Court File No.: A-228-14

FEDERAL COURT OF APPEAL

BETWEEN:

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

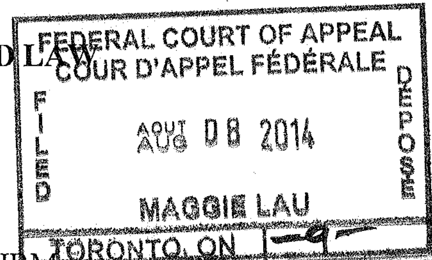
Appellants (Plaintiffs)

- and –

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

Respondents (Defendants)

APPELLANT'S MEMORANDUM OF FACT AND LAW



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PART III - THE LAW AND ARGUMENT

A/ The Rule 51 Judge's Decision

4. In his decision, the learned Rule 51 Appeal Judge ruled that:

a) The, main, declaratory relief sought by the Plaintiff, contrary to the Prothonotary's ruling, is justiciable;

- Appeal Book, @ Tab 4, @ pp. 79-86, @ paragraphs 69-76

b) Agreed with the Prothonotary that the tort claims be struck, with leave to amend;

- Ibid, @ Tab 4, @ p. 87, @ paragraph 77

c) that, with respect to the **Charter** claims, agreed with the Prothonotary,

- Ibid, @ Tab 4, @ pp. 88, paragraphs 78-81

wherein the Prothonotary had ruled that no **Charter** rights, or interests, are engaged;

- Appeal Book, @ Tab 3, @ pp. 25-27, @ paragraphs 53-56

d) with respect to the jurisdiction of the Court to deal with the claim, while the Prothonotary had decided jurisdiction existed, the Learned Rule 51 Appeal Judge left this issue to be decided after the amended pleadings were filed;

- Appeal Book, @ Tab 4, @pp. 90-93, @ paragraphs 82-91

e) with respect to standing, while the Prothonotary was unclear as to private interest standing, but ruled that public interest standing existed;

- Appeal Book, @ Tab 3, @ pp. 28-29, paragraphs 59-61

the Learned Rule 51 Appeal Judge left the issue of public interest standing up in the air until amendments were made.

- Appeal Book, @ Tab 4, @ pp. 93-95, @ paragraphs 92-98

5. At the end of the day, the Learned Rule 51 Appeal Judge struck certain portions of the statement of claim,

   - Appeal Book, @ Tab 4, p. 96, paragraph 100

   with the view that, if these portions were struck, then the entire claim ought to be struck, with leave to amend.

   - Ibid, @ Tab 4, @ pp. 96-97, paragraph 101

B/Summary of Errors of Learned Rule 51 Appeal Judge

6. It is submitted that the learned Rule 51 Appeal Judge erred in striking the **entire** claim.

7. It is submitted that, once he found the Declaratory relief justiciable, the jurisdiction of the Court is self-evident.

8. It is further submitted that the learned Rule 51 Appeal Judge erred in not finding that the plaintiffs had both private, and at minimum, public interest standing, to seek the declaratory relief found justiciable.

9. It is submitted that the learned Rule 51 Appeal Judge also erred in concluding that the **Charter** was not engaged.

10. It is further submitted that the learned Rule 51 Appeal Judge, also erred, in law, in his (non) treatment of the Budgetary issue as self-standing declaratory relief.

C/ General Principles on Motion to Strike

11. It is submitted and tritely held, by the Supreme Court of Canada, and the Appellate Courts, and plead before the learned Prothonotary, and Rule 51 Appeal Judge, that:

(a) the facts pleaded by the Plaintiffs must be taken as proven and fact:

- ***A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735***
- ***Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC)***
- ***Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441***
- ***Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959***
- ***Dumont v. A.G. Canada [1990] 1 S.C.R. 279***
- ***Trendsetter Ltd. v. Ottawa Financial Corp. (1989) 32 O.A.C. 327 (C.A.)***
- ***Nash v. Ontario (1995) 27 O.R. (3d) 1 (Ont. C. A.)***
- ***Canada v. Arsenault 2009 FCA 242***

