

T-2010-11

FEDERAL COURT

BETWEEN:

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

and

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

FEDERAL COURT
COUR FÉDÉRALE
Plaintiffs
MAR 16 2012
MICHAEL PACE
TORONTO, ON

Defendants

WRITTEN REPRESENTATIONS OF THE DEFENDANTS

March 15, 2012

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WRITTEN REPRESENTATIONS OF THE DEFENDANTS**PART I – STATEMENT OF FACTS**

1. The Committee for Monetary and Economic Reform (“COMER”) and two individuals have brought a claim against the Defendants by Statement of Claim filed on December 12, 2011 and amended on January 19, 2012 (hereinafter the “Claim”) alleging wrongs of statutory and constitutional abdication and infringement of all Canadian citizens’ and residents’ rights under the *Charter of Rights and Freedoms*¹ (hereinafter the “Charter”). It is plain and obvious that the Claim cannot succeed. The Attorney General of

¹ *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11

Canada ("Canada") on behalf of the Defendants requests that the Claim be struck out and the action dismissed, with costs to the Defendants.

PART II – POINTS IN ISSUE

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

3. Does the unincorporated entity, the Committee styled "COMER", have standing to commence this action and/or do the two individuals have standing? Alternatively, can the test for the grant of public interest standing be met?

PART III – SUBMISSIONS

A. THE BURDEN ON A STRIKE MOTION

4. The test in Canada to strike out a pleading under Rule 221 of the Rules is whether it is plain and obvious on the facts pleaded that the action cannot succeed.² However, 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

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

that allegations based on assumptions and speculations be taken as true.³ Moreover, the Court need not accept at face value bare allegations, factual allegations which may be regarded as scandalous, frivolous or vexatious, or legal submissions dressed up as factual allegations.⁴

5. The test for striking is a stringent one: only if the statement of claim is certain to fail because it contains a “radical defect” should the plaintiff be “driven from the judgment seat”.⁵

B. NO REASONABLE CAUSE OF ACTION

6. No reasonable cause of action is made out in the Claim because the Plaintiffs have failed to plead the necessary elements of each cause of action together with the relevant material facts.

a) Claim breaches the rules of pleading

7. The *Federal Courts Rules* impose an obligation to plead material facts that disclose a reasonable cause of action, consisting of four basic requirements of a pleading: (a) it must state facts and not merely conclusions of law; (b) it must include material facts; (c) it must state facts and not the evidence by which they are to be proved; and (d) it must state

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

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

⁵ *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15

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 would be that such a claim discloses no reasonable cause of action,⁷ as is the case with the present Claim.

b) Allegations of misfeasance by public officers

8. The Claim repeats the allegation that the Defendants or their officials or Parliament have abdicated their statutory and constitutional duties.⁸ This is an attempt to characterize a claim of misfeasance in public office. However, the necessary elements of the tort are not plead nor are material facts that could support a finding that the public officers' 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.⁹ The Plaintiffs characterize the state of mind of the officials as "wittingly and/or unwittingly, in

⁶ *Carten v. Canada*, 2009 FC 1233 (CanLII) at para. 36; see also *Sivak v. Canada*, 2010 FC 272; Rule 174 of the *Federal Courts Rules* prescribes that every pleading shall contain a concise statement of the material facts on which the party relies but shall not include evidence by which those facts are to be proved. Rule 181 provides that a pleading must contain particulars of every allegation.

⁷ *Benaissa v. Canada (Attorney General)*, 2005 FC 1220 at para. 15

⁸ And is the basis for declarations sought in para. 1(a)(ii), 1(a)(iii) and 1(a) (v) of the Claim

⁹ *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)

varying degrees of knowledge and intent”.¹⁰ The Claim does not satisfy the requirement of pleading the elements of the cause of action.

9. As Justice Stratas held in *St John’s Port Authority*, to plead the tort of abuse of public office, the plaintiff must cover each essential element of the tort, setting out all material facts (as required by Rule 174) with necessary particularity (as required by Rule 181) as to “any alleged state of mind of a person”, “wilful default”, “malice” or “fraudulent intention”.¹¹ The identity of the individual who is alleged to have engaged in misfeasance is a material fact that must be pleaded.¹² The Plaintiffs have failed to do any of this.

