Court File No.: T-2010-11

FEDERAL COURT

BETWEEN:

COMMITTEE 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 AND THE ATTORNEY GENERAL OF CANADA

Defendants

WRITTEN REPRESENTATIONS OF THE DEFENDANTS

April 23rd, 2015

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PART I – STATEMENT OF FACTS

1. The plaintiffs seek declarations, coercive orders and damages. They seek to set aside the parliamentary process in the approval of federal budgets and resulting appropriation acts. They lack a cognizable legal interest, lack standing and seek to adjudicate matters that are not justiciable and outside the court's jurisdiction. The defendants move to strike out the claim without leave to amend. Leave to amend has already been granted by the Federal Court and upheld by the Federal Court of Appeal; this is the second round of litigation about whether this claim is fatally flawed.

2. This litigation was commenced in late 2011. After three judicial hearings the original amended Statement of Claim was struck out with leave to amend. On March 26, 2015 the plaintiffs filed a further amended Statement of Claim.[1] The defendants move to strike out this Amended Claim ask that the plaintiffs' claim be dismissed with costs.

PART II – POINTS IN ISSUE

3. Does the Amended Claim contain a radical defect such that it must be struck out in its entirety and the action dismissed under Rule 221(1) of the *Federal Courts Rules*?

4. Can the plaintiffs purport to add new parties to their existing Claim and can they raise new grounds which were not in the original pleading that was struck out?

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[1] Decision of Prothonotary Aalto striking entire Claim, no leave to amend: August 9, 2013 (2013 FC 855); Decision of Russell J. striking entire Claim, with leave to amend: April 24, 2014 (2014 FC 380); Decision of the Federal Court of Appeal, dismissing both appeal and cross-appeal: January 26, 2015

5. Does the unincorporated entity, "COMER", have standing to bring this action and do the two individuals have standing? Alternatively, can the test for the grant of public interest standing be met by any of them?

6. Does the Federal Court have jurisdiction to hear the plaintiffs' Amended Claim?

PART III – SUBMISSIONS

A. THE BURDEN ON A STRIKE MOTION

7. The test to strike out a pleading under Rule 221 is whether it is plain and obvious on the facts pleaded that the action cannot succeed.[2] The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether the claim discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true.[3] The court need not accept at face value bare allegations, which may be regarded as scandalous, frivolous or vexatious, or legal submissions dressed up as facts.[4]

B. NO REASONABLE CAUSE OF ACTION

8. No reasonable cause of action is made out in the Amended Claim because the plaintiffs have failed to plead the necessary elements of each cause of action together with the material facts. Where pleaded, their allegations do not result in liability by the defendants or any one of them.

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[2] *Sivak et al. v The Queen et al.*, 2012 FC 272 at para 15; *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 17

[3] *Operation Dismantle v The Queen,* [1985] 1 SCR 441 at para. 27

[4] *Carten v Canada*, 2009 FC 1233 (CanLII) at para 31

a) Amended Claim not in accord with court order

9. The Amended Claim breaches the terms of the permission to amend granted by Russell J. of the Federal Court. In careful reasons, Russell J. identified the problems with the original Claim before determining that all of it must be struck out. However, he gave leave to amend.[5] The plaintiffs have failed to cure the problems identified by the Judge.

b) Amended Claim still breaches the rules of pleading

10. The *Federal Courts Rules* impose an obligation to plead material facts that disclose a reasonable cause of action – the claim must: (i) state facts and not merely conclusions of law; (ii) include material facts; (iii) state facts and not the evidence by which they are to be proved; and (iv) state facts concisely in a summary form.[6] When a particular cause of action is pleaded, the claim must contain material facts satisfying all the necessary elements of the cause of action. Otherwise, the inevitable conclusion is that such a claim discloses no reasonable cause of action.[7]

11. The plaintiffs make amendments that are not permissible by the *Federal Courts Rules*. They add new parties – the steering committee members of COMER.[8] They try to add a cause of action not grounded in the factual matrix they have already pleaded: the allegation of breach of s. 3 Charter rights of the plaintiffs through the levy of taxes and a claim for these taxes to be returned. It is not clear if the plaintiffs continue to

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[5] Reasons for Order of Russell J., dated April 24, 2014 (2014 FC 380)
[6] *Carten v Canada*, 2009 FC 1233 (CanLII) at para 36; see also *Sivak v Canada*, 2010 FC 272; Rules 174 & 181 of the *Federal Courts Rules*.
[7] *Benaissa v Canada (Attorney General)*, 2005 FC 1220 at para 15
[8] Paragraph 2(a) of the Amended Claim; see also paras 1(b)(i) and (ii)

rely on the allegations of conspiracy and misfeasance, but they have failed to plead the material facts to support these causes of action.

1) BUDGET PRESENTATION & TAXATION

12. There is no constitutional duty of presenting the federal budget in the manner sought by the plaintiffs. There is no breach of the principle of "no taxation without representation". This principle, as defined by the Supreme Court, means that the Crown may not levy a tax except with the authority of Parliament.[9] This constitutional requirement was satisfied here.

13. Parliament is master of its own procedure.[10] It is well recognized that there is no duty on Parliament to legislate.[11] There is no cause of action for the omission of Parliament to enact any law.[12]

14. The plaintiffs allege that the accounting method used in the budgetary process is a breach of ss. 91(6) *Constitution Act, 1867*,[13] which grants legislative power over "[t]he census and statistics" to Parliament. This provision will not aid them. Section 91 enumerates the classes of subjects and all matters coming within them to which the exclusive legislative authority of the Parliament of Canada is granted - it does not impose duties on Parliament or the Government. A reference to a class of federal power in the

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[9] *Kingstreet Investments v New Brunswick*, [2007] 1 SCR 3 at para 14, see also, *Constitution Act, 1867*, ss. 53 and 90

[10] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 389 per McLachlin J., and at 354-355 per Lamer CJ; *Telezone Inc. v Canada (Attorney General)*, (2004) 69 OR (3rd) 161 (CA)

[11] *Lucas v Toronto Police Services Board*, 2001 CanLII 2797, at para 10. (Ont. Div. Ct.)