(b) it has been further held, that on a motion to strike, the test is a rather high one, namely that,

> "A Court should strike a pleading under Rule 126 **only in plain and obvious cases where the pleading is bad beyond argument.**
>
> **Furthermore, I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.** Rule1.04(1) of the Rules of Civil Procedure in Ontario, O. Reg 560/84, confirms this principle in stating that "these rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."
>
> - ***Nelles, supra,*** **p. 627**

and rephrased, re-iterated by the Supreme Court of Canada, in

Dumont, wherein the Court stated that,

> ***"It cannot be said that the outcome of the case is 'plain and obvious' or 'beyond doubt'.***
>
> 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 base can be laid."
>
> **- *Dumont, supra.* p. 280**

and further, that:

> "It is not for this Court on a motion to strike to reach a decision as to the plaintiff's chance of success."
>
> - ***Hunt, supra (SCC)***

and further that:

> **The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.**
>
> ...
>
> This brings me to the second difficulty I have with the defendants' submission. **It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel.** If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.
>
> - ***Hunt, supra* p. 14**

and that "the court should make an order only in ***plain and obvious cases*** which it is satisfied to be beyond doubt";

- ***Trendsetter Ltd*, *supra,* (Ont. C.A.).**

(c) (i) and that a statement of claim should not be struck just because it is "novel";

- ***Nash v. Ontario (1995) 27 O.R. (3d) (C.A.)***
- ***Hanson v. Bank of Nova Scotia (1994) 19 O.R .(3d) 142 (C.A.)***
- ***Adams-Smith v. Christian Horizons (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.)***
- ***Miller (Litigation Guardian of) v. Wiwchairyk (1997) 34 O.R. (3d) 640 (Ont.Gen.Div)***

(ii) that "matters law not ***fully settled*** by the jurisprudence should not be disposed of at this stage of the proceedings";

- ***R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*** (1991) 5 O.R. (3d) 778 (C.A.)

(iii) and that to strike, 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. Schawartz Levitsky Feldman*** (1994) 19 O.R. (3d) 463 (Gen. Div).

(d) and that, in fact, the Court ought to be generous in the drafting of pleadings and not strike but allow amendment before striking.

- ***Grant v. Cormier – Grant, et. al*** (2001) 56 O.R. (3d) 215 (Ont. C.A.)
- ***TD Bank v. Delloitte Hoskins & Sells*** (1991) 5 O.R. (3d) 417 (Gen. Div.)

12. Further plead, and read, to the Prothonotary, and Rule 51Appeal Judge, during oral argument,

    - Record herein, Tab 5 @pp. 205; (p. 3, lines 2-22 of transcript)

    was that the line between fact and evidence is not a clear-cut one, wherein the Federal Court has ruled:

    > **20** The line between pleading facts and pleading evidence is not a distinct one. I can see no prejudice to the defendants, arising in this case, as a result of the plaintiff setting out the facts on which he relies in the terms and with the specificity noted above. I do not see that this makes the drafting of a defence more complex or difficult. Indeed, it may have obviated the procedural step of seeking particulars.
    >
    > - ***Liebmann v. Canada*** [1994] 2 F.C. 3

    and furthermore, that the claim has to be taken as pleaded by the Plaintiff, not reconfigured by the Defendant, wherein the Court of Appeal Ruled:

    > **10** In my view, for the purposes of Rule 221(1) of the *Federal Courts Rules,* SOR/98-10, the moving party must take the opposing party's pleadings as they find them, and cannot resort to reading into a claim something which is not there. The Crown cannot, by its construction of the respondents' claim, make it say something which it does not say.
    >
    > ***- Canada v. Arsenault*** 2009 FCA 242

    which was also plead and read during argument.