10. The Supreme Court established in *Saskatchewan Wheat Pool* that the nominate tort of statutory breach does not exist.¹³ The proper remedy for a breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity.¹⁴ In any event, as discussed below, the legislation on which the Plaintiffs rely as having been breached, far from requiring the Bank of Canada or any Minister to take or refrain from taking particular action, employs permissive language.

¹⁰ See paragraph 41 of the Claim; The Oxford English Dictionary (online) defines “wittingly” (an adverb) as: (1) With knowledge or awareness of what one is doing; knowingly, consciously; often implying ‘designedly, deliberately, intentionally’. (In earlier use freq. in collocation with *wilfully* or *willingly*.) (2) With knowledge; skilfully; wisely. *Obs. rare*.

¹¹ *St. John’s Port Authority v. Adventure Tours Inc.*, 2011 FCA 198 (CanLII) at para. 25

¹² *St. John’s Port Authority*, *supra*, at para. 41

¹³ *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at p. 225

¹⁴ *Holland v. Saskatchewan*, 2008 SCC 42 at para. 9

c) Conspiracy allegations

11. The Plaintiffs allege conspiracy:

*to render impotent the Bank of Canada Act, as well as Canadian sovereignty over financial, monetary, and socio-economic policy, and in fact by-pass the sovereign rule of Canada, through its Parliament, by means of banking and financial systems.*¹⁵

12. The Plaintiffs plead "conspiracy and elements of such tortious conduct" found in the Supreme Court's decision in *Hunt v. Carey*, but fail to plead any material facts to support their allegations, such as the identity of the Defendants' 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.

13. The tort of conspiracy, according to Professor Gerald Fridman, requires an agreement between two or more persons.¹⁶ A further essential requirement is intent. As Prof. Fridman writes, 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".¹⁷ The Plaintiffs have only alleged that "the defendants' (officials) are wittingly and/or unwittingly, in varying degrees, knowledge, and intent, engaged in a

¹⁵ See para. 41 of the Claim

¹⁶ 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

¹⁷ G.H.L. Fridman, *supra*, p. 185

conspiracy".¹⁸ Hence, the Plaintiffs have failed to plead the necessary elements of the tort of conspiracy to injure with the necessary material facts.

d) Accounting method

14. The Plaintiffs allege that the accounting method used in the budgetary process is a breach of s. 91(5) of the *Constitution Act, 1867*¹⁹ and the duty of the Defendants to maintain accurate statistics.²⁰ However, subsection 91(5) of the *Constitution Act, 1867* does not assist the Plaintiffs as it grants law-making power over the postal service to the Parliament of Canada. Similarly, subsection 91(6), which grants legislative power over "[T]he census and statistics" to the federal Parliament will not aid in fastening a duty upon the Defendants. Section 91 of the *Constitution Act, 1867* enumerates the classes of subjects (and all matters coming within) to which the exclusive legislative authority of the Parliament of Canada is granted - it does not impose duties on the Government or any Minister.

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

15. Section 24 of the *Bank of Canada Act* has nothing to do with the keeping of minutes by the Bank,²¹ but in any event, the Plaintiffs plead that Parliament has permitted the actions by the Governor that they impugn.²² Section 30.1 provides that no action lies against the Crown, the Minister of

¹⁸ See para. 41 of the Claim

¹⁹ *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.)

²⁰ See para. 39 of the Claim

²¹ See para. 1(a)(iv) of the Claim

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 any powers or duties under the *Act*.²³ Plaintiffs have not shown how this provision would affect their rights and have failed to provide the legal and material grounds on which their assertions are made.