[12] *Moriss v Attorney General*, [1995] EWJ No. 297 (England and Wales Court of Appeal), at para 38 – see also *Ontario Association of Radiologists v Ontario (Minister of Health)*, [1999] OJ No. 3027 (Ont. Div. Ct.) – refusal to make a regulation is not justiciable

[13] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.)

Constitution Act, 1867 is not the imposition of a duty upon Parliament to legislate in respect of that subject matter. S. 91 (6) - "the Census and Statistics" – is one of the classes of subjects enumerated in s. 91 for which it is declared in the *Constitution Act, 1867* that "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within" this class of subjects.[14]

15. In any event, much of the information sought by the plaintiffs to be included in the budget documents presented before Parliament is publicly available from the Department of Finance, for example: Tax Expenditures and Evaluations 2012 at: http://www.fin.gc.ca/taxexp-depfisc/2012/taxexp12-eng.asp.[15]

2) NO LEGITIMATE EXPECTATIONS OR PROCEDURAL RIGHTS

16. In Canada, the doctrine of legitimate expectations is part of the doctrine of fairness or natural justice and does not create substantive rights.[16]When the individual plaintiffs cast a vote in a federal election no substantive rights or special procedural rights accrue to them as to the nature and content of laws enacted by elected representatives.

17. In *Authorson*, the Supreme Court held that longstanding parliamentary tradition makes it clear that the only procedure due any Canadian citizen is that proposed legislation receive three readings in the House of Commons and the Senate and that it receive Royal Assent; once that process is completed, legislation within Parliament's competence is unassailable.[17] A challenge to the process of legislation is not justiciable.[18]

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[14] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.)
[15] Web-site accessed on April 23, 2015
[16] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26, affirming *Old St. Boniface* at 1204
[17] *Authorson v Canada (Attorney General)*, [2003] 2 SCR 40 at para 37

18. In *Authorson*, Major J. for the Court concluded that to accept the argument that due process protections of the *Canadian Bill of Rights* can interfere with the right of the legislative branch to determine its own procedure would be to effectively amend the Constitution of Canada, which in its preamble enshrines a constitution similar in principle to the constitution of the United Kingdom - and there - no such procedural rights have ever existed.[19] The same analysis applies to the plaintiffs' arguments.

3) THE MAGNA CARTA DOES NOT HELP

19. The plaintiffs seek rely on the *Magna Carta*. Recently, Justice Rennie of the Federal Court (as he then was) comprehensively analyzed the place of the *Magna Carta* in the Canadian legal landscape and determined that it is not a constitutional instrument. While its seminal place in the development of Canadian constitutional and legal principles is well known, the terms of the *Magna Carta* may be and have been displaced by the legislation of the United Kingdom Parliament and our Parliament. As Prof. Hogg writes, the *Magna Carta* is simply a statute "amenable to ordinary legislative change". Rennie J. held that the *Magna Carta* "has no independent legal significance or legislative weight in the scheme of current Canadian legislation".[20] It does not assist the plaintiffs.

4) INHERENT PRIVILEGE OF FREE SPEECH IN PARLIAMENT

20. The Parliament of Canada and its members have certain powers, privileges and immunities which insure the proper and unimpeded functioning of Parliament.[21]

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[18] *Penikett v The Queen*, 1987 CanLII 145 (YK CA) at p 17-18
[19] *Authorson v Canada (Attorney General)*, [2003] 2 SCR 40 at para 41
[20] *Rocco Galati et al v Canada*, 2015 FC 91 applying *Harper v Atchison*, 2011 SKQB 38 at para 9
[21] *Telezone Inc. v Canada (Attorney General)*, (2004) 69 OR (3rd) 161 (Ont. CA) at para 13

Parliament's sovereignty when engaged in its legislative duties is undoubted.[22] The formulation, content, presentation and the debate of the federal Budget and associated legislation is part of the legislative duties of the members of the House of Commons and an inherent privilege of free speech in Canada's Parliament.

21. Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions. Without this protection, members would be constrained in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive, and as a forum for expressing the anxieties of citizens, would be diminished.[23] In *Vaid*, Binnie J., writing for the Supreme Court, held that Parliamentary privilege is one of the ways in which the fundamental constitutional separation of powers is respected.[24]

22. In Canada, the principle has its roots in the preamble to the *Constitution Act, 1867,* which calls for "a Constitution similar in Principle to that of the United Kingdom".[25] Each of the branches of the State is vouchsafed a measure of autonomy from the others.[26] Historically, Parliamentary privilege was partially codified in art. 9 of the U.K. Bill of Rights of 1689, 1 Will. & Mar. sess. 2, c. 2, but the freedom of speech to which it refers was asserted at least as early as 1523 (*Erskine May's Treatise on The Law,*

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[22] *Canada (House of Commons) v Vaid*, [2005] 1 SCR 667 at para 45, citing *Penikett v Canada,* (1987) 45 DLR (4th) 108 (YTCA); *Sibbeston v Northwest Territories (Attorney General)*, [1988] 2 WWR 501 (NWTCA); *Pickin v British Railways Board*, [1974] AC 765 (HL) at 788-90

[23] British Joint Committee Report quoted with approval in *Canada (House of Commons) v Vaid*, [2005] 1 SCR 667 at para 42 & 45: "which seems to me to reflect the underlying principles of the common law".

[24] *Canada (House of Commons) v Vaid*, [2005] 1 SCR 667 at para 21

[25] *ibid.*

[26] *ibid*

Privileges, Proceedings and Usage of Parliament (23rd ed. 2004), at p. 80).[27] Parliamentary privilege is a principle common to all countries based on the Westminster system.[28] It has a loose counterpart in the Speech or Debate Clause of the United States Constitution, art. 1 §6, cl. 1.[29]

23. In *Authorson*, the Supreme Court affirmed its decision in *Reference re Resolution to Amend the Constitution*, stating that how a legislative body proceeds is a matter that is immune from judicial review and a matter of self-definition and inherent authority of that legislative body:

> *How Houses of Parliament proceed, how a provincial legislative assembly proceeds is in either case a matter of self-definition, subject to any overriding constitutional or self-imposed statutory or indoor prescription. It is unnecessary here to embark on any historical review of the "court" aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before (unless references are made to them for their opinion on a bill or a proposed enactment). It would be incompatible with the self-regulating — "inherent" is as apt a word — authority of Houses of Parliament to deny their capacity to pass any kind of resolution. Reference may appropriately be made to art. 9 of the Bill of Rights of 1689, undoubtedly in force as part of the law of Canada, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".*[30]

24. Article 9 of the *Bill of Rights of 1688/89* precludes any court from impeaching or questioning the freedom of speech and debates or proceedings in Parliament; it is well established that this prevents a court from entertaining any action against a member of a

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[27] *ibid.*

[28] *ibid.*

[29] *ibid.* Note that Binnie J. further describes the US provisions in para. 74 of the *Vaid* decision, citing an appellate judgment of Ginsburg J., now a justice of the US Supreme Court, when she was on the Federal Court of Appeals: the Speech or Debate Clause is "to secure against executive or judicial interference the processes of the nation's elected representatives leading up to the formulation of legislative policy and enactment of laws."

legislature which seeks to make them legally liable whether in criminal or civil law, for acts done or things said in Parliament.[31]

25. The House of Lords in *Hamilton v. Al Fayed* ruled:

> *Article 9 of Bill of Rights 1689 provides:*
>
> *"That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."*
>
> *It is well established that article 9 does not of itself provide a comprehensive definition of parliamentary privilege. In* Prebble v. Television New Zealand Ltd. *[1995] 1 AC 321 at p. 332, I said:*
>
> *"In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles.* ***So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges****: Burdett v. Abbott (1811) 14 East 1; Stockdale v. Hansard (1839) 9 Ad. & E.C. 1; Bradlaugh v. Gossett (1884) 12 Q.B.D. 271; Pickin v. British Railways Board [1974] AC 765; Pepper v. Hart [1993] AC 593. As Blackstone said in his Commentaries on the Laws of England, 17th ed. (1830), vol. 1, p. 163: 'the whole of the law and custom of Parliament has its origin from this one maxim, "that whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere."'*[32] (emphasis added in bold)

26. Section 18 of the *Constitution Act, 1867* prescribes that the privileges, immunities and powers to be held, enjoyed and exercised by the Senate and House of Commons and by the members thereof are a matter of self-definition by the Parliament of Canada, subject only that these not exceed those privileges, immunities and powers, held,

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[30] *Authorson v Canada (Attorney General)*, [2003] 2 SCR 40 at para 38, quoting *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 785

[31] *Prebble v Television New Zealand*, [1994] UKPC 4, [1995] 1 AC 321 (JCPC)

[32] *Hamilton v al Fayed*, [2000] 2 All ER 224 (HL)

enjoyed and exercise by the Commons House of Parliament of the United Kingdom.[33] Further, s. 4 of the *Parliament of Canada Act* declares that the privileges, immunities and powers of the Senate and House of Commons are those held by the United Kingdom Parliament at Confederation and such other ones as are defined by an Act of Canada's Parliament provided these do not exceed, at the time of the passing of the Act, those of the Commons House of Parliament of the United Kingdom.[34]

27. Once a category of privilege or sphere of activity is established before the courts, it is for Parliament, not the courts to determine whether in a particular case the exercise of the privilege is necessary or appropriate.[35] In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts.[36] As the Supreme Court stated in *Vaid*, recognized categories include freedom of speech and control by the Houses of Parliament over "debates or proceedings in Parliament" (as guaranteed by the *Bill of Rights of 1688/89*) including day to day procedure in the House.[37] Hence, the category of

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[33] S. 18 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) as amended: "The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof."

[34] S. 4 of the *Parliament of Canada Act*, RSC 1985, c. P-1. S. 5 of the Act requires that the privileges, immunities and powers of the Senate and House of Commons are part of the general and public law of Canada and that in all courts in Canada and before all judges, shall be taken notice of judicially. See also: *Pickin v British Railways Board*, [1974] AC 765 (HL) at p. 790

[35] *Canada (House of Commons) v Vaid*, [2005] 1 SCR 667 at para 29, part 11

[36] *Canada (House of Commons) v Vaid*, [2005] 1 SCR 667 at para 29, part 11

[37] *Canada (House of Commons) v Vaid*, [2005] 1 SCR 667 at para 29, part 11; *Janssen-Ortho v Amgen Canada*, 2005 CanLII 19660 (ON CA) at para 78; *Hamilton v al Fayed*, [2000] 2 All ER 224 (HL)

Parliamentary privilege being recognized, there is in regard to the Budget debate, its presentation and supporting papers and associated legislation, no role for the courts.[38]

28. It must be added that Money Bills must originate in the House of Commons by virtue of the requirement of s. 53 of the *Constitution Act, 1867* and any bill for the expenditure of public money must receive a recommendation from the Governor General (s. 54).[39] There is no suggestion in the present Claim that these constitutional requirements have been other than satisfied.

5) SECTION 3 OF THE CHARTER IS NOT ENGAGED

29. The protections of section 3 of the *Charter* – electoral rights of citizens - does not accrue to the unincorporated association styled "COMER" – but may only be available to the two individual plaintiffs provided that they are Canadian citizens.[40] But, the individual plaintiffs have failed to plead a cause of action that could constitute a breach of the s. 3 *Charter* right to vote.