    - Record herein, Tab 5, @pp. 205-206 (pp. 3-4, lines 23-25; 1-14 of transcript)

D/ Constitutional Limits – General Principles Applied to Issue(s)

13. As plead before the learned Prothonotary, and Rule 51 Appeal Judge, the constitution delineates both legislative and executive limits, and does not belong to either the Federal or Provincial legislatures, as set out by the Supreme Court of Canada, in that:

> The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled.
>
> - ***Nova Scotia (Attorney General) v. Canada (Attorney General)*** [1951] S.C.R. 31

14. The jurisprudence is clear that neither Parliament, nor the Executive, can abdicate its duty to govern wherein the Supreme Court of Canada has ruled:

> ***These powers to appropriate property which were given to the Governor in Council by the War Measures Act, have been deleted from the National Emergency Transitional Powers Act, and I think that it is fair to assume that it was the clear intention of Parliament, that such powers would not exist in the future.*** The National Emergency Transitional Powers Act is to my mind without doubt a clear curtailment of the powers that the Governor in Council could validly exercise during the war under the War Measures Act.
>
> …
>
> I cannot find in this section 2 any words, general or specific, that can lead me to the conclusion that maintain, control and regulate, include compulsory taking and fixing the compensation to be paid. ***If it had been the intention of Parliament to give such a wide power to the Governor General in Council, this power would have been specifically mentioned, as it had been in the War Measures Act, or it would be found in the opening words of the section. It would surely not have been deleted as it has been in the statute now under consideration.***
>
> The War measures Act is a general Act but the new Act is limited in its purposes, and cannot be extended. As Chief Justice Sir Charles Fitzpatrick said in the Gray case (1918) 57 Can. S.C.R. 150 at 157:

> ***Parliament cannot indeed, abdicate its functions***, but within reasonable limits at any rate it can delegate its powers to the Executive Government. ***Such powers must necessarily be subject to the termination at any time by Parliament, and needless to say the acts of the Executive, under it delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.***

> I have therefore reached the conclusion that under the guise of maintaining, controlling and regulating prices, the Governor General in Council cannot compulsorily appropriate property and arbitrarily fix the compensation to be paid. ***The exercise of such powers would be beyond the authority conferred by statute.***
>
> ***For these reasons, I think that the provisions of P.C. 1292***, dealing with the compulsory taking and vesting in the Canadian Wheat Board of all oats and barely in commercial positions in Canada, and fixing the compensation to be paid, ***are ultra vires of the Governor in Council.***
>
> **- *Canada (Wheat Board)*** v. ***Hallett and Carey Ltd.*** [1951] S.C.R. 81
>
> **- *Re Gray*** (1918) 57 Can. S.C.R. 150 @ 157

and has been further held that the Executive, and every other government actor, and institution, is bound by the terms of constitutional norms.

- ***Reference re Secession of Quebec,*** [1988] 2 S.C.R. 217

15. It has also been held, by the Supreme Court of Canada, that legislative omission can also lead to constitutional breaches.

- ***Vriend v. Alberta*** [1998] 1 S.C.R. 493

16. It is further submitted, and long-held, and pleaded and read to the learned Prothonotary, and Rule 51 Appeal Judge, that, pre-***Charter***, all executive ***action*** was also required to conform to constitutional norms and limits:

- ***Air Canada v. British Columbia (A.G.)*** [1986] 2 S.C.R. 539

And, post-Charter, as well as all Executive ***inaction***:

- ***Canada (Prime Minister) v. Khadr***, [2010] 1 S.C.R. 44

17. It is submitted that this caselaw was canvassed in oral argument, as well as pleaded, and ignored (not applied) in the context of the making of final substantive rulings, and ignoring other issue(s) on the motion to strike, which constitutes error of law and refusal/failure to exercise jurisdiction.

   - Appeal Book herein, Tab 5, @ pp. 213-224

E/ Application of *Charter to* Issue(s)

"Life, Liberty & Security of the Person under s. 7"

18. With respect to the learned Prothonotary's, and Rule 51 Appeal Judge's, findings on s. 7 of the ***Charter***,

   - Appeal Book, Tab 4, p.88, paragraphs 78-81
   - Ibid., Tab 3, pp. 25-27, paragraphs 53-56.

   the Plaintiffs state that their s.7 rights are engaged, with respect to seeking Declaratory relief, and damages, as follows:

   (a) by a reduction, elimination, and/or fatal delay in health care services;

   (b) by a reduction, elimination, and/or fatal delay in education; and

   (c) by a reduction, elimination, and/or fatal delay in other human capital expenditures and services;

      - Appeal Book, Tab 5, pp. 107-132 (@pp.124,131) Statement of Claim, paragraphs 27(e) and 47(a)

   which speak to physical and psychological integrity covered by s.7 of the ***Charter***.