C. THE CHARTER IS NOT ENGAGED

a) *Life, Liberty and Security of the Person under s. 7*

16. The protections of sections 7 and 15 of the *Charter* do not accrue to the unincorporated association styled "COMER", but only to the two individual plaintiffs.²⁴

17. But the two individuals' Charter claims cannot succeed, for as articulated by the Supreme Court in *Operation Dismantle*, a successful 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.²⁵ The Claim fails to disclose material facts which show a causal relationship between any of the Defendant's actions and any alleged harms to the Plaintiffs which breach *Charter* protections.²⁶ The Claim is of incredible generality, alleging that the *Charter* has been breached "by a reduction, elimination, and or fatal delay of

²² See para. 1(a)(v) of the Claim

²³ S. 30.1 of the *Bank of Canada Act*, R.S.C. 1985, c. B-2

²⁴ Peter Hogg, *Constitutional Law of Canada*, (5th edition) vol. 2, at pp. 37-4 and 37-5

²⁵ *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at para 7.

²⁶ See, for instance: *Canadian Bar Association v. British Columbia*, 2008 BCCA 92 at para. 50 (leave to appeal to SCC dismissed at [2008] S.C.C.A. No. 185)

health care services, education and other human capital expenditures and services.”²⁷

18. The Supreme Court in *Operation Dismantle* held that section 7:

*cannot reasonably be read as imposing a duty on the government to refrain from those acts which might lead to consequences that deprive or threaten to deprive individuals” of their life, liberty or security of the person.*²⁸

19. In order to prove an infringement or threat of infringement, the Court looks to “‘evidentiary’ facts...real or intangible.”²⁹ Real facts are those “susceptible of proof by direct evidence,”³⁰ and intangible facts, “frequently the subject of opinion,”³¹ “may be proved by inference from real facts or through the testimony of experts.”³² The Claim fails to disclose any real or intangible facts causally connecting the impugned policies and calculations to the alleged harms of “reduction, elimination, and/or fatal delay of health care services, education and other human capital expenditures and services.”³³ Further, there is no real possibility of establishing any real or tangible facts to establish this kind of causality.

²⁷ See para. 47 of the Claim

²⁸ *Ibid* at para 29.

²⁹ *Ibid* at para 78.

³⁰ *Ibid* at para 78.

³¹ *Ibid* at para 78.

³² *Ibid* at para 78.

³³ see para. 47 of the Claim

20. The Claim is not one where the law or state action is preventing a person from making “fundamental personal choices”.³⁴ These types of choices, protected by s. 7 of the *Charter*, are of a “narrow class” such that, “by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.”³⁵ Such personal autonomy, however, “is not synonymous with unconstrained freedom.”³⁶

21. In addition to requiring demonstrable causation,³⁷ the Supreme Court in *Blencoe* held that it would be inappropriate to hold the government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.³⁸ The Court requires the type of causal connection established in cases such as *Morgentaler* and *Rodriguez*, where it was not the condition of being disabled or pregnant that caused a deprivation of security of the person, but rather the state action itself.³⁹

22. The Federal Court of Appeal in *Toussaint* affirmed recent case law and applied the teaching of the Supreme Court that the *Charter* does not confer a freestanding constitutional right to health care.⁴⁰ Further, the

³⁴ *Blencoe v British Columbia* [2000] 2 SCR 307 at paras 49 & 54.

³⁵ *Blencoe*, *ibid* at para. 51; the Court in *Blencoe* gave as examples of fundamental personal choices: the decisions where to make one's home; with what medical care to treat one's children; and whether to terminate a pregnancy (paras. 50 and 51).

³⁶ *Ibid* at para 54.

³⁷ For instance, in the s. 7 discussion in *Blencoe supra*, the SCC quotes the passage from *Operation Dismantle supra*, determining an alleged causal connection to be too “uncertain, speculative and hypothetical to sustain a cause of action.”

³⁸ *Blencoe*, *ibid* at para 59.

³⁹ *Blencoe supra*, at paras 69 and 70.

⁴⁰ *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 (CanLII) at para. 77 & 78

provision of health care services and education are provincial responsibilities.⁴¹

23. Finally, the s. 7 claim would fail due to the requirement that at the very least, an s. 7 claim must arise “as a direct result of a determinative state action that in and of itself deprives the claimant of the right to life, liberty or security of the person.”⁴² Moreover, s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those measures “that can be attributed to state action implicating the administration of justice.”⁴³

b) No s. 15 infringement

i) Equality under s. 15

24. The claim of a breach of the s. 15 *Charter* right to equality and equal protection and benefit without discrimination cannot succeed. According to the principles established in *Andrews v. Law Society of British Columbia*, an infringement of s. 15 requires, first and foremost, a differential treatment between the claimant(s) and others.⁴⁴ Yet in the Claim, there is no *other individual* from whom the Plaintiffs can say they are being treated differently by law. Further, Plaintiffs cannot satisfy the other requirements of s. 15.

⁴¹ Subsection 92(7) and section 93, *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.)

⁴² *Gosselin v. Quebec (AG)*, 2002 SCC 84 at para. 213.

⁴³ *Gosselin, supra*, at para 77.

⁴⁴ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 46.

ii) No differential treatment on a protected ground

25. Differential treatment can arise out of either direct or indirect treatment.⁴⁵ Similarly, discrimination is identified as being capable of arising out of either formal or substantive inequality. Despite the refinement of certain parts of the s. 15 analysis, the Supreme Court has maintained the *Andrews* principle that equality is a comparative concept.⁴⁶

26. The Claim includes all Canadian citizens and residents. Similarly, the impugned Bank of Canada policies and accounting methods apply to all Canadian citizens and residents. Accordingly, not only are there no *others* in the social and political setting, but, no relevant comparator exists for the set of Canadian citizens and residents to whom the Bank of Canada's policies apply. As articulated by the Supreme Court in *Canadian Egg Marketing Agency v. Richardson*, "[p]rovided the federal government treats all people within the country equally, it does not discriminate."⁴⁷

27. The Plaintiffs have failed to identify a protected ground under section 15 – either a ground that is listed or analogous thereto. The s. 15 equality right is not a free-standing duty of affirmative action, but a remedy for

⁴⁵ *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras. 63-64

⁴⁶ *Withler, supra*, at para 41

⁴⁷ *Canadian Egg Marketing Agency v Richardson*, [1998] 3 S.C.R. 157 at para 161 (underlining is in original text)

differential treatment on protected grounds, that has a discriminatory impact.⁴⁸

iii) No prejudice or stereotyping

28. Lastly, the Plaintiffs have not plead facts on which they could establish that the impugned law or state action has a discriminatory impact in terms of prejudicing or stereotyping,⁴⁹ within the context of “the place of the group in the entire social, political and legal fabric of our society.”⁵⁰ [emphasis added] Moreover, prejudice or stereotyping refers to “[p]erpetuation of disadvantage” that typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group.⁵¹ The purpose of section 15 is to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.⁵² It is therefore contrary to the *Charter’s* very purpose for all Canadian citizens and residents to qualify as a group subject to prejudice or stereotyping, either historically or at the present time.

⁴⁸ See, for instance, *Boulter v. Nova Scotia Power Inc.*, 2009 NSCA 17 at paras. 72-73 (leave to appeal to SCC dismissed at [2009] S.C.C.A. No. 172)

⁴⁹ *Withler, supra*, at para. 34-35.

⁵⁰ *Law v. Canada (MEI)* [1999] 1 SCR 497 at para 29.

⁵¹ *Withler, supra*, at para 51& 53.

⁵² *Law, supra*, at para 47.

D. CLAIM IS OUTSIDE THE COURT’S JURISDICTION

a) *The test for determining jurisdiction*

29. Although the Federal Court is a superior court of record, the Court has no general common law or civil law jurisdiction. It has only such jurisdiction as has been specifically conferred by statute and subject to the limits on Parliament to establish additional courts for the better administration of the laws of Canada under section 101 of the *Constitution Act, 1867*.⁵³

30. The starting point for determining whether a matter is within the jurisdiction of the Federal Court is *ITO-International Terminal Operators*. Therein, the Supreme Court of Canada set out a three-part test, each part of which is essential in order to found jurisdiction in the Federal Court:

1. There must be a statutory grant of jurisdiction by the federal 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*.⁵⁴

⁵³ *Rasmussen v. Breau*, [1986] 2 F.C. 500, at para. 7; *Constitution Act, 1867* [30 &31 Victoria, c. 3 (U.K.)] s. 101

⁵⁴ *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at p. 766

b) No statutory grant over Bank of Canada

31. There is no statutory grant of jurisdiction for a suit to be brought against the Bank of Canada. 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.⁵⁵ The Bank of Canada is a statutory corporation created by the *Bank of Canada Act*, the entire capital of which is issued in shares to and held by the Minister of Finance on behalf of Her Majesty in right of Canada.⁵⁶ The Bank acts as fiscal agent of the Government of Canada.⁵⁷

c) No Jurisdiction over Ministers of the Crown

32. The basic proposition is that a Minister of the Crown may not be sued in his or her representative capacity (that is *qua* Minister), nor may he or she be sued personally, unless the actions are said to be done in a personal capacity:

The plaintiffs have named the Honourable William McKnight as a defendant in this action. A Minister of the Crown cannot be sued in his representative capacity, nor can he be sued in his personal capacity unless the allegations against him relate to acts done in his personal capacity (Re Air India, (1987), 62 O.R. (2d) 130; 44 D.L.R. (4th) 317 (Ont. H.C.)). As the plaintiffs have made no claims against the Minister relating to actions done in

⁵⁵ *Rasmussen v. Breau*, [1986] 2 F.C. 500, at para. 12

⁵⁶ *Bank of Canada Act*, R.S.C., 1985, c. B-2, s. 3(2) and 17(2)

⁵⁷ *Bank of Canada Act*, R.S.C., 1985, c. B-2, s. 24(1)

*his personal capacity, the Honourable William McKnight must be struck as a party to the action.*⁵⁸

33. There are no allegations in the Claim that any of the Ministers or Crown servants/officials acted in a personal capacity. Further, government departments have no legal existence separate from Her Majesty. Thus, the Queen is the only necessary defendant in an action against the Crown.⁵⁹

d) 1st part of ITO jurisdictional test

34. The first part of the *ITO* test requires that there must be a statutory grant of jurisdiction by the federal 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.⁶⁰

35. With respect to Crown servants, the Court of Appeal ruled in *Peter G. White Management* that the statutory grant of jurisdiction in s. 17(5)(b) of the *Federal Courts Act* contemplates that Crown servants may be sued for anything done or omitted in the performance of their duties.⁶¹ However, the test for grounding Federal Court jurisdiction is still not satisfied

⁵⁸ *Peter G. White Management v. Canada (Minister of Heritage)*, 2006 FCA 190 at para. 39.

⁵⁹ *Peter G. White Management v. Canada (Minister of Heritage)*, 2004 FC 346 (CanLII) at para. 14, applying *Robichaud v. Attorney General of Canada*, (1991) 44 F.T.R. 172 at p. 177

⁶⁰ 17(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended

⁶¹ *Peter G. White Management (FCA)*, *supra*, at paras. 43-44

in the present Claim,⁶² either against the Crown servants or the Crown, as will be indicated below.

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

36. The second and third 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, have not been met. The allegations against Crown servants and defendants⁶³ are based on tort law as would be applied by the courts of the provinces. The allegations of abdication of statutory and constitutional duties can only be grounded in the law of negligence, tort of civil conspiracy and/or misfeasance in public office.

37. It has been held by the Federal Court that the fact that a power allegedly misused by a federal public servant emanates from a federal statute, or that a duty alleged to have been breached was created by a federal statute, is not sufficient in itself to satisfy the second part of the jurisdictional test.⁶⁴ The rights arising from such misuse of power or breach of statutory duty, including the torts of conspiracy and misfeasance in public office, remain “emanations of provincial law relating to tortious liability”.⁶⁵

⁶² *Peter G. White Management (FCA)*, *supra*, at para. 47

⁶³ The Crown's liability would only be vicarious pursuant to s. 3 of the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50.

⁶⁴ *Leblanc v. Canada*, 2003 FCT 776 (CanLII) (Prothonotary) at para. 24

⁶⁵ *Leblanc v. Canada*, 2003 FCT 776 (CanLII) (Prothonotary) at para. 24

38. The second part of the ITO test contemplates a “detailed statutory framework” of federal law, from which the plaintiff acquires specific rights and which governs the exercise of such rights, such that the cause of action itself arises out of federal law.⁶⁶ This is not the case with the breaches being alleged by the Claim, as the Plaintiffs do not have any specific rights under the referenced legislation nor is there a detailed statutory framework for the exercise of those rights.

39. The Claim can be usefully contrasted with *Oag*, where the plaintiff’s mandatory supervision was suspended by the National Parole Board. The Federal Court of Appeal, in finding jurisdiction, pointed to the detailed statutory framework that included the mandatory supervision provisions, which gave entitlement to a partial degree of freedom, which could not be interfered with, except as provided in the legislation.⁶⁷

f) Alleged Charter infringements cannot ground jurisdiction

40. Lastly, in so far as the Plaintiffs may seek to characterize the *Charter* as a “law of Canada” as the phrase is used in section 101 of the *Constitution Act, 1867*, the jurisprudence is against them. Mahoney J.A. in

⁶⁶ *Leblanc v. Canada*, 2003 FCT 776 (CanLII) (Prothonotary) at para. 25; *Oag v. Canada*, [1987] 2 F.C. 511; *Kigowa v. Canada*, [1990] 1 F.C. 804; *Rhine v. The Queen*, [1980] 2 S.C.R. 442; see also *Hendriks v Fairweather*

⁶⁷ *Oag v. Canada*, [1987] 2 F.C. 511, paras. 8-12

Kigowa concluded that sections 7 and 9 of the *Charter* were not “laws of Canada in the section 101 sense”.⁶⁸

E. PLAINTIFFS LACK STANDING

a) Public duties only

41. The provisions of the various 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 suffer damages by reason of their breach.⁶⁹

42. The Plaintiffs do not have standing as of right to bring the Claim because there has been no interference with a private right of theirs nor have they suffered some special damages peculiar to themselves from an interference with a public right.⁷⁰

43. Plaintiffs must satisfy the test for public interest standing, which is that:

- (i) they must raise a serious issue to be tried;
- (ii) they must have a genuine interest in the issue; and
- (iii) there must not be other reasonable and effective means to bring the matter before the courts.

⁶⁸ *Kigowa v. Canada (M.E.I.)*, [1990] 1 F.C. 804 at para. 8, applying *Consolidated Distilleries Ltd., v. Consolidated Exporters Corp.*, [1930] S.C.R. 531 at p. 534, which was followed by Estey J. in *Northern Telecom v. Communications Workers*, [1983] 1 S.C.R. 733 at pp. 744-45. The *Charter*, which is part of the Constitution of Canada, 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

⁶⁹ *Pacific Western Airlines v. The Queen*, [1980] 1 F.C. 86 at para.6

⁷⁰ *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at paras.18-22

Only if these criteria are met, does a court then have the discretionary power to grant public interest standing.⁷¹

44. In *Canadian Council of Churches*, the Supreme Court explained the basis for the “genuine interest” component of the public interest standing test in the context of a *Charter* challenge to parts of the *Immigration Act*. In accepting that the Council had a sufficiently genuine interest in the litigation to warrant a grant of public interest standing, the Supreme Court considered the Council’s reputation in the community and its public interest in the matter. The Court determined that the Council had the “highest possible reputation” and had demonstrated “a real and continuing interest in the problems of refugees and immigrants”.⁷² But nonetheless, standing was refused for failing to meet the third criterion.

45. Since the *Canadian Council of Churches* decision, courts have elaborated the requirement of “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. Rather, a claimant seeking public interest standing must demonstrate that there is a “stronger nexus” between them and the impugned legislation.⁷³

⁷¹ *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236

⁷² *Canadian Council of Churches*, *supra*, at p. 23

⁷³ *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 (S.C.J.), *aff’d* C.A. [2007] O.J. No. 4440, at paras. 24, 34; *Talbot v. Northwest Territories (Commissioner)*, 1997 CanLII 4520 (NWT S.C.); *League for Human Rights of B’nai Brith Canada v. Canada*, 2008 FC 732 at para. 32ff

46. The Plaintiffs provide only one example of a denial by the Minister of Finance of an interest free loan request from the Bank of Canada. This single example appears in para. 19 of the Claim and is based on a request alleged to have been made by the Town of Lakeshore. An alternative procedure for challenging that decision by the Minister would have been for those parties directly affected by the refusal to do so - had it been brought within the time limits prescribed by statute. Thus it cannot be said that the issue sought to be raised by the Plaintiffs is immunized from judicial review.

47. Further, public interest standing cannot be used to circumvent statutorily prescribed limitation periods.⁷⁴

F. CLAIM IS NOT JUSTICIABLE

48. The justiciability of a matter refers to its suitability for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors.⁷⁵

⁷⁴ See s. 39 of the *Federal Courts Act*

⁷⁵ *Friends of the Earth v. Canada (Governor in Council)*, [2009] 3 F.C.R. 201, para. 25 (F.C.), 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.

a) Subject matter and manner of presentation

49. The Plaintiffs seek declarations of unbounded scope that appear predicated on the Court determining that Parliament and the Defendants abdicated their duty to govern as well as their constitutional and statutory duties in respect of monetary, currency and financial policies. They seek to support these conclusions not with material facts but with generalities such as allegations of conspiracy to render impotent the *Bank of Canada Act* and Canadian sovereignty over economic policy.

50. These allegations call for determinations that are well outside the proper realm of review by a court. They are infused with policy-laden considerations and there are no objective legal criteria which can be applied to material facts by a court.⁷⁶ 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 proceeding would entail “policy-laden considerations” which are beyond the “proper subject matter for judicial review.” Barnes J. stated:

*That is so because there are no objective legal criteria which can be applied and no facts to be determined which would allow a Court to decide whether compliance had been achieved.*⁷⁷

⁷⁶ *Canada v. Chiasson*, 2003 FCA 155, at para. 8.

⁷⁷ *Friends of the Earth*, *supra*, at para. 33

51. The Plaintiffs seek to compel the Minister of Finance and the Government of Canada, *inter alia*, under section 18 of the *Bank of Canada Act*, to take certain steps relating to “interest-free loans” for “human capital” expenditures and Canadian “socio-economic governance” relationships with international bodies like the Bank for International Settlements (“BIS”), the Financial Stability Board (“FSB”) and the International Monetary Fund (“IMF”).⁷⁸ 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 ss. (a) to (p). Far from requiring the Bank to take or refrain from taking particular action, this use of this non-mandatory language precludes the possibility of employing s. 18 as an objective criterion with which to determine the legality of the conduct at issue. This point 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 in requiring legislation to be implemented. This, he said, would tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction.*⁷⁹

52. Chief among the Plaintiffs’ arguments is the call that the Bank of Canada is to make available “interest-free loans” for what is characterized as

⁷⁸ *Claim*, paras. 1(a)(i), 1(a)(iii)

⁷⁹ *Friends of the Earth*, *supra*, at para. 38.

“human capital” expenditures.⁸⁰ Nowhere in the *Act*, however, is there reference to either “interest-free loans” or to “human capital,” which the Plaintiffs define as including payments for “education, health, [and] other social services.” Though the Plaintiffs insist that these loans must be provided, there is no requirement in the *Act*, or otherwise, which offers an objective legal criterion against which a court of law could measure the appropriateness of the Plaintiffs’ request.

53. This lack of a statutory or constitutional requirement recurs with respect to the allegation of a negative impact on the Canadian economy of Canada’s relationships with different states and international organizations. The Claim asserts that government officials are “in varying degrees, knowledge, and intent, engaged in a conspiracy” with groups like the BIS, FIS and the IMF to “render impotent the Bank of Canada Act.” Such inter-government activity, it is claimed, is a direct and palpable breach of the *Act* since federal “monetary and financial policy are in fact, by and large, dictated by private foreign bank and financial interests.” Among other things, this alleged violation is said to result in the “loss of sovereignty over decision[s] related to banking, monetary policy, economic policy [and] social policy” and the “spiralling schism between the rich and the poor in Canada.”⁸¹

⁸⁰ *Claim*, paras. 1(a) (i), 3(b).