30. The right to vote confers on each Canadian citizen the right to "effective representation" in the legislative body:

> *Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the*

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[38] *Roman Corp. v Hudson's Bay Oil & Gas Co.*, [1973] 3 SCR 820 at 827-828 and *N.B. Broadcasting v Nova Scotia*, [1993] 1 SCR 319 – The judges of the Supreme Court differed as to the reason why parliamentary privilege could not be impugned: Chief Justice Lamer held because the *Charter* did not apply (p. 35 & ff), La Forest J. because parliamentary privilege was part of the grant of a legislative assembly and incorporated into the *Constitution Act, 1867* (p. 368) and McLachlin J., writing for the plurality of four judges, because the privilege enjoys constitutional status (p. 374 & ff).

[39] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.)

[40] Section 3 declares: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." See also: P. Hogg, *Constitutional Law of Canada*, (5th ed.) vol. 2, at pp 37-4 and 37-5

right to bring one's grievances and concerns to the attention of one's government representative.[41]

31. The voting right has been explained by the Supreme Court as the right of each citizen to meaningful participation in the electoral process.[42] There is no suggestion in the Amended Claim that the meaningful participation in the electoral process of the plaintiffs was affected in any way or that they were denied "effective representation".

32. A cause of action under the *Charter* "must at least be able to establish a threat of violation, if not an actual violation" of a *Charter* right.[43] The Amended Claim fails to disclose facts which show a causal relationship between any of the defendant's actions and alleged harms which could breach the s. 3 *Charter* protection.[44] Section 3 has never been interpreted to encompass any rights or legitimate expectations by claimants that their elected representatives will enact any particular measures or refrain from doing so.

6) DAMAGE CLAIM ALSO FAILS

33. The plaintiffs have failed to plead a cause of action that could constitute a breach of the s. 3 *Charter* right and Parliamentary privilege bars the review by courts of debates and proceedings in Parliament. Further, there is no factual or legal foundation or cause of action for their damage claim for the return of allegedly unconstitutional taxes.

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[41] *Reference re Provincial Electoral Boundaries (Saskatchewan),* [1991] 2 SCR 158 at 183 per McLachlin J., (as she then was).
[42] *Figueroa v Canada (Attorney General)*, [2003] 1 SCR 912 at para 27
[43] *Operation Dismantle v The Queen,* [1985] 1 SCR 441 at para 7.
[44] See, for instance: *Canadian Bar Association v British Columbia*, 2008 BCCA 92 at para 50 (leave to appeal to SCC dismissed at [2008] SCCA No 185) Note that s. 7 and s. 15 claims have been discontinued.

7) OTHER ALLEGATIONS

a) Allegations of misfeasance by public officers

34. The Amended Claim repeats earlier allegations that the defendants or their officials or Parliament have abdicated their statutory and constitutional duties and now adds the suggestion of *malafides* in the withholding of anticipated total revenue.[45] In so far as there is a claim of misfeasance in public office it lacks the necessary elements of the tort. Absent are material facts that could support a finding that the public officer's misconduct was deliberate and unlawful in his or her capacity as a public officer, and further, that the public officer must have been aware that his or her conduct was unlawful and that it was likely to harm the plaintiff.[46] The Amended Claim does not satisfy the requirement of pleading the elements of this cause of action.

35. Stratas J.A. ruled in *St John's Port Authority* that in pleading the tort of abuse of public office, the 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".[47] The identity of the individual who is alleged to have engaged in misfeasance is a material fact that must be pleaded.[48] The plaintiffs have failed to do this.

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[45] See the newly added paragraph 41 of the Amended Claim

[46] *Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras 23, 28-29, 32; see also: *Leblanc v Canada*, 2004 FC 774 (CanLII) at para 23-25 (reversed by FCA, but on other grounds)

[47] *St. John's Port Authority v Adventure Tours Inc.*, 2011 FCA 198 (CanLII) at para 25

[48] *St. John's Port Authority, supra,* at para 41

36. The Supreme Court established in *Saskatchewan Wheat Pool* that the nominate tort of statutory breach does not exist.[49] The remedy for a breach of statutory duty by a public authority is judicial review for invalidity.[50]

b) Conspiracy allegations

37. The plaintiffs do not plead material facts to support an allegation of conspiracy, such as the identity of the officials engaged in such conduct, the type of agreement entered into, when that agreement was reached, the lawful or unlawful means that were to be used and the nature of the intended injury to the plaintiffs. The tort of conspiracy, according to Professor Gerald Fridman, requires an agreement between two or more persons.[51] A further essential requirement is intent. The requirement of intent to injure means that conspiracy cannot be committed negligently or accidentally: "[t]he parties must know and intend what they are doing".[52]

c) S. 24 and 30.1 of the Bank of Canada Act

38. Section 24 of the *Bank of Canada Act* has nothing to do with the keeping of minutes by the Bank,[53] but in any event, the plaintiffs plead that Parliament has permitted the actions by the Governor that they impugn.[54] Section 30.1 provides that no action lies against the Crown, the Minister of Finance and officials of the Bank of Canada for anything done or omitted to be done in good faith in the administration or discharge of

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[49] *The Queen (Can.) v Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at p. 225
[50] *Holland v Saskatchewan*, 2008 SCC 42 at para 9
[51] G.H.L. Fridman, *Introduction to the Canadian Law of Torts*, 2nd ed.(Butterworths/LexisNexis, Markham, July 2003) Chapter 22(4) "Essentials of Liability for Conspiracy", at p. 185
[52] G.H.L. Fridman, *supra*, p. 185
[53] See para 1(a)(iv) of the Claim
[54] See para 1(a)(v) of the Claim

any powers or duties under the *Act.*[55] Plaintiffs have not shown how this provision would affect their rights and have failed to provide the necessary material grounds.

C. CLAIM FOR DECLARATORY RELIEF

a) Federal Court has jurisdiction to issue declaratory and coercive remedies only as prescribed in the Federal Courts Act

39. Section 18 of the *Federal Courts Act* prescribes that the extraordinary remedies - including declaratory relief – may be obtained only on an application for judicial review under s. 18.1. Section 18.4(2) allows, if the Federal Court "considers it appropriate", for the Court to direct that an application for judicial review be treated and proceeded with as an action. This provision does not authorize the plaintiffs to initiate a request for declaratory or coercive relief in an action. Rather, in a situation of a proper and valid application for judicial review [56] the Federal Court is empowered to "treat" such an application for judicial review as an action.[57]

40. One of the requirements for a proper judicial review application is set out in s. 18.1: only someone "directly affected by the matter in respect of which relief is sought" may bring an application for judicial review. The plaintiffs are not directly affected.