19. It is further submitted that the availability, and/or restriction of medical services, has been determined by the Supreme Court of Canada to constitute a s. 7 ***Charter*** right/interest:

    -Chaoulli v. Quebec [2005] 1 S.C.R. 791

    and it is further submitted that all reduction and elimination in human capital expenditures such as health, education, libraries, the arts, etc. directly diminishes the quality of life of the Plaintiffs and, in certain instances, actually endangers it physically and psychologically, which are s. 7 ***Charter*** protected, and which is pleaded.

20. It is further submitted that the Defendants have also pleaded a specific increased gulf between the rich and poor, and disappearance of a middle class, which has lead, and continues to lead, to deteriorating socio-economic conditions resulting in threat(s) to their physical and psychological well-being through increased crime, and other socio-economic evils, with resulting threat, degeneration, and devolution of society. The Plaintiffs' s.7 ***Charter*** rights also encompasses the right to a normative constitutional order as dictated by the remedial section in s.52 of the ***Constitution Act, 1982***, which is also a s.7 ***Charter*** interest. In the end, there is no doubt that physical and psychological integrity is s.7 protected.

    - ***Statement of Claim, paragraphs 27, 47(a), 48, 49***
    - ***Singh et al v. MEI*** [1985] 1 S.C.R. 177
    - ***R. v. Morgentaler*** [1988] 1 S.C.R. 30
    - ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 S.C.R. 519

21. The Plaintiffs further submit that in the elimination, curtailment, and non-provision of such human capital expenditures, which go to the physical and psychological integrity of the Plaintiffs, and others, which are largely a direct result of the Ministers of

Finance's unlawful conduct under the ***Bank of Canada Act***, as well as his constitutional omission of his duty in the budgetary process to set out true and accurate revenues, that a s. 7 ***Charter*** violation also occurs, by way of "omission", as set out by the Supreme Court of Canada in ***Vriend***:

> [56] It is suggested that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the Courts to disallow those laws, or to dictate that certain matters be included in those laws. **To put the issue in this way is misleading and erroneous. Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures.** This is necessarily true of all constitutional democracies. **Citizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge**. It is said, however, that this case is different because the challenge centers on the legislature's failure to extend the protection of a law to a particular group of people. **This position assumes that it is only a positive act rather than an omission which may be scrutinized under the Charter. In my view, for the reasons that will follow, there is no legal basis for drawing such a distinction. In this as in other cases, the courts have a duty to determine whether the challenge is justified.** It is not a question, as McClung J.A. suggested, of the courts imposing their view of "ideal" legislation, but rather of determining whether the challenged legislative act or omission is constitutional or not.
>
> [57] McClung J.A.'s position that judicial interference is inappropriate in this case is "neutral". Yet, questions which raise the issue of neutrality can only be dealt with in the context of the s.15 analysis itself. Unless that analysis is undertaken, it is impossible to say whether the omission is indeed neutral or not. Neutrality cannot be assumed. To do so would remove the omission from the scope of judicial scrutiny under the ***Charter***. ***The appellants have challenged the law on the ground that it violates the Constitution of Canada, and the courts must hear and consider that challenge***. If, as alleged, the ***IRPA*** excludes some people from receiving benefits and protection it confers on others in a way that contravenes the equality guarantees in the ***Charter***, then the courts have no choice but to say so. ***To do less would be to undermine the Constitution and the rule of law.***

[58] Let us now consider the substance of the respondent's position on this issue.

[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 asset 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 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 Forums 113, at p. 115). ***The application of the Charter is not restricted to situations where the government actively encroaches on rights.***

-Vriend v. Alberta [1998] 1 S.C.R. 493, @ para. #56-60

"No s. 15 Infringement"

22. With respect to s. 15 of the ***Charter***, the Plaintiffs state that the Plaintiffs have pleaded the requisite facts to obtain the declaratory and other relief sought:

-Appeal Book, Tab 5, pp. 107-132, @ pp. 124, 131, Statement of Claim, paragraph 27(e), 47(b), (c), (d)

and in particular, the refusal to use the Bank of Canada provisions for human capital expenditures leads to regional anomalies, disparities, and unequal level of services, such

as health and education over which both s.7 and s.15 of the ***Charter*** apply, as well as a contravention of s. 36 of the ***Constitution Act, 1867***, and the structural imperative to equality of all citizens as enunciated by the Supreme Court of Canada in ***Winner v. S.M.T. (Eastersn) Ltd.,*** [1951] S.C.R. 887. And it has been further ruled, under s.15 of the ***Charter***, that geography of residence may be an analogous ground under s.15 of the ***Charter***.

- ***R. v. Turpin***, [1989] 1 S.C.R. 1296

23. It is further submitted, with respect to the Defendants' submissions on s. 15, that the "substantive equality" analysis recently outlined by the Supreme Court of Canada, makes the Plaintiffs relief sought arguable.

> *-**R. v. Kapp** [2008] 2 S.C.R. 483 @ paragraphs 14-15; @ paragraphs 23-24.*

24. It is further submitted that the notion of "substantive equality" has been focused and enhanced recently by the Supreme Court of Canada in ***Withler*** wherein the Court has removed, in the s.15 analysis, the need for a "comparator group" whereby the analysis, now under s.15 of the ***Charter*** is simply a two-part test namely:

> ***The jurisprudence establishes a two-part test for assessing as. 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.***

- ***Withler et al., v. Canada (Attorney General), 2011 SCC 12, @p.2, @paragraphs 61-67***

25. It is submitted that when the learned Prothonotary ruled that, and Rule 51 Appeal Judge upheld, no ***Charter*** interests or rights were engaged, by stating:

> [53] The claim under section 15 of the *Charter* is the right to equality and equal protection under the law. A claim under section 15 requires that there be differential treatment between the claimants and others. There is no distinction pleaded in the Claim based on an analogous or enumerated ground. The Supreme Court was clear in *Withler* v. *Canada (Attorney General),* that the notion of substantive equality is a requirement for a successful section 15 claim. The Court stated at paras. 41 and 63 as follows:
>
>> [4] As McIntyre J. explained in *Andrews,* equality is a comparative concept, the condition of which may "only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises" (p. 164). However, McIntyre J. went on to state that formal comparison based on the logic of treating likes alike is not the goal of s. 15. What s. 15(1) requires is substantive not formal equality. [63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step in the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.
>
> [54] Applying this to the current case, the claim is asserted on behalf of all Canadians. There is no distinction pleaded based on an

enumerated or analogous ground The *Bank Act* policies and economic policies apply to all Canadians and no relevant comparator of discrimination is identified. The Supreme Court confirmed this approach in *Canadian Egg Marketing Agency* v, *Rickardson,* wherein it is stated "[provided the federal government treats all people within the country equally, it does not discriminate". Therefore, this part of the Claim must also be struck.

[55] Section 7 of the *Charter* deals with life, liberty and security of the person. As pleaded this section of the *Charter* is not engaged. The Claim is generalized with respect to the section 7 claim only alleging that "by a reduction, elimination and or fatal delay of health care services, education and other human capital expenditures and services". There is no causal connection pleaded in the Claim connecting the government economic policies and actions to a breach of section 7. I am in agreement with the argument of the Crown as set out in paragraphs 18 through 22 of their written submissions particularly the analysis of the application of *Blencoe* v. *British Columbia (Human Rights Commission)* In *Blencoe*, the Supreme Court stated:

> 59 Stress, anxiety or stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time. We are therefore not concerned in this ease with all such prejudice but only that impairment which can be said to flow from the delay in the human rights process. It would be inappropriate to hold government for harms that are brought about by third parties who are not in any sense acting as agents of the state, [emphasis in original]

[56] The Supreme Court has also clearly held that section 7 rights do not encompass positive rights. In *Gosselin* v. *Quebec (Attorney General),*[34] the Supreme Court noted that a section 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". No negative infringement or state prohibition of a section 7 interest has been pleaded. This Claim must be struck.

> ***- Appeal Book, Tab 3, pp. 25-27, @paragraphs 53-56***
> ***- Ibid, Tab 4, p.88, @paragraphs 78-81***

both the Prothonotary and Rule 51 Appeal Judge erred and exceeded jurisdiction in that:

(a) they misunderstood and misstated the argument which was made with respect to s. 7 of the ***Charter*** as well as ignoring facts they were required to take as proven;

(b) misunderstood and misstated the structural equality, as well as the s. 15 **Charter** argument in that the comparator group pleaded and argued the treatment of Canadian citizens versus foreign, ***private*** bankers, and persons,;

(c) ignored the facts pleaded which they had to rule as proved; and

(d) made a determination reserved for the trial judge.

F/ Justiciability

26. It is respectfully submitted that, when the Prothonotary ruled:

> [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.
>
> ***- Appeal Book, @ Tab 3, @ p.32. Decision, @ paragraph 64***

he not only erred in law, but exceeded jurisdiction. It is submitted that **the Rule 51 Appeal Judge was correct in overturning the Prothonotary on the issue of justiciability.**

- Appeal Book, Tab 4, @ pp. 79-86, @ paragraphs 69-76

27. It is submitted that, by making a substantive determination on the meaning of the word "may",

- Appeal Book, @ Tab 3, p.32,, @ paragraph 64

which was the subject of full argument, and at the crux of the claim and dispute,

- Appeal Book, @ Tab 5, @ pp. 224-229, @ pp; (transcript, @ pp 22-27)

the learned Prothonotary actually, without jurisdiction, "adjudicated" part of the crux of the claim. He did the same with the ***Charter*** issue(s). While the learned Rule 51 Appeal Judge over-turned him on the issue of "may", he erred into making the same error on adjudicating the arguable **Charter** issues.

28. They thus exceeded jurisdiction, on this **trial** function, on a motion to strike, as pointed out to in oral argument,

- Appeal Book, @Tab 5 @ p. 229 (p. 27, lines 3-20 of transcript)

as set out by the Supreme Court of Canada in ***Dumont*** wherein the court ruled:

> ***"It cannot be said that the outcome of the case is 'plain and obvious' or 'beyond doubt'.***
>
> 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 base can be laid."
>
> **- *Dumont v. A.G. Canada*** [1990] 1 S.C.R. 279

29. On the issue of justiciability, it is submitted that on the facts of this case, the learned Prothonotary, as pleaded before him, and in the statement of claim, erred in law. It is submitted that the learned Rule 51 Judge was correct in over- turning the decision on this crucial point.

30. It is respectfully submitted that the test for justiciability boils down to whether the ***subject-matter*** is justiciable. Is there a legal issue tied to statute, the constitution, or the common law?

31. It is submitted that simply because the ***subject-matter*** deals with ***socio-economic*** matters, does ***not*** make it ***non***-justiciable. Nor because it is "novel" nor because it is "laden" with socio-economic policy issue(s).

32. In fact, historically, the entire Division of Powers jurisprudence, under Trade & Commerce, Banks, Property and Civil Rights, etc., with respect to ss. 91-92, has occupied the vast majority of the constitutional jurisprudence. In fact both levels of Provincial and Federal Governments are constitutionally charged with legislating in ss. 91-92 of the ***Constitution Act, 1867***, on many facets of socio-economic activity including banking, trade & commerce, tax etc.

33. It is submitted that the Defendants, with respect, in a very smooth, but obvious and naked fashion, figure-skate from the notion of "justiciability" to that of "political question" doctrine, at common law, over ***choice of policy***, then further figure-skate into the doctrine of "enforceability", which have nothing to do with justiciability. It is further submitted that the learned Prothonotary erred and exceeded jurisdiction in this ***de facto*** final adjudication and decision on this ground.