Federal Court  Cour fédérale

Date: 20160208

Docket: T-2010-11

Citation: 2016 FC 147

Ottawa, Ontario, February 8, 2016

PRESENT: The Honourable Mr. Justice Russell

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, THE ATTORