(j) make loans to the Government of Canada or the government of any province, but such loans outstanding at any one time shall not, in the	j) consentir des prêts au gouvernement du Canada ou d'une province, à condition que, d'une part, le montant non remboursé des prêts ne

case of the Government of Canada, exceed one-third of the estimated revenue of the Government of Canada for its fiscal year, and shall not, in the case of a provincial government, exceed one-fourth of that government's estimated revenue for its fiscal year, and such loans shall be repaid before the end of the first quarter after the end of the fiscal year of the government that has contracted the loan;

dépasse, à aucun moment, une certaine fraction des recettes estimatives du gouvernement en cause pour l'exercice en cours — un tiers dans le cas du Canada, un quart dans celui d'une province — et que, d'autre part, les prêts soient remboursés avant la fin du premier trimestre de l'exercice suivant;

[…]

[…]

(m) open accounts in a central bank in any other country or in the Bank for International Settlements, accept deposits from central banks in other countries, the Bank for International Settlements, the International Monetary Fund, the International Bank for Reconstruction and Development and any other official international financial organization, act as agent or mandatary, or depository or correspondent for any of those banks or organizations, and pay interest on any of those deposits;

m) ouvrir des comptes dans une banque centrale étrangère ou dans la Banque des règlements internationaux, accepter des dépôts — pouvant porter intérêt — de banques centrales étrangères, de la Banque des règlements internationaux, du Fonds monétaire international, de la Banque internationale pour la reconstruction et le développement et de tout autre organisme financier international officiel, et leur servir de mandataire, dépositaire ou correspondant;

[…]

[…]

Fiscal agent of Canadian Government

Agent financier du gouvernement canadien

24. (1) The Bank shall act as fiscal agent of the Government of Canada.

24. (1) La Banque remplit les fonctions d'agent financier du gouvernement du Canada.

Charge for acting

(1.1) With the consent of the Minister, the Bank may charge for acting as fiscal agent of the Government of Canada.

To manage public debt

(2) The Bank, if and when required by the Minister to do so, shall act as agent for the Government of Canada in the payment of interest and principal and generally in respect of the management of the public debt of Canada.

Canadian Government cheques to be paid or negotiated at par

(3) The Bank shall not make any charge for cashing or negotiating a cheque drawn on the Receiver General or on the account of the Receiver General, or for cashing or negotiating any other instrument issued as authority for the payment of money out of the Consolidated Revenue Fund, or on a cheque drawn in favour of the Government of Canada or any of its departments and tendered for deposit in the Consolidated Revenue Fund.

[…]

No liability if in good faith

30.1 No action lies against Her Majesty, the Minister, any officer, employee or director of the Bank or any person acting

Honoraires

(1.1) La Banque peut, avec le consentement du ministre, exiger des honoraires pour remplir de telles fonctions.

Gestion de la dette publique

(2) Sur demande du ministre, la Banque fait office de mandataire du gouvernement du Canada pour la gestion de la dette publique, notamment pour le paiement des intérêts et du principal de celle-ci.

Encaissement des chèques du gouvernement canadien

(3) La Banque ne peut exiger de frais pour l'encaissement ou la négociation de chèques tirés sur le receveur général ou pour son compte et d'autres effets autorisant des paiements sur le Trésor, ni pour le dépôt au Trésor de chèques faits à l'ordre du gouvernement du Canada ou d'un ministère fédéral.

[…]

Immunité judiciaire

30.1 Sa Majesté, le ministre, les administrateurs, les cadres ou les employés de la Banque ou toute autre personne

under the direction of the Governor for anything done or omitted to be done in good faith in the administration or discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.	agissant sous les ordres du gouverneur bénéficient de l'immunité judiciaire pour les actes ou omissions commis de bonne foi dans l'exercice — autorisé ou requis — des pouvoirs et fonctions conférés par la présente loi.

[27] The following provisions of the *Constitution Act, 1867*, are applicable in these proceedings

Appropriation and Tax Bills	Bills pour lever des crédits et des impôts
53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.	53. Tout bill ayant pour but l'appropriation d'une portion quelconque du revenu public, ou la création de taxes ou d'impôts, devra origiher dans la Chambre des Communes.
Recommendation of Money Votes	Recommandation des crédits
54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.	54. Il ne sera pas loisible à la Chambre des Communes d'adopter aucune résolution, adresse ou bill pour l'appropriation d'une partie quelconque du revenu public, ou d'aucune taxe ou impôt, à un objet qui n'aura pas, au préalable, été recommandé à la chambre par un message du gouverneur-général durant la session pendant laquelle telle résolution, adresse ou bill est proposé.
[…]	[…]
Application to Legislatures of Provisions respecting Money Votes, etc.	Application aux législatures des dispositions relatives aux crédits, etc.

90. The following Provisions of this Act respecting the Parliament of Canada, namely, — the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, — shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

90. Les dispositions suivantes de la présente loi, concernant le parlement du Canada, savoir : — les dispositions relatives aux bills d'appropriation et d'impôts, à la recommandation de votes de deniers, à la sanction des bills, au désaveu des lois, et à la signification du bon plaisir quant aux bills réservés, — s'étendront et s'appliqueront aux législatures des différentes provinces, tout comme si elles étaient ici décrétées et rendues expressément applicables aux provinces respectives et à leurs législatures, en substituant toutefois le lieutenant-gouverneur de la province au gouverneur-général, le gouverneur-général à la Reine et au secrétaire d'État, un an à deux ans, et la province au Canada.

Legislative Authority of Parliament of Canada

Autorité législative du parlement du Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans

that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :
[…]	[…]
1A. The Public Debt and Property. (45)	1A. La dette et la propriété publiques. (45)
[…]	[…]
3. The raising of Money by any Mode or System of Taxation.	3. Le prélèvement de deniers par tous modes ou systèmes de taxation.
4. The borrowing of Money on the Public Credit.	4. L'emprunt de deniers sur le crédit public.
[…]	[…]
6. The Census and Statistics.	6. Le recensement et les statistiques.
[…]	[…]
14. Currency and Coinage.	14. Le cours monétaire et le monnayage.
[…]	[…]
16. Savings Banks.	16. Les caisses d'épargne.
[…]	[…]
18. Bills of Exchange and Promissory Notes.	18. Les lettres de change et les billets promissoires.
19. Interest.	19. L'intérêt de l'argent.

20. Legal Tender.	20. Les offres légales.
[…]	[…]

[28] The following provisions of the *Constitution Act, 1982*, are applicable in these proceedings

Life, liberty and security of person	Vie, liberté et sécurité
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
[…]	[…]
Equality before and under law and equal protection and benefit of law	Égalité devant la loi, égalité de bénéfice et protection égale de la loi
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
[…]	[…]
Commitment to promote equal opportunities	Engagements relatifs à l'égalité des chances
36. (1) Without altering the legislative authority of Parliament or of the provincial	36. (1) Sous réserve des compétences législatives du Parlement et des législatures et

legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à :

(a) promoting equal opportunities for the well-being of Canadians;

a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;

(b) furthering economic development to reduce disparity in opportunities; and

b) favoriser le développement économique pour réduire l'inégalité des chances;

(c) providing essential public services of reasonable quality to all Canadians.

c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

Commitment respecting public services

Engagement relatif aux services publics

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

ARGUMENT

Plaintiffs

[29] The Plaintiffs argue that the Prothonotary erred in his ruling on justiciability by exceeding his jurisdiction and making substantive findings on the issues between the parties, in particular the proper construction of the term "may" in s.18 of the Bank Act, and the applicability of the Charter. They say that, according to Supreme Court jurisprudence, these are issues that must be left to the trial judge and not decided on a motion to strike. They also argue that the Prothonotary ignored pointed and clear jurisprudence on the issues before him, and completely failed to deal with the relief sought with respect to the constitutional, budgetary issues.

[30] The Plaintiffs remind the Court of the general principles to be applied on a motion to strike. The facts pleaded by the Plaintiffs must be taken as proven: *Canada (Attorney General) v Inuit Tapirasat of Canada*, [1980] 2 SCR 735; *Nelles v Ontario* (1989), DLR (4th) 609 (SCC) [*Nelles*]; *Operation Dismantle Inc.*, above; *Hunt*, above; *Dumont v Canada (Attorney General)*, [1990] 1 SCR 279 [*Dumont*]; *Trendsetter Developments Ltd v Ottawa Financial Corp*. (1989), 32 OAC 327 (CA) [*Trendsetter*]; *Nash v Ontario* (1995), 27 OR (3d) 1 (Ont CA) [*Nash*]; *Canada v Arsenault*, 2009 FCA 242 [*Arsenault*]. A claim should be struck "only in plain and obvious cases where the pleading is bad beyond argument" (*Nelles*, above, at 627), or where it is "'plain and obvious' or 'beyond doubt'" that the claim will not succeed (*Dumont*, above, at 280; *Trendsetter*, above). It is inappropriate to strike a claim simply because it raises an "arguable, difficult or important point of law" (*Hunt*, above, at 990-91), or because it is a novel claim: *Nash*, above; *Hanson v Bank of Nova Scotia* (1994), 19 OR (3d) 142 (CA); *Adams-Smith v Christian Horizons* (1997), 14 CPC (4th) 78 (Ont Gen Div); *Miller (Litigation Guardian of) v Wiwchairyk* (1997), 34 OR (3d) 640 (Ont Gen

Div). Indeed, in the law of torts in particular, this may make it critical that the claim proceed so that the law can evolve in response to modern needs (*Hunt*, above, at 991-92). Matters not fully settled by the jurisprudence should not be decided on a motion to strike: *R.D. Belanger & Associates Ltd v Stadium Corp of Ontario Ltd* (1991), 5 OR (3d) 778 (CA). The Plaintiffs say that, in order to succeed, the Defendants must produce a "decided case directly on point from the same jurisdiction demonstrating that the very same issue has been squarely dealt with and rejected": *Dalex Co v Schwartz Levitsky Feldman* (1994), 19 OR (3d) 463 (Gen Div). Furthermore, the Court should be generous with respect to the drafting of the pleadings, permitting amendments before striking: *Grant v Cormier – Grant et al* (2001), 56 OR (3d) 215 (CA); *Toronto-Dominion Bank v Deloite Hoskins & Sells* (1991), 5 OR (3d) 417 (Gen Div). Finally, the Claim has to be taken as pleaded by the Plaintiffs, not as reconfigured by the Defendants: *Arsenault*, above.

[31] The Plaintiffs say that the Prothonotary correctly stated the test on a motion to strike, but wholly misapplied it by determining substantive matters that should have been left for the trial judge, striking the Claim despite acknowledging that it was a "novel" and "complex" one, and making an erroneous ruling on the application of the Charter.

[32] With respect to their constitutional claims, the Plaintiffs note that each level of government is entrusted with both the "power and the duty" to legislate concerning the subjects exclusively allocated to them under the Constitution (*Nova Scotia (Attorney General) v Canada (Attorney General)*, [1951] SCR 31), and neither Parliament nor the executive can abdicate its duty to govern (*Canada (Wheat Board) v Hallet and Carey Ltd*, [1951] SCR 81 [*Wheat Board*] ; *Re Gray* (1918),

57 Can SCR 150 at 157; *Reference re Secession of Quebec*, [1988] 2 SCR 217 [*Reference re Secession of Quebec*]).

[33] One consequence of this, in the Plaintiffs' view, is that it is not plain and obvious that s.91(6) of the *Constitution Act, 1867*, does not impose a duty. In their view, this provision requires the Minister to adopt certain accounting methods for budgetary purposes. The constitutional duty to outline all revenues and expenditures during the budgetary process evolved from the *Magna Carta*, the Plaintiffs argue, and is tied to the constitutional right of "no taxation without representation." This principle is entrenched in the Canadian Constitution both through the preamble to the *Constitution Act, 1867*, and through ss.53, 54, and 90, which state that all taxing measures must emanate from the House of Commons: *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, [2001] 1 SCR 470 at paras 67-79. These powers cannot be delegated, even to the Governor-in-Council. By not revealing the government's true revenues to Parliament, the Plaintiffs argue, the Minister is in violation of these constitutional principles and provisions removing the ability of elected MPs to properly review and debate the budget and pass expenditure and taxing provisions.

[34] Furthermore, the Supreme Court of Canada has held that legislative omissions can lead to constitutional breaches. As stated in *Vriend v Alberta*, [1998] 1 SCR 493 at paras 59-60 [*Vriend*] [Plaintiffs' emphasis]:

> [59] The respondents contend that a deliberate choice not to legislate should not be considered government action and thus does not attract Charter scrutiny. This submission should not be accepted. They assert that there must be some "exercise" of "s. 32 authority" to bring the decision of the legislature within the purview of the Charter. Yet there is nothing either in the text of s. 32 or in the

> jurisprudence concerned with the application of the Charter which requires such a narrow view of the Charter's application.
>
> [60] The relevant subsection, s. 32(1)(b), states that the Charter applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province". There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the Charter will be engaged even if the legislature refuses to exercise its authority" ("The Sounds of Silence: Charter Application when the Legislature Declines to Speak" (1996), 7 Constitutional Forum 113, at p. 115). The application of the Charter is not restricted to situations where the government actively encroaches on rights.

Both executive action and executive *inaction* must also conform to constitutional norms (*Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539; *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44 [*Khadr*]).

[35] With respect to s.7 of the Charter, the Plaintiffs argue that their rights to life, liberty and security of the person are engaged by a reduction, elimination and/or fatal delay in health care services, education, and other human capital expenditures and services. These problems affect their physical and psychological integrity, which are protected by s.7: *Singh et al v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177; *R v Morgentaler*, [1988] 1 SCR 30; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519. In particular, the availability or restriction of medical services has been found to constitute a s.7 interest: *Chaoulli*, above. In addition, the increased gulf between the rich and the poor, and the disappearance of the middle class in Canada, results in deteriorating socio-economic conditions that pose a threat to the Plaintiffs' physical and psychological well-being through increased crime and other socio-economic evils, and this

implicates their s.7 rights. The Plaintiffs argue that the curtailment of human capital expenditures that leads to these results is largely a result of the Minister's unlawful conduct under the Bank Act, as well as the omission, in accordance with his duty, to set out true and accurate revenues in the budgetary process. Thus, the principle from *Vriend*, above, that Charter violations can occur by omission is relevant to the s.7 claim. The Plaintiffs argue that the Prothonotary misunderstood and misstated their s.7 claim at paragraphs 55-56 of his Decision, and that he also ignored facts he was required to take as proven in considering whether it was plain and obvious that the s.7 claim could not succeed.

[36] In addition, the Plaintiffs argue, the failure to use the powers set out in s.18 of the Bank Act to provide interest-free loans for human capital expenditures leads to regional disparities and an unequal level of services, which is contrary to s.15 of the Charter, s.36 of the *Constitution Act,1982*, and the structural imperative to ensure the equality of all citizens as enunciated by the Supreme Court of Canada in *Winner v SMT (Eastern) Ltd*, [1951] SCR 887. The Supreme Court has held that geography of residence is an analogous ground under s.15 of the Charter: *R v Turpin*, [1989] 1 SCR 1296.

[37] The Prothonotary erred, the Plaintiffs argue, in finding that substantive inequality could not be established because the Plaintiffs had not pleaded a distinction based upon enumerated or analogous grounds and no relevant comparator of discrimination was identified, since the claim was advanced on behalf of all Canadians. First, the Plaintiffs say, the Supreme Court in *Withler*, above removed the requirement for a comparator group analysis, and established a two-part test. They quote from the headnote of the case as follows [Plaintiffs' emphasis]:

> The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) Does the law create a distinction that is based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The claimant must establish that he or she has been denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1). It is not necessary to pinpoint a mirror comparator group. Provided that the claimant establishes a distinction based on one or more of the enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. At the second step, the question is whether, having regard to all relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping it

Furthermore, the Plaintiffs point out that, in this case, they pleaded and argued a comparator group: the treatment of Canadian citizens in contrast to foreign private bankers, persons and interests.

[38] On the issue of justiciability, the Plaintiffs argue that the Prothonotary erred by making a substantive determination on the meaning of the word "may" in s.18 of the Bank Act. The Prothonotary found that, since s.18 is a permissive provision, "no legislative imperative exists" to make interest-free loans for human capital expenditures, and the Court was therefore not the proper vehicle for declaring that the Government must change its policy. The existence of a legislative duty to make interest-free loans was at the crux of the Claim and the dispute, and the Prothonotary did not have jurisdiction to decide it on a motion to strike.

[39] The Prothonotary further erred in his analysis of justiciability, the Plaintiffs argue, by ignoring the jurisprudence that facts pleaded must be taken as proven, including the fact that the

Bank was set up to provide interest-free loans for human capital expenditures. Furthermore, they say that the interpretation of a statutory provision or a constitutional duty or right is *always* justiciable. The declaratory relief and damages sought are grounded in the interpretation of the Bank Act as well as statutory and constitutional duties that have not been adhered to in this case, with the result that the Plaintiffs' rights are being infringed. The jurisprudence makes it clear that these are justiciable issues.

[40] The fact that the subject-matter of a dispute deals with socio-economic matters does not make a claim non-justiciable, the Plaintiffs argue. Among the issues dealing with socio-economic policies that have been previously found to be justiciable are:

- Whether "wage and price" controls were within the competence of the federal Parliament: *Anti-Inflation Reference*, [1976] 2 SCR 373;
- Whether the limits on transfer payments between the federal and provincial governments could be altered unilaterally: *CAP Reference*, above; and
- A challenge by an individual regarding whether transfer payments by the federal government to the provincial governments with respect to welfare payments were illegal because the province was breaching certain provisions of the Canada Assistance Plan: *Finlay v Canada (Minister of Justice)*, [1986] 2 SCR 607.

[41] The Plaintiffs argue that the clear test for justiciability is whether there is a "sufficient legal component to warrant the intervention of the judicial branch" (*CAP Reference*, above), and that their Claim meets this test.

[42] Furthermore, when social policies are alleged to infringe Charter-protected rights, the Plaintiffs argue, the courts must consider them. "Political questions" are not excluded from judicial scrutiny where the Constitution itself is alleged to be violated: *Chaoulli*, above, at paras 89, 183, 185. In such cases, the question is not whether the policy is sound, but whether it violates constitutional rights, which is a "totally different question": *Operation Dismantle Inc*, above, at 472.

[43] The Prothonotary further erred in his justiciability analysis, the Plaintiffs argue, by not properly distinguishing between the declaratory relief and the tort relief sought. By viewing some of the declaratory relief sought as non-enforceable, he confused the notion of enforceability with that of justiciability. Rule 64 provides a statutory right to seek declaratory relief whether or not any consequential relief is or can be claimed, and the Supreme Court of Canada has recognized that there may be cases where it is appropriate to declare a right but not to enforce it: *Khadr*, above. Furthermore, declaratory relief can be sought in the context of an action under s.17 of the *Federal Courts Act*: *Edwards v Canada* (2000), 181 FTR 219.

[44] Finally, the Plaintiffs argue that the two tort claims, even if properly struck, should have been granted leave to amend: *Collins v Canada*, [2011] DTC 5076; *Simon v Canada*, [2011] DTC 5016; *Spatling v Canada*, 2003 CarswellNat 1013; *Larden v Canada* (1998), 145 FTR 140.

Defendants

[45] The Defendants say that the Prothonotary's Decision reflects a careful and thorough review of the Claim. He determined that it was fatally flawed and bereft of any chance of success, and the Defendants urge the Court to reach the same conclusion.

[46] The Defendants note that the test on a motion to strike under Rule 221 is whether it is plain and obvious on the facts pleaded that the action cannot succeed: *Sivak et al v The Queen et al*, 2012 FC 272 at para 15 [*Sivak*]; *Imperial Tobacco*, above, at para 17. They argue that the appropriate question is not whether there is *any* chance of success, but whether "*in the context of the law and litigation process*, the claim has no reasonable chance of succeeding": *Imperial Tobacco*, above, at para 25 (emphasis in original). The Court's power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure, essential to effective and fair litigation: *Imperial Tobacco*, above, at para 19.

[47] The Defendants argue that there is no reasonable prospect that a Court will read the word "may" in s.18 of the Bank Act as imperative (i.e. imposing a duty). They note that s.11 of the federal *Interpretation Act*, RSC 1985, c I-21, mandates that the expression "shall" is to be construed as imperative and the expression "may" as permissive. Thus, it is appropriate for the Court to conclude on a motion to strike that this aspect of the claim cannot succeed. Furthermore, the Bank Act speaks of loans to the Government or a province, not municipalities.

[48] The Defendants acknowledge that a motion to strike proceeds on the basis that the material facts pleaded in the Claim are true, unless they are manifestly incapable of being proven (*Imperial Tobacco*, above, at para 22), but they note that this applies only to the facts pleaded in the Claim, not counsel's submissions on the motion. Furthermore, they say this rule does not require that allegations based on assumptions and speculation must be taken as true; the Court need not accept at face value bare allegations or those that are scandalous, frivolous or vexatious; nor must it accept

legal submissions dressed up as factual allegations: *Operation Dismantle*, above, at para 27; *Carten v Canada*, 2009 FC 1233 at para 31 [*Carten*].

[49] The Defendants argue that no reasonable cause of action is made out in the Claim because the Plaintiffs have failed to plead the necessary elements of each alleged cause of action together with the relevant facts. These are breaches of the four basic requirements of a pleading, namely that it must: (a) state facts and not merely conclusions of law; (b) include the material facts; (c) state facts and not the evidence by which they are to be proved; and (d) state facts concisely in a summary form: *Carten*, above, at para 36; *Sivak*, above; Rule 174. A claim must contain material facts satisfying all of the necessary elements of the cause of action, or the inevitable conclusion is that is discloses no reasonable cause of action: *Benaissa v Canada (Attorney General)*, 2005 FC 1220 at para 15.

[50] While the Claim in this case alleges misfeasance in public office by stating that the Defendants or their officials have abdicated their statutory and constitutional duties, the necessary elements of that tort are not pleaded, nor are material facts pleaded that could support such a claim. Misfeasance in public office requires that a public officer's misconduct was deliberate and unlawful in his or her capacity as a public office holder, and that the officer was aware that the conduct was unlawful and was likely to harm the plaintiff: *Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras 23, 28-29, 32; *Leblanc v Canada*, 2004 FC 774 at paras 23-25 (reversed by FCA but on other grounds). In their Claim, the Plaintiffs characterize the relevant officials' state of mind as "wittingly and/or unwittingly, in varying degrees of knowledge and intent," and have therefore not pleaded the elements of the tort.

[51] Furthermore, the Court of Appeal has held that to plead the tort of abuse of public office, a plaintiff must cover each essential element of the tort, setting out all material facts (Rule 174) with necessary particularity (Rule 181) as to "any alleged state of mind of a person," "wilful default," "malice" or "fraudulent intention": *St. John's Port Authority*, above at para 25. The identity of the individual or individuals alleged to have engaged in misfeasance is a material fact that must be pleaded: *St. John's Port Authority*, above, at para 41. The Defendants argue that the Plaintiffs have failed to do any of this. Rather, as found by the Prothonotary, their allegations consist of general statements about economic policy and argument.

[52] While the Defendants maintain that s.18 of the Bank Act does not impose any duties, they also note that breach of a statutory duty itself is not a tort. There is no nominate tort of statutory breach: *The Queen (Canada) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 225. Rather, the remedy for such a breach is judicial review: *Holland v Saskatchewan*, 2008 SCC 42 at para 9.

[53] While the Plaintiffs plead the elements of the tort of conspiracy (see *Hunt*, above), the Defendants say they fail to plead any material facts to support their allegations, such as the identity of the officials involved, the type of agreement entered into, when that agreement was reached, the lawful or unlawful means used, and the nature of the intended injury to the Plaintiffs. As found by the Prothonotary, the Claim includes only general statements about finance ministers and unnamed others, along with international monetary agencies that are allegedly undermining the Bank Act. Such allegations do not meet the test for proper pleading. The tort of conspiracy requires not only an agreement between two or more persons, but also an intent to injure, which means that conspiracy

cannot be committed negligently or accidentally: "[t]he parties must know and intend what they are doing" (G H L Fridman, *Introduction to the Canadian Law of Torts*, 2nd ed. (Butterworths/LexisNexis, Markham, July 2003) Chapter 22(4), "Essential of Liability for Conspiracy" at 185). The Plaintiffs fail to specify who has engaged in the alleged conspiracy, and say only that "the defendants' (officials) are wittingly and/or unwittingly, in varying degrees, knowledge, and intent, engaged in a conspiracy." They have therefore not pleaded any material facts that could support a claim for conspiracy.

[54] The Defendants also say that s.91(6) of the *Constitution Act, 1867*, which grants legislative power over "the census and statistics" to the federal Parliament, does not attach any duty to the Defendants. Section 91 merely enumerates the classes of subjects over which exclusive legislative authority is granted to Parliament; it does not impose duties on the Government or its Ministers. Moreover, just because the Plaintiffs can contemplate another way of doing budgetary accounting, which they favour, does not make the current methods unconstitutional.

[55] With respect to the other breaches or constitutional infirmities of the Bank Act that the Plaintiffs have alleged, the Defendants argue that s.24 has nothing to do with the keeping of minutes by the Bank (and in any case the Plaintiffs plead that Parliament has permitted the actions by the Governor that they impugn), and the Plaintiffs have not shown how s.30.1 affects their rights.

[56] With respect to the alleged Charter infringements, the Defendants argue that a claimant "must at least be able to establish a threat of a violation, if not an actual violation" of a Charter right

to succeed (*Operation Dismantle Inc*, above, at para 7), and that the Plaintiffs' Claim shows no reasonable prospect of this.

[57] The Defendants say that the Plaintiffs' s.15 claim must fail because the pleadings reveal no differential treatment between the Plaintiffs and others; nor have they identified a listed or analogous ground upon which differential treatment could be asserted: *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; *Boulter v Nova Scotia Power Inc*, 2009 NSCA 17 at paras 72-73). No relevant comparator group exists because the Claim is advanced on behalf of all Canadians. The Supreme Court in *Withler* maintained the principle that equality is a comparative concept: *Withler*, above, at paras 63-64. As the Prothonotary observed, "[p]rovided the federal government treats all people within the country equally, it does not discriminate": *Richardson*, above, at para 161 (underlining in original). In addition, the Plaintiffs have not pleaded facts upon which they could establish that the impugned state action has resulted in stereotyping or the perpetuation of historical prejudice, which is required under the s.15 test (*Withler*, above, at paras 51, 53) and speaks to the remedial purpose of the provision (*Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 47). It is contrary to the Charter's very purpose, the Defendants argue, for all Canadian citizens and residents to qualify as a group subject to prejudice and stereotyping, either historically or in the present time.

[58] Furthermore, the Claim is of incredible generality, and fails to disclose material facts that show a causal relationship between any of the Defendants' actions and any alleged harms to the Plaintiffs that breach Charter protections. They argue that this is true with respect to both the s.15 and s.7 claims.

[59] The Defendants argue that the Prothonotary was right to conclude that there is no causal connection pleaded connecting the impugned Government economic policies and actions to a breach of s. 7. Nor are there any "evidentiary facts" pleaded, whether "real or intangible" (see *Operation Dismantle Inc*, above, at para 78), that could establish such a causal connection, and no real possibility of establishing such facts. The Claim is not one where the law or the state is preventing a person from making "fundamental personal choices," which is a narrow class of choices, and it would be inappropriate to hold the Government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state (*Blencoe*, above, at paras 49, 54, 59). At the very least, a s.7 claim must arise "as a direct result of a determinative state action that in and of itself deprives the claimant of the right to life, liberty and security of the person": *Gosselin*, above at para 213. The Federal Court of Appeal has recently affirmed that the Charter does not confer a freestanding constitutional right to health care (*Toussaint v Canada (Attorney General)*, 2011 FCA 213 at paras 77 and 78), and the provision of health care and education are in any case provincial responsibilities. The Plaintiffs misread *Chaoulli*, where it was state action (legislation prohibiting private insurance for health care services already insured by the state) that was found to breach s.7 and the Quebec Charter: *Chaoulli*, above, at para 45 (per Deschamps J) and para 102 (per McLachlin CJ and Major and Bastarache JJ).

[60] The Defendants say that the Prothonotary was also correct in finding that the Claim is not justiciable. The issues in the Claim are policy-laden and raise broad economic considerations. The Prothonotary was right to conclude that s.18 of the Bank Act is a permissive provision and that no legislative imperative exists to request or make interest-free loans for "human capital expenditures."

The declarations sought are unbounded in scope, supported by generalities rather than material facts, and call for determinations that are well outside the proper realm of review by a court. There are no objective legal criteria which can be applied to material facts by a court: *Canada v Chiasson*, 2003 FCA 155 at para 8; *Friends of the Earth*, above, at para 33. This absence of objective legal criteria runs throughout the Claim, and the generality and broadness of the Claim means that it is unworkable. Its parameters cannot be ascertained in a meaningful way, and it therefore defies judicial manageability: *Chaudhary v Canada*, 2010 ONSC 6092 at para 17.

[61] The Defendants argue that "managing the national economic environment… is the role of the government and not the courts" (*Archibald v Canada*, [1997] 3 FC 335 at para 83), and it is not the role of judges to "assess the effectiveness or wisdom of various government strategies for solving pressing economic problems" (*Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424 at para 36). The Claim asks the Court to re-write the processes governing the Bank and Canada's involvement with international financial and monetary groups, and to mandate to the Government and the Bank the economic positions that the Plaintiffs advocate. This runs contrary to the proper scope of judicial involvement. Whether or not a policy is "financially or economically fallacious" is not a matter for the judiciary to decide, the Defendants say, but is for the Government to decide as mandated by the electorate.

[62] Based on the above, the Defendants say that the Prothonotary was right to conclude that the defects in the Claim go to its very root and cannot be cured. He was therefore right to strike the Claim in its entirety and not to allow an amendment for defects that cannot be cured.

ANALYSIS

[63] The Plaintiffs say they don't like the way the original intent of the Bank Act has been subverted and ignored. They say there is a conspiracy involving the Defendants, their officials, and various international institutions to "render impotent the Bank Act, as well as Canadian sovereignty over financial, monetary, and socio-economic policy, and in fact by-pass the sovereign rule of Canada, through its Parliament, by means of banking and financial systems…"

[64] These are serious allegations involving complex and far-reaching considerations of Canadian socio-economic policy and governance, and its constitutional underpinnings. What the Plaintiffs say about the misuse, or the non-use, of the Bank Act may well make good economic and social sense, although of course there is bound to be vigorous disagreement. It is not the role of the Court, however, to assess and decide broad issues of socio-economic policy. The role of the Court is to decide whether the Plaintiffs' allegations have any factual and legal base to them or, more precisely in a motion to strike under Rule 221, whether the claims made in the Plaintiffs' Claim have any reasonable prospect of success, or whether it is plain and obvious on the facts pleaded, that the Claim cannot succeed.

[65] Prothonotary Aalto thought it was plain and obvious that there was no reasonable prospect of success, and he struck the Claim accordingly, and without leave to amend because he thought the Claim was not justiciable.

Rule 221 and the Law

[66] I see no disagreement between the parties as to the law applicable to this motion. The disagreement is over how it should be applied to the Claim.

[67] As Prothonotary Aalto pointed out in his reasons of 9 August 2013, the Crown has brought the motion to strike on the following grounds:

> i) the Claim fails to disclose a reasonable cause of action against the Defendants, or any one of them;
>
> ii) the Claim is scandalous, frivolous or vexatious;
>
> iii) the Claim is an abuse of process of the Court;
>
> iv) the Claim fails to disclose facts which would show that the action or inaction of the Defendants, or any one of them, could cause an infringement of the Plaintiffs' rights under the Charter or the Constitution;
>
> v) the causal link between the alleged action or inaction of the Defendants or any one of them, and the alleged infringement of the Plaintiffs' rights is too uncertain, speculative and hypothetical to sustain a cause of action;
>
> vi) the Claim seeks to adjudicate matters that are not justiciable;
>
> vii) the Claim concerns matters outside the jurisdiction of the Federal Court;
>
> viii) the Plaintiffs, or any one of them, do not have standing to bring the Claim as of right and, furthermore, the Plaintiffs, or any one of them, do not satisfy the necessary requirements for the grant of public interest standing;

[68] Prothonotary Aalto also provided a summary of the legal principles that the Court must apply in a motion to strike which I adopt for the purposes of my own reasons:

Discussion

[41] Against these competing positions, it must be remembered that the test for striking an action is a high one. The action must be bereft of any chance of success and as noted above just because it is a novel cause of action it does not automatically fail.

[footnote omitted]

[42] The Supreme Court of Canada has recently summarized the principles to be applied on a motion to strike. In *R. v. Imperial Tobacco Canada Ltd.*, the Chief Justice, writing for the Court made the following observations regarding a motion to strike:

> [17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. Supreme Court Rules. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of [page 67] success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
>
> [footnote omitted]
>
> ...
>
> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised

> [page68] on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
>
> [...]
>
> [25] Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way - in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the [page 70] law and the litigation process, the claim has no reasonable chance of succeeding.

[43] These are the principles to be applied on this motion. Do the various claims have any chance of succeeding?

Justiciability

[69] At the heart of Prothonotary Aalto's Decision is a finding that the Plaintiffs' Claim is not justiciable. The Prothonotary's reasons need to be examined carefully because justiciability is also the principle issue before me.

> *Is the Claim Justiciable?*
>
> [62] As noted by the Crown in its submissions, the justiciability of a matter refers to its suitability for determination by a Court. It involves the subject matter for determination by the Court, its presentation and the appropriateness of judicial determination.
>
> [footnote omitted]
>
> [63] This Claim has as its subject matter economic policy and socio-economic matters. In and of itself that does not make it non-justiciable. It depends upon a reading of the legislation and what obligations are imposed by that legislation. As noted by Barnes, J. in *Friends of the Earth*:
>
> […]
>
> [64] The issues in dispute in this Claim are "policy-laden" as they require a consideration of economic policy and the relief sought requires the Government of Canada to take certain steps regarding "interest-free loans" for "human capital" expenditures. What objective legal criteria can be applied to interpret these provisions when economic issues such as those raised are matters of government policy? COMER may not agree with the policy but the Court is not the vehicle for declaring that the Government change that policy if no legislative imperative exists. The *Bank Act* in section 18 is a permissive section in that the powers to be exercised "may" be exercised. This allows for discretion and considerations of policy in the implementation of those powers under the *Bank Act*. There is no requirement that "interest-free loans for human capital" be made.
>
> [65] In my view, this Claim is similar in circumstance to that in *Friends of the Earth*. It is a policy-laden matter that is within the purview of Parliament and is not therefore justiciable. The Claim

founders on the shoals of justiciability. As noted by Dean Lorne Sossin:

> Whether in the normative or positive sense, "appropriateness" has emerged as the most common proxy for justiciability... Appropriateness not only includes both normative and positive elements, but also reflects an appreciation for both the capacities and legitimacy of judicial decision-making...While justiciability will contain a diverse and shifting set of issues, in the final analysis, all one can assert with confidence is that there will always be, and always should be, a boundary between what courts should and should not decide, and further, that this boundary should correspond to predictable and coherent principles.
>
> [footnote omitted]

[66] The Written Representations of the Crown set out succinctly the issue and the problems with the Claim:

> 53. This lack of a statutory or constitutional requirement recurs with respect to the allegation of a negative impact on the Canadian economy of Canada's relationships with different states and international organizations. The Claim asserts that government officials are "in varying degrees, knowledge, and intent, engaged in a conspiracy" with groups like the BIS, FIS and the IMF to "render impotent the *Bank of Canada Act*." Such inter-government activity, it is claimed, is a direct and palpable breach of the *Act* since federal "monetary and financial policy are in fact, by and large, dictated by private foreign bank and financial interests." Among other things, this alleged violation is said to result in the "loss of sovereignty over decision[s] related to banking, monetary policy, economic policy [and] social policy" and the "spiralling schism between the rich and the poor in Canada."
>
> [54] The lack of objective legal criteria to adjudicate the allegations brought forward is

throughout the Claim, in respect of multiple issues: accounting activities, minute-keeping at the BIS and FSB, tax credits, corporate good will and the renting of federal government buildings. Further, the Claim is unworkable. The generality and broadness of the Claim is such that its parameters cannot be ascertained in a meaningful way and it therefore defies judicial manageability.

...

[56] The Plaintiffs are concerned with the way in which Canada develops and implements fiscal policy and monetary policy and Canada's participation in international economic organizations. As indicated, the Claim deals not with specific aspects of legislation, but rather with abstract issues relating to Bank of Canada governance and the role of global markets.

...

[62] The Plaintiffs seek to litigate precisely the types of issues which have been deemed beyond the appropriate scope for adjudication by Canadian courts. Rather than pointing to specific actions or policies governed by the *Act*, the Claim asks this Court to re-write the processes governing the Bank of Canada and Canada's involvement with groups like the BIS, FIS and the IMF. The Claim seeks to have the Court mandate to government and to the Bank of Canada the economic positions advocated by the Plaintiffs.

[63] The Plaintiffs admit they are interested chiefly in targeting policy: "policies such as interest rates, and other policies set by the Bank of Canada", alleging these are being developed "in consultation" with or "at the direction of" the FSB and related organizations. More generally, there is a focus on "monetary and financial policy" (and related "economic and social policies") which Plaintiffs view as deficient insofar as they are "dictated by private foreign bank and financial interests." This request

> runs contrary to the proper scope of judicial involvement. Whether or not a policy is "financially or economically fallacious" is not a matter for the judiciary to decide, but for the government as mandated by the electorate.

[67] The citations have been omitted from these paragraphs but a review of those cases supports these submissions.

[footnote omitted]

[68] The position of COMER that the issues are justiciable relies upon such cases as *Chaoulli v. Quebec (Attorney General)*; *Reference Re Canada Assistance Plan (B.C.); Reference Re: Anti-Inflation Act (Canada);* and, *Manitoba (Attorney General) v. Canada (Attorney General) [Patriation Reference]*. These are all cited for the proposition that Courts have not shied away from issues that engage interpretation of statutes or constitutional duties or rights. All that is required for the Court to entertain the Claim is a subject matter that has "a sufficient legal component to warrant the intervention of the judicial branch". Further, *Chaouilli* is cited for the proposition that 'There is nothing in our constitutional arrangement to exclude 'political questions' from judicial review where the Constitution itself is alleged to be violated".

[footnotes omitted]

[69] COMER argues that the issue in dispute is not about socio-economic policy and whether it is correct but rather whether or not the implementation of the *Bank Act* provisions violates the rights of COMER.

[70] In the end result, I am not persuaded that the Claim is justiciable. The Claim focuses on matters such as the Minister's decision being "financially and economically fallacious" (para. 21); that Provinces are getting more interest-free loans than others (para. 21 (d); decisions are based on "the reasoning that such loans would increase annual deficits" (para. 24); "it is long recognized that investment and expenditure in human capital is the most productive investment and expenditure a government can make etc. These few examples from the Claim, of which there are many more, resonate with policy making implications not legal considerations.

[70] The Claim is certainly novel and ambitious. It accuses Parliament and Government officials, including the Minister of Finance, of abdicating their constitutional duties and of having handed their powers over to international, private entities, whose interests and directives are now placed above the interests of Canadians and ahead of the primacy of the Canadian Constitution. However, the novelty and boldness of a claim, as the Supreme Court of Canada made clear in *Imperial Tobacco*, above, are not grounds to strike.

[71] Prothonotary Aalto felt that the Claim was not justiciable because it was too "policy-laden" and that there were no legal criteria that could be applied to assess and direct Government policy. He said that

> COMER may not agree with the policy but the Court is not the vehicle for declaring that the government change that policy if no legislative imperative exists. The Bank Act in section 18 is a permissive section in that the powers to be exercised "may" be exercised. This allows for discretion and consideration of policy in the implementation of those powers under the Bank Act. There is no requirement that "interest-free loans for human capital" be made.

[72] In order to reach his conclusion on justiciability, this paragraph makes clear that the Prothonotary decided that the Bank Act, and s.18 in particular, had to be read in a permissive way. The obverse of his reasoning would seem to suggest that if the Bank Act contains a "legislative imperative" then this may well be a justiciable matter for the Court. The full import of the Bank Act and what it requires of Canada and those ministers and officials who act, or don't act, in accordance with the Bank Act is at the heart of this dispute. Hence, in order to reach his conclusions on the non-justiciability, the Prothonotary decided the principal legal issue at stake in these proceedings. I do not accept the Plaintiffs argument that statutory interpretation cannot be dealt with on a motion to

strike. *Laboratories Servier v Apotex Inc*, 2007 FC 837 teaches, however, that it may be better to leave a complex matter of statutory interpretation for argument at trial, and the fact that an issue is contentious does not necessarily make it complex. Prothonotary Aalto felt that "may" in s.18 had an obvious literal meaning that could be dealt with on a motion to strike. My reason for differing from the Prothonotary on justiciability is that, in addition to breaches of the Bank Act, the Claim is also based upon other alleged constitutional breaches and, even if s.18 of the Bank Act is permissive, this does not dispose of the allegations of improper handing-off to international institutions. "May" is usually permissive, but it is not invariably so, and full legal argument on a full evidentiary record is required before the Court can decide what the Bank Act requires of the Government and those involved in applying and interpreting that statute. As the Supreme Court of Canada pointed out in *Dumont*, above,

> Issues as to the proper interpretation of relevant provisions…and the effect… upon them would appear to be better determined at trial where a proper factual case can be laid.

[73] I don't think that when the Supreme Court of Canada, in *Imperial Tobacco,* above, said that the "question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of success," it meant to encourage the Court in a strike motion to decide points of statutory interpretation before hearing the evidence and full legal argument based upon that evidence. It may well be, however, that at some appropriate time in these proceedings this important matter will lend itself to summary determination.

[74] In addition, and as I think the Claim makes clear, the Plaintiffs clearly dispute and challenge certain socio-economic policy decisions that have been taken by the Government and others with

respect to the Bank Act. It is also clear that the Plaintiffs would like the Government and others to make policy choices that are more in line with the Plaintiffs' views of how to interpret and apply the Bank Act. In my view, however, the principal relief sought in this Claim (the declaratory relief) does not require the Court to adjudicate competing policy choices. It requires the Court to assess whether Canada and the Ministers and the officials identified have acted, and continue to act, in accordance with the Bank Act and their constitutional obligations. In other words, there is, in my view, a sufficient legal component to the Claim that will allow the Court to assess Government action against the Bank Act and the Constitution without having to review policy.

[75] The difficult boundary between what a court should and should not decide will arise time and again in a case like the present. However, the issue is not whether the Court should mandate the Government and the Bank to adopt the economic positions espoused and advocated by the Plaintiffs. Nor will the Court be deciding whether a particular policy is "financially or economically fallacious," although this kind of accusation does appear in the Claim. In my view, the Court is being asked to decide whether particular policies and acts are in accordance with the Bank Act and the Constitution. If justiciability is a matter of "appropriateness," then the Court is the appropriate forum to decide this kind of issue. In fact, the Court does this all the time. The Supreme Court of Canada has made in clear that the Parliament of Canada and the executive cannot abdicate their functions (*see Wheat Board*, above) and that the executive and other government actors and institutions are bound by constitutional norms. See *Reference re Secession of Quebec*, above, and *Khadr*, above.

[76] So, as regards the declaratory relief sought in this Claim, it is my view that the matters raised could be justiciable and appropriate for consideration by the Court. Should the Plaintiffs stray across the line into policy, they will be controlled by the Court. There is a difference between the Court declaring that the Government or the Governor, or the Minister, should pursue a particular policy and a declaration as to whether the policy or policies they have pursued are compliant with the Bank Act and the Constitution. The facts are pleaded on these issues. Subject to what I have to say about other aspects of the Claim, the Plaintiffs should be allowed to go forward, call their evidence, and attempt to make their case. It cannot be said, in my view, that it is plain and obvious on the facts pleaded that the action cannot succeed as regards this aspect of the Claim. And even if s.18 of the Bank Act is interpreted as purely permissive, that does not decide the issue raised in the Claim that Canada has obviated crucial aspects of the Bank Act and has subverted or abdicated constitutional obligations by making itself subservient to private international institutions.

The Tort Claims

[77] As regards the tort claims of misfeasance in public office and conspiracy, I am entirely in agreement with what Prothonotary Aalto has to say on these matters. These aspects of the Claim should be struck. They are simply not pleaded in accordance with the rules that govern pleadings. However, because I am of the view that the Claim is justiciable, I think the Plaintiffs must be given an opportunity to amend this aspect of their Claim.

The Charter Claims

[78] The Plaintiffs' Charter claims are novel and fraught with difficulties. The Plaintiffs assert that the *ultra vires* actions of the Minister and the Bank have breached the rights of all Canadians but, as paragraph 47 of the Claim makes clear, their identification of the rights breached is abstract and unsubstantiated. This kind of pleading is impossible to defend against and manage in legal proceedings because, in its present form, it is little more than abstract debate. The Plaintiffs say they have the evidence and they will produce it at trial, but this does not answer the problem. The Defendants need to know in a much clearer fashion than is presently pleaded, and with the relevant facts, how the asserted rights of the Plaintiffs "and all other Canadians" have been breached. Paragraph 47 as presently drafted supports the Defendants' position that the Plaintiffs are using legal proceedings to further a policy debate about what is appropriate socio-economic policy for the country as a whole. It would help if the Plaintiffs would plead the facts that support a breach of their rights.

[79] Subparagraph 47(a) of the Claim attempts to plead some facts in relation to s.7 of the Charter and says the breach of s.7 rights occurs because of a "reduction, elimination and/or fatal delay of health care services, education and other human capital expenditures and services…:" However, this tells us nothing about what has happened to the Plaintiffs in particular (presumably if Mr. Krehm and Ms. Emmett have suffered from a "fatal delay in health care services" they would not be around to make this Claim) and it tells us nothing about which Canadians have suffered a breach of their s.7 rights. If "all other Canadians" have suffered a reduction, elimination, and/or fatal delay of health care services, education and other human capital expenditures and services, the facts to support this assertion will have to be pleaded because, as this pleading stands, the Defendants will

have to interview "all other Canadians" before they can defend the Claim in order to ascertain whether "all other Canadians" have suffered a breach of s.7 rights.

[80] The oral submissions of Plaintiffs' counsel have elaborated somewhat on how ss.7 and 15 come into play in this Claim. For example, Counsel has said that the s.15 rights of Canadians have been breached because the Defendants have favoured private, international institutions at the expense of Canadians. As far as I am aware this is a novel application of s.15. There is, of course, nothing wrong with that. However, counsel's elaborations before me about what the Plaintiffs might have in mind are not pleadings, and until they are pleadings the Defendants have no idea what they need to plead in defence. Defects in pleadings cannot be cured by counsel's ingenuity at the hearing of the motion.

[81] I am only saying here what Prothonotary Aalto pointed out in a much more concise and able way in his reasons on this issue. I agree with what he says and adopt it for purposes of my *de novo* assessment. There is no point in repeating his recitation of the legal principles involved and their application to these pleadings. In my view, if the Plaintiffs say their ss.7 and 15 Charter rights have been breached, then they must plead the facts as to what they have suffered and how it can be connected to alleged breaches by the Minister and the Bank. If they want to make assertions about "all other Canadians," then they need to plead the facts to support those assertions and allow the Defendants to understand what they need to plead in defence. In my view, the whole of paragraph 47 has to be struck because, as presently drafted, it is just not possible to understand how the individual Plaintiffs or "all other Canadians" have been affected by the alleged breaches. All we have are abstract, debatable allegations that cannot be reconciled with the rules that govern

pleadings. The Court is not required to accept assumptions and speculations as true. See *Operation Dismantle Inc,* above, para 27.

Jurisdiction

[82] The Defendants have raised various arguments concerning the jurisdiction of the Federal Court to deal with this Claim. There is a significant difficulty in trying to deal with these arguments at this stage in the process. I have concluded that the tort and Charter claims should be struck, and there is no way of knowing whether any amendments to the pleadings are possible to cure the defects that the Court has identified. In other words, it is not clear as yet what the Claim will involve if acceptable amendments are made.

[83] Prothonotary Aalto dealt with the Crown's arguments on jurisdiction, but only as regards the tort claims. He felt that, pursuant to s. 2, 17 and 18 of the *Federal Courts Act*,

> the wording is sufficiently wide to capture these types of claims against federal actions and Crown servants. It is therefore, not plain and obvious that this Court is without jurisdiction to entertain claims seeking declaratory relief as here.

[84] As the Crown points out, the Claim as presently drafted seeks more than declaratory relief. The Plaintiffs are also seeking damages in the amount of $10,000.00 per Plaintiff and, should the action be certified as a class action, $1.00 for every Canadian citizen/resident. As yet, it is impossible to understand how the individual Plaintiffs or Canadian citizen/residents may have suffered damages as a result of the statutory and constitutional breaches pleaded in the Claim, or as a result of an alleged conspiracy.

[85] However, the heart of the Claim involves a request for declaratory relief against the Minister, the Government, the Crown, the Bank, Parliament, and "officials" who are allegedly in breach of various statutory and constitutional obligations.

[86] As I have concluded that it is not plain and obvious that the breach of statutory and constitutional obligations and the declaratory relief sought is not justiciable, all I can do at this juncture is decide whether the Court has the jurisdiction to deal with this aspect of the Claim. If amendments are made to portions of the Claim that are struck, this issue may have to be re-visited.

[87] At this stage in the proceedings, s. 17 of the *Federal Courts Act* appears sufficiently wide enough to give the Federal Court concurrent jurisdiction where relief is sought against the Crown. This doesn't end the matter, of course, and the Defendants have asked the Court to examine and apply the *ITO v Miida Electronics Inc*, [1986] 1 SCR 752 at p. 766 [*ITO*], jurisdictional test.