⁸¹ *Claim*, paras. 1(a)(viii), 11, 15(e), 15(f)

54. The lack of objective legal criteria to adjudicate the allegations brought forward is throughout the Claim, in respect of multiple issues: accounting activities, minute-keeping at the BIS and FSB, tax credits, corporate good will and the renting of federal government buildings. Further, the Claim is unworkable. The generality and broadness of the Claim is such that its parameters cannot be ascertained in a meaningful way and it therefore defies judicial manageability.⁸²

b) Appropriateness of judicial adjudication

55. 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.*⁸³

56. The Plaintiffs are concerned with the way in which Canada develops and implements fiscal policy and monetary policy and Canada’s participation in international economic organizations. As indicated, the Claim

⁸² See, for instance: *Chaudhary v. Canada*, 2010 ONSC 6092, at para. 17

⁸³ Lorne M. Sossin: *Boundaries of Judicial Review: The Law of Justiciability in Canada*, at pp. 4-5 (Carswell: Toronto, 1999).

deals not with specific aspects of legislation, but rather with abstract issues relating to Bank of Canada governance and the role of global markets.

57. The Supreme Court has held that economic and fiscal policy-making is properly the province of governments, not the judiciary. Recently, this point was underscored by Deschamps J. in *Fraser*:

*where the economic balance is concerned, I share the view expressed by LeBel J. in Advance Cutting: Legislatures are entitled to a substantial, though not absolute, degree of latitude and deference, to settle social and economic policy issues... Courts should be mindful to avoid second-guessing legislatures on controversial and complex political choices.*⁸⁴

58. Similarly Dickson C.J.C. held in *Public Service Alliance*:

*... courts must exercise considerable caution when confronted with difficult questions of economic policy. It is not our judicial role to assess the effectiveness or wisdom of various government strategies for solving pressing economic problems.*⁸⁵

59. The Supreme Court in *RJR-MacDonald* affirmed that the policy-making role is assigned to the elected representatives, who have the necessary and appropriate institutional resources to carry out this role:

courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups.

⁸⁴ *Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3 at para. 302

⁸⁵ *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424 at para. 36.

*In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary.*⁸⁶

60. With respect to decision-making in the realm of socio-economics, as held in *Archibald v. Canada*, "it is up to the democratically elected government of the day to decide under what economic system Canadians will conduct business affairs."⁸⁷ 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."⁸⁸ With respect to assessing governmental decision-making in the realm of socio-economics:

*...courts must exercise considerable caution when confronted with difficult questions of economic policy. It is not our judicial role to assess the effectiveness or wisdom of various government strategies for solving pressing economic problems.*⁸⁹

61. The Supreme Court has ruled that "the Court will defer where a legislative choice inured in scientific and socio-economic expertise is required between competing interests of various groups."⁹⁰

62. The Plaintiffs seek to litigate precisely the types of issues which have been deemed beyond the appropriate scope for adjudication by

⁸⁶ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at paras. 21, 68.; see also *Archibald v. Canada*, [1997] 3 F.C. 335 at paras. 54, 83 (T.D.).

⁸⁷ *Archibald v Canada*, [1997] 3 FC 335 at para 83.

⁸⁸ *Ibid* at para 145.

⁸⁹ *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424 at paras. 36& 37

Canadian courts. Rather than pointing to specific actions or policies governed by the *Act*, the Claim asks this Court to re-write the processes governing the Bank of Canada and Canada's involvement with groups like the BIS, FIS and the IMF. The Claim seeks to have the Court mandate to government and to the Bank of Canada the economic positions advocated by the Plaintiffs.

63. The Plaintiffs admit they are interested chiefly in targeting policy: "policies such as interest rates, and other policies set by the Bank of Canada", alleging these are being developed "in consultation" with or "at the direction of" the FSB and related organizations. More generally, there is a focus on "monetary and financial policy" (and related "economic and social policies") which Plaintiffs view as deficient insofar as they are "dictated by private foreign bank and financial interests."⁹¹ This request runs contrary to the proper scope of judicial involvement. Whether or not a policy is "financially or economically fallacious" is not a matter for the judiciary to decide, but for the government as mandated by the electorate.

⁹⁰ *Archibald supra*, at para 133.
⁹¹ *Claim*, paras. 7 and 11.

PART IV – ORDER SOUGHT

64. The Attorney General of Canada on behalf of the Defendants requests that the Claim be struck out and the action dismissed, with costs to the Defendants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

At Toronto, this 15th day of March, 2012.

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per: P. Hajeczek

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