41. The plaintiffs claim damages in the form of "return of the portion of illegal and unconstitutional tax" for themselves and members of a steering committee. It is hard to see how they can claim these taxes without impugning the underlying legality of the instruments and processes that gave rise to the raising of these taxes. Further, in so far as

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[55] Section 30.1 of the *Bank of Canada Act*, R.S.C. 1985, c. B-2

[56] One where the requirements of s. 18.1 of the *Federal Courts Act* are met, *inter alia*, standing to bring the application and time limits

[57] *Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215 at paras 45-50

the plaintiffs seek to attack administrative action by state actors, the law is clear that the plaintiffs can only do so by way of judicial review.[58]

b) No entitlement to declaratory orders

42. In any event, to claim declaratory relief the plaintiffs must establish their entitlement to such declarations: the court must have jurisdiction to issue the declaration, the plaintiffs must raise a "real dispute" not a theoretical one, and they must have a "real interest" to raise it.

43. In *Khadr* the Supreme Court held that a declaration of unconstitutionality is a discretionary remedy.[59] The Court emphasized that a declaration of unconstitutionality has been recognized as "an effective and flexible remedy for the settlement of a real dispute".[60] A court can issue a declaratory remedy so long as it has jurisdiction over the issue at bar, the question before the court is real and not theoretical and the person raising it has a real interest to raise it.[61] None of these requirements are met here.

c) No entitlement to an advisory opinion

44. The plaintiffs are not entitled to refer matters for an advisory opinion.[62] Russell J. determined that the plaintiffs are simply asking that the Federal Court declare that their view of the way the *Bank of Canada Act* and the Constitution should be read is correct and that this is akin to asking for an advisory opinion.[63] The Judge found that the

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[58] *Canada (Attorney General) v Telezone*, [2010] 3 SCR 585 at para 52
[59] *Canada (Prime Minister) v Kha*dr, 2010 SCC 3 at para 46
[60] *ibid.* underlining is in the original text
[61] *ibid.*
[62] See for instance s. 18. 3(1) of the *Federal Courts Act* which permits a federal board, commission or tribunal at any stage of its proceedings to refer certain issues to the Federal Court, while s. 18.3 (2) empowers the Attorney General to make such a reference.
[63] Russell J.'s Reasons at para 88,

plaintiffs fail to show a statutory grant of jurisdiction by Parliament that the Federal Court can entertain and rule on the claim as presently constituted (that is, simply declare that statutory and constitutional breaches have occurred without an adequate description in the pleading of how a private right or interest has been affected and grounds for a valid cause of action).[64] The plaintiffs have not cured this deficiency in the Amended Claim.

45. The Judge further held that the plaintiffs do not have any specific rights under the legislation which they attack and that they have provided no statutory or other framework for the exercise of any rights.[65] The plaintiffs have not cured this deficiency.

d) There is no real dispute to be settled

46. An interpretation of s. 18 of the *Bank of Canada Act* at the plaintiffs' behest will not settle a real dispute – but, rather it will be a theoretical or academic exercise. They simply want to be "proved right" – they want the Federal Court to state that their interpretation of the *Bank of Canada Act* and the Constitution are the correct ones.

47. Declaratory relief is unavailable in the absence of a "real dispute" between the parties. As the Supreme Court held in *Operation Dismantle* the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences – "there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventative measure".[66]

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[64] Russell J.'s Reasons at para 91,
[65] Russell J.'s Reasons at para 91,
[66] *Operation Dismantle Inc., v The Queen*, [1985] 1 SCR 441, at para 33

48. Like here, a private reference was being sought in *Diabo v. Whitesand First Nation,* where a Band wanted a declaration on the validity of its code of membership.[67] There must be a concrete issue put before the court for decision, the Court of Appeal of Ontario held in *Re Danson.* Judicial tradition and the common law have developed a bias towards settling matters of principle on a case by case basis. Courts are not concerned with the hypothetical or the moot but with deciding actual cases involving parties with a specific stake in the proceedings.[68]

e) Plaintiffs have no real interest

49. Russell J. found that no private rights of the plaintiffs were at issue, noting that they claim to be acting for "all other Canadians", but have failed to produce a pleading how "all other Canadians" have been impacted in a way that translates into an infringement of an individual or collective right.[69]

50. In the seminal case of *Gouriet*, Lord Diplock held that a court is not to declare the law generally or to give advisory opinions, but is confined to declaring contested legal rights.[70] His Lordship emphasized that there are inherent limits in the nature of declaratory relief – it is a declaration of rights.[71]

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[67] *Diabo v Whitesand First Nation,* 2011 FCA 96, per Stratas JA

[68] *Re Danson and the Attorney-General of Ontario*, (1987) 60 OR (2d) 679 at p. 685 (CA), appeal to SCC dismissed. Finlayson J.A. also referred to *Ainsbury v Millington*, [1987] 1 All E.R. 929 per Lord Bridge of Harwich quoting an earlier decision of the House: "It has always been a fundamental feature of our judicial system that courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

[69] Russell J.'s Reasons at para 89,

[70] *Gouriet v Union of Post Office Workers*, [1978] AC 435 at 501-502

[71] *Gouriet v Union of Post Office Workers*, [1978] AC 435 at 501-502

51. No interest or right of the plaintiffs is affected or in play by the interpretation or the operation of s. 18 of the *Bank of Canada Act*. Courts – absent special legislative authority – do not give advisory opinions on the law.

D. CLAIM IS NOT JUSTICIABLE

52. The justiciability of a matter refers to its suitability for determination by a court: it involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication.[72] In the words of Chief Justice Dickson, "justiciability" is a doctrine founded upon a concern with the appropriate role of the courts as the forum for resolution of different types of disputes. It is a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or deferring to the other institutions of the polity.[73]

53. Courts cannot exercise judicial review on constitutional grounds unless the Constitution has provided norms that are capable of application.[74]

a) Statutory interpretation of the *Bank of Canada Act*

54. The plaintiffs want s. 18(i) and (j) of the *Bank of Canada Act* to be read as imperative: that the Bank of Canada is statutorily required, when necessary, to make interest-free loans for the purposes they define.

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[72] *Friends of the Earth v Canada (Governor in Council),* [2009] 3 F.C.R. 201, para 25 (FC), affirmed, 2009 FCA 297, referencing Dean Lorne Sossin's book (see infra) wherein Thomas Cromwell (now a Justice of the Supreme Court of Canada) is quoted.

[73] *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 90-91

[74] Barry L. Strayer, *The Canadian Constitution and the Courts,* 3rd edition, (Toronto: Butterworths, 1988) at pp 218-219

55. It is critical to note that s. 18, which enumerates the "business and powers of the bank," begins by stating that the Bank "may" do the things listed at paragraphs (a) to (p). Far from requiring the Bank to take or refrain from taking particular action, this is clearly non-mandatory language. This point of interpretation is underscored by Barnes J. in *Friends of the Earth*, in connection with the *Kyoto Protocol Implementation Act*:

> *I note, as well, that s. 6 of Act says only that the GIC "may" make regulations. That language is clearly not mandatory. This, I think, was the basis for the admonition by Lord Browne-Wilkinson in R. v. Secretary of State for the Home Department...to the effect that without clear statutory language the courts have no role to play to in requiring legislation to be implemented. This, he said, would tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction.* [75]

56. A court can deal with statutory interpretation on a motion to strike. Snider J. so determined in *Les Laboratoires Servier.*[76] The court should do so here. Section 18 of the *Bank of Canada Act* is not a provision "particularly obscure in its meaning". To read it as mandatory borders on absurdity, for it would mean that Parliament did not follow through its very purpose for creating a Bank of Canada: to regulate credit and currency in the best interest of the economic life of the Canadian nation (as is set out in the Preamble of the Act). But also, if the Bank "must" do all of the things in paras. 18 (a) to (p), which consist of a myriad of matters, such as the buying of gold and other precious metals, securities, etc., there is no guidance for the Bank when it "must" do these. It does make sense when s. 18 is read as it is drafted: "The Bank may…"

57. In *Friends of the Earth*, Justice Barnes of the Federal Court held that absent "objective legal criteria," courts should decline to hear a matter since any such

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[75] *Friends of the Earth v Canada,* 2008 FC 1183 at para 38
[76] *Les Laboratoires Servier v Apotex*, 2007 FC 837 (CanLII) at para 38

proceeding would entail "policy-laden considerations" which are beyond the "proper subject matter for judicial review".[77]

58. Moreover, the plaintiffs are seeking a coercive order and not merely interpretation of the *Bank of Canada Act* when they ask for a declaration that the Minister of Finance and the Government of Canada "is required to request" interest-free loans for the projects described by them as ""human capital expenditures" and/or municipal/provincial/federal "human capital" and/or infrastructure expenditures". S. 18 of the *Act* states nothing about the Minister of Finance or the Government of Canada making such a request. Also, none of these "types" of loans appear anywhere in the *Bank of Canada Act,* as paras. 18(i) and (j) only reference loans to the Government of Canada or of a province.

59. Declaring that the Finance Minister or the Government is required to request particular loans is outside the mandate of a court of law. Whether a particular loan should be sought by the Government and made by the Bank of Canada are matters inappropriate for judicial involvement, both institutionally and constitutionally. Brought into play are both the adequacy of judicial machinery for such a task and the legitimacy of using it.

60. The *Bank of Canada Act* does not set out requirements for when loans are to be made, Parliament having decided to repose its trust in the Bank of Canada to exercise its powers under section 18 for the purposes set out in the Preamble to the *Bank of Canada Act*. The Preamble states that "it is desirable to establish a central bank in Canada

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[77] *Friends of the Earth, supra* at para 33

to regulate credit and currency in the best interest of the economic life of the nation [...] and generally to promote the economic and financial welfare of Canada."[78]

61. Except as explicitly provided for in the *Bank of Canada Act*,[79] there are no requirements imposed by that Act on how the Bank must exercise its lending powers and any decision on loan-making is clearly subject to the consideration by the Bank of a wide range of circumstances. These are poly-centric concerns which the Bank is best placed to identify, consider and weigh.

62. If the *Bank of Canada Act* is to be read as imperative, it will be necessary for the Federal Court to prescribe the circumstances under which the Government "must" request loans and the Bank "must" provide them. Absent the crucial details of "when" the loans are to be made and what are "human capital" and "infrastructure" expenditures, the Court will either have to legislate or to make a meaningless declaration: that the Bank is to make loans when it considers such loans to be "necessary". Case law is clear that courts will not make a declaration where "it will serve little or no purpose".[80]

63. Parliament has entrusted the responsibility for regulating credit and currency in the best interest of the economic life of the Canadian nation and to promote the economic and financial welfare of Canada to the Bank of Canada. Under the plaintiffs' plan this task would become the responsibility of the Federal Court to pronounce the requirements for loans on an *ad hoc* basis, with coercive orders.[81]

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[78] Preamble, *Bank of Canada Act*, R.S.C., 1985, c. B-2
[79] See for instance, s. 18(h) and 23(b) and (c) of the *Bank of Canada Act*
[80] *Terrasses Zarolega Inc., v R.I.O.*, [1981] 1 SCR 94 at p. 106-107
[81] See also paragraph 1(c) of the Claim: "such further declaratory and/or consequential injunctive and/or prerogative order and/or relief as counsel may advise..."

b) So-called "handing off" allegations are not justiciable

64. The declaration sought of so-called improper handing-off to international institutions was the second justiciability concern of Russell J.[82] He held that this part could be justiciable and gave leave to amend this part of the Claim.[83] The plaintiffs have not cured this deficiency. Properly interpreted, these allegations are not justiciable.

65. The plaintiffs' sought after declarations are predicated on the Federal Court finding that Parliament and the defendants "abdicated their duty to govern". But, there is no such duty as characterized by the plaintiffs: see *In re George Edwin Gray*, [1918] SCR 150. In effect, the plaintiffs want the court to sit as a kind of a grand inquisition in regard to monetary and fiscal matters. This is not the proper role of the court.

66. These allegations call for determinations that are well outside the proper realm of review by a court: infused as they are with ideological, political, social, historical and policy-laden considerations and there are no objective legal criteria which can be applied to material facts by a court.[84] The allegation of the "handing-off" to international institutions is not a legal cause of action. It is not justiciable because it does not concern itself with the objective legal propriety of any particular actions or inactions, but rather with nebulous concepts of placing "private interests" above the "interests of Canadians", "rendering impotent" the *Bank of Canada Act* and Canadian sovereignty over financial, monetary and socio-economic policy and by-passing the sovereign rule of Canada. It is for the people of Canada through their elected representatives to determine the "interests of Canadians" and the parameters of their own sovereignty.

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[82] Paragraph 1(a)(iii) of the Amended Claim

67. In *Imperial Tobacco,* the Chief Justice states that "there is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability".[85]

68. Further, issues are non-justiciable if some other branch of government is more appropriate to decide the matter. As stated 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.* [86]

69. The Amended Claim attacks the way in which Canada has and develops and implements fiscal and monetary policy and Canada's participation in international economic organizations. It seeks to wrestle with abstract issues relating to Bank of Canada governance and Canada's interaction with international financial institutions and the role of global markets. The Supreme Court has held that economic and fiscal policy-making is properly the province of governments, not the judiciary.[87]

70. The Supreme Court in *RJR-MacDonald* affirmed that the policy-making role is assigned to the elected representatives, who have the necessary and appropriate

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[83] Russell J.'s Reasons at para 72
[84] *Canada v Chiasson*, 2003 FCA 155, at para 8.
[85] *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 72
[86] Lorne M. Sossin: *Boundaries of Judicial Review: The Law of Justiciability in Canada* at pp. 4-5 (Carswell: Toronto, 1999).
[87] *Ontario (Attorney General) v Fraser*, [2011] 2 SCR 3 at para 302 and *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424 at para 36.

institutional resources to carry out this role.[88] Decision-making in the realm of socio-economic policy "is up to the democratically elected government of the day to decide under what economic system Canadians will conduct business affairs."[89] Accordingly, "[t]here is, of course, no doubt that the role of managing the national economic environment...is the role of the government and not the courts."[90] With respect to assessing governmental decision-making in the realm of socio-economics.[91]

71. As a matter of constitutional practice in Canada in our parliamentary system built upon responsible government, the Government of the day is responsible to and must hold the confidence of the majority of the House of Commons.[92] The House is composed of representatives elected by the Canadian people in free elections based on universal suffrage at regular intervals. Any failure by the "Government" or a minister thereof, to govern or any "abdication of the duty to govern" is a matter for the House, to express through its confidence or lack thereof in the government. And ultimately, the action or inaction of the government is a matter for the Canadian people at the polling booth.

72. The present case is one of the non-justiciable categories to which Stratas JA refers in the *Hupacasath First Nation* decision.[93]

73. Lastly, the generality and broadness of the Amended Claim is such that its parameters cannot be ascertained in a meaningful way and it defies judicial manageability.[94]

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[88] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 21, 68. See also Archibald v Canada, [1997] 3 F.C. 335 at paras 54, 83 (T.D.).
[89] *Archibald v Canada*, [1997] 3 FC 335 at para 83.
[90] *Ibid* at para 145.
[91] *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424 at para 36

E. CLAIM OUTSIDE COURT'S JURISDICTION

a) The test for determining jurisdiction

74. The Federal Court has no general common law or civil law jurisdiction, but only such jurisdiction as has been conferred by statute and subject to the limits on Parliament to establish additional courts for the better administration of the laws of Canada under s. 101 of the *Constitution Act, 1867*.[95] The test for determining whether a matter is within the jurisdiction of the Federal Court is found in *ITO-International Terminal Operators*:

1. There must be a statutory grant of jurisdiction by Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act*, 1867.[96]

b) No statutory grant over Bank of Canada

75. There is no statutory grant of jurisdiction for a suit to be brought against the Bank of Canada. Subsection 17(1) of the *Federal Courts Act* provides that the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown. In *Rasmussen v. Breau*, the Federal Court of Appeal determined that s. 17 of the *Federal Courts Act* only applies to the Crown *eo nomine* or "under that name" – it does not apply to a statutory corporation acting as an agent of the Crown.[97] The Bank of Canada is a statutory corporation created by the *Bank of Canada Act*, the entire capital of

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[92] Peter Hogg, *Constitutional Law of Canada* (5th edition), §9.1, at pp. 9-1 to 9-3
[93] *Hupacasath First Nation v Canada*, 2015 FCA 4 at para 66
[94] See, for instance: *Chaudhary v Canada*, 2010 ONSC 6092, at para 17
[95] *Rasmussen v Breau*, [1986] 2 F.C. 500, at para 7; *Constitution Act, 1867* [30 &31 Victoria, c. 3 (U.K.)] s. 101

which is issued in shares to and held by the Minister of Finance on behalf of Her Majesty in right of Canada.[98] As a statutory corporation created by a special Act of Parliament, the Bank is not the Crown. Nor is it a Crown agency. Although, the Bank acts as fiscal agent of the Government of Canada for certain purposes,[99] the statutory powers of the Bank in section 18 of the *Bank of Canada Act* that the plaintiffs are asking the Federal Court to consider are not even fiscal agent powers – they are powers that the Bank exercises solely in its own right and not as the Crown or as agent of the Crown.

c) No jurisdiction over Ministers of the Crown

76. A Minister of the Crown may not be sued in their representative capacity (*qua* Minister).[100] The Queen is the only proper defendant in an action against the Crown.[101]

d) 1st part of ITO jurisdictional test

77. The first part of the *ITO* test requires a statutory grant of jurisdiction by Parliament. Section 17(1) of the *Federal Courts Act* grants the Federal Court concurrent original jurisdiction in all cases in which relief is claimed against the Crown.[102]

e) The 2nd and 3rd parts of the ITO jurisdictional test

78. The 2nd and 3rd parts of the ITO test - the requirement of an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction and the law of Canada requirement - are not met. The

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[96] *ITO-International Terminal Operators Ltd. v Miida Electronics*, [1986] 1 SCR 752 at p. 766
[97] *Rasmussen v Breau,* [1986] 2 FC 500, at para 12
[98] *Bank of Canada Act*, R.S.C., 1985, c. B-2, s. 3(2) and 17(2)
[99] *Bank of Canada Act*, R.S.C., 1985, c. B-2, s. 24(1)
[100] *Peter G. White Management v Canada*, 2006 FCA 190 at para 39.
[101] S. 48(1) and Schedule, *Federal Courts Act*; *Peter G. White Management v Canada (Minister of Heritage)*, 2004 FC 346 (CanLII) at para 14, applying *Robichaud v Canada*, (1991) 44 FTR 172 at 177
[102] 17(1) of the *Federal Courts Act,* RSC 1985, c. F-7, as amended

allegations against the defendants[103] are largely based on tort law as would be applied by the provincial courts. The allegations of abdication of statutory and constitutional duty can only be grounded in negligence, civil conspiracy or misfeasance in public office.

79. The fact that a power allegedly misused by a public servant emanates from a federal statute, or that a duty alleged to have been breached was created by statute, is not sufficient in itself to satisfy the 2nd part of the jurisdictional test.[104] The rights arising from such (alleged) misuse of power or breach of statutory duty, including conspiracy and misfeasance are "emanations of provincial law relating to tortious liability".[105]

80. The 2nd part of the ITO test contemplates a "detailed statutory framework" of federal law, from which a plaintiff acquires specific rights and which governs the exercise of such rights, such that the cause of action itself arises out of federal law.[106] Here, the plaintiffs do not have specific rights nor is there a detailed statutory framework.[107]

81. Lastly, in so far as the plaintiffs seek to characterize the *Charter* as a "law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*, the binding jurisprudence is against them. Mahoney J.A. in *Kigowa* concluded that ss. 7 and 9 of the

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[103] The Crown's liability would only be vicarious pursuant to s. 3 of the *Crown Liability and Proceedings Act*, RSC, 1985, c. C-50.
[104] *Leblanc v Canada*, 2003 FCT 776 (CanLII) (Prothonotary) at para 24
[105] *Leblanc v Canada*, 2003 FCT 776 (CanLII) (Prothonotary) at para 24
[106] *Leblanc v Canada*, 2003 FCT 776 (CanLII) (Prothonotary) at para 25; *Oag v Canada*, [1987] 2 FC 511; *Kigowa v Canada*, [1990] 1 FC 804; *Rhine v The Queen*, [1980] 2 SCR 442
[107] The claim can be usefully contrasted with *Oag v Canada*, [1987] 2 FC 511 at paras 8-12, where a detailed statutory framework gave entitlement to mandatory supervision.

Charter were not "laws of Canada in the s. 101 sense".[108] The same reasoning would apply to s. 3 of the *Charter*.

F. PLAINTIFFS LACK STANDING

82. The provisions of the statutes and constitutional provisions invoked by the plaintiffs, when they create duties, create public duties only and do not confer any direct right of action on any individual citizen who may allegedly suffer damages by reason of their breach.[109] The Amended Claim is not justiciable. The plaintiffs do not have standing as of right as there has been no interference with their private right nor have they suffered some special damages peculiar to them from an interference with a public right.[110]

83. The plaintiffs have not shown some special interest that would entitle them to bring this action. Since the *Canadian Council of Churches,*[111] courts have interpreted "genuine interest", holding that a party's disdain for a particular government law or action is insufficient to meet this criterion for public interest standing. A claimant seeking public interest standing must demonstrate that there is a "stronger nexus" between them and the impugned legislation.[112] The Amended Claim is not "in all the circumstances, a reasonable and effective manner of bringing the matter before the court".[113]

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[108] *Kigowa v Canada (M.E.I.)*, [1990] 1 FC 804 at para 8, applying *Consolidated Distilleries Ltd., v Consolidated Exporters Corp.*, [1930] SCR 531 at p. 534, which was followed by Estey J. in *Northern Telecom v Communications Workers*, [1983] 1 SCR 733 at 744-45. The *Charter* was enacted by the Parliament of the United Kingdom: *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11. See also: *Canadian Transit Company v Windsor*, 2015 FCA 88 at, *inter alia*, para 63, per Stratas J.A.

[109] *Pacific Western Airlines v The Queen*, [1980] 1 FC 86 at para.6

[110] *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at pp. 617-24 (paras.18-22)

[111] *Canadian Council of Churches v Canada,* [1992] 1 SCR 236

[112] *Marchand v Ontario* (2006), 81 OR (3d) 172 (SCJ), aff'd CA [2007] OJ No. 4440 at paras 24, 34; *Talbot v Northwest Territories (Commissioner),* 1997 CanLII 4520 (NWT SC); *League for Human Rights v Canada*, 2008 FC 732 at para 32ff

[113] *Canada v Downtown Eastside Sex Workers*, [2012] 2 SCR 524 at para 52

PART IV – ORDER SOUGHT

84. The defendants request that the Amended Claim be struck out and the entire action dismissed, with costs to the defendants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

At Toronto, this 23rd day of April, 2015.

"William F. Pentney, Q.C."
per:

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