[88] Given the Federal Court of Appeal decision in *Rasmussen v Breau*, [1986] 2 FC 500 at para 12, to the effect that the *Federal Courts Act* only applies to the Crown *eo nomine*, and not to a statutory corporation acting as an agent for the Crown, it is difficult to see why the Bank should be named as a Defendant. However, the main problem in the way of determining jurisdiction at this stage is that the Plaintiffs have yet to produce pleadings that adequately set out how any private or other interest has been affected by the alleged statutory and constitutional breaches. The Plaintiffs are asking the Court to declare that their view of the way the Bank Act and the Constitution should be read is correct, and that breaches have occurred. This is akin to asking the Court for an advisory

opinion, and I see nothing in the jurisprudence to suggest that the Court has the jurisdiction to provide this kind of ruling in the form of a declaration.

[89] The Plaintiffs are extremely vague on this issue. They simply assert that the Federal Court has jurisdiction to issue declarations concerning statutes such as the Bank Act, and jurisdiction over federal public actors, tribunals and Ministers of the Crown. They say they have private rights to assert but, as yet, and given that the tort and Charter claims must be struck, I see no private rights at issue. In addition, they claim to be acting for "all other Canadians," but, once again, they have yet to produce pleadings that adequately plead how the rights of "all other Canadians" have been impacted in a way that translates into the infringement of an individual or a collective right. If the rights of all Canadians are impacted, then the individual Plaintiffs would be able to describe, in accordance with the rules that govern pleadings, how their individual rights have been breached, but they have, as yet, not been able to do this.

[90] It seems to me that the fundamental problem of how the Plaintiffs can simply come to the Court and request declarations that their interpretations of the Bank Act and the Constitution are correct is the reason why they have attached tortious and Charter breaches to their Claim. They know that they need to show how individual rights have been infringed but, as of yet, they have not even set out in their pleadings how their own rights have been infringed, let alone the rights of "all other Canadians."

[91] This means that, in terms of the *ITO* principles, the Plaintiffs have yet to show a statutory grant of jurisdiction by the federal Parliament that the Court can entertain and rule on the Claim as

presently constituted (i.e. simply declare that statutory and constitutional breaches have occurred without an adequate description in the pleadings of how a private right or interest has been affected and the grounds for a valid cause of action), and they have yet to cite an existing body of federal law which is essential to the disposition of the case and which nourishes such a statutory grant of jurisdiction. The Plaintiffs do not have any specific rights under the legislation which they cite and they have provided no statutory or other framework for the exercise of any rights. They may be able to do these things with appropriate amendments to the pleadings. As yet, however, I cannot see how the Court acquires the jurisdiction to provide the declaratory relief that is sought.

Standing

[92] The Plaintiffs claim that, as a result of the tortious and unconstitutional conduct of the Defendants and their officials, the Plaintiffs have "suffered damages as set out above, and in reduced services in human capital expenditures and infrastructure, as has every other Canadian citizen/resident."

[93] As discussed above, as presently drafted the pleadings are not sufficient to provide private interest standing. The Plaintiffs are attempting to establish themselves as constitutional actors with the standing to take the Bank and the Crown to task for what, in their opinion, is a wrong application of the Bank Act and a breach of the Constitution. They are claiming that they speak for all Canadians but, as yet, COMER has pled nothing that makes it anything more than a "think-tank" that disagrees with Government action and policy and wants to have its opinions endorsed by the Court by way of declaration.

[94] The Plaintiffs also claim to have

> Suffered damage to the normative constitutional order by irreparable harm to the constitutional supremacy required and dictated not only by s. 52 of the Constitution Act, 1982, but also by the supremacy required and dictated by its underlying principles.

[95] There is no indication in the pleadings as to how this alleged "damage" distinguishes the Plaintiffs from any other Canadian or Canadians. These are ominous words, but all they mean in the context of the Claim as presently drafted is that all Canadian have an interest in insuring that the Constitution is honoured and that Government actors conduct themselves in accordance with constitutional requirements.

[96] On the issue of standing, Prothonotary Aalto had the following to say:

> *Plaintiff's Standing*
>
> [59] With respect to the issue of standing, there is now a plethora of cases setting the parameters of both private and public interest standing. In a recent decision Hughes, J. in United Steel Workers v. MCI, reviewed the case law relating to public interest standing and summarized the current approach of courts as follows:
>
> [footnote omitted]
>
> > [13] To summarize these decisions, I view the current jurisprudence with respect to public interest standing to be:
> >
> > * The Court is to take a flexible, discretionary approach.
> >
> > * Three factors are to guide the Court in its considerations:
> >
> > * Does the case raise a serious justiciable issue?

> Does the party bringing the proceeding have a real stake or genuine interest in the outcome?
>
> Is the proposed proceeding a reasonable and effective means for bringing the matter to Court?
>
> * The Court should take a liberal and generous approach in its consideration of the matter.

> [60] In this case the individual Plaintiffs have standing to assert rights but only if there is interference with a private right and they have suffered damages as a result. Although the written representations and argument set out greater detail of the premise upon which rights relating to expectations and declarations that the budgetary process and constitutional requirements impinged their rights, it is not clear from the pleading that these are sufficient to give private interest standing.
>
> [61] However, with respect to public interest standing, in taking a flexible, liberal and generous approach to the issues raised in the Claim, it cannot be said at this juncture that COMER does not meet the test for public interest standing. If the claims are sufficiently amended to satisfy the requirements of pleading, the claims would meet the first part of the test by raising serious issues to be tried. COMER has a genuine interest in economic policy. There appears not to be an alternative reasonable and effective means to bring the matter to Court. However, this is not the end of the matter.

[97] I agree with Prothonotary Aalto on this issue. It cannot be said on the present pleadings that the Plaintiffs have individual standing but, depending upon how the Claim is amended, it may be that the Plaintiffs can satisfy the criteria for private and/or public interest standing.

[98] The issue of standing should be left until the Plaintiffs have had an opportunity to file amendments and may be decided as part of any subsequent motion to strike by the Defendants, or disposed of with the merits of the case.

Conclusions

[99] In my view, this appeal cannot succeed in its entirety. However, given my finding that the allegations of breach of statute and constitutional obligations may be justiciable depending upon whether the Plaintiffs can establish a reasonable cause of action through appropriate amendments, the Plaintiffs should have leave to amend.

[100] In view of my reasons, the following paragraphs of the Claim must be struck in their entirety:

a. Paragraph 1(a)(viii);

b. Paragraph 1(b);

c. Paragraph 41;

d. Paragraph 47;

e. Paragraph 48;

f. Paragraph 49.

[101] If these paragraphs are struck, it is then my view that, in accordance with Rule 221, the entire Claim discloses no reasonable cause of action, is scandalous and vexatious, and is an abuse of the process of the Court. However, there is a possibility that these problems could be remedied by

appropriate amendments. For this reason, then, the Claim should be struck in its entirety with leave to amend.

ORDER

THIS COURT'S ORDER is that:

1. The appeal is allowed in part. The Plaintiffs' Amended Statement of Claim is struck in its entirety.
2. The Plaintiffs are granted leave to amend their Amended Statement of Claim within 30 days of the date of this Order, unless otherwise extended by the Court on the advice of counsel.
3. Following the filing of any Amended Amended Statement of Claim, the Defendants may again bring a motion to strike.
4. As this motion has only been partially successful no costs are awarded to either side.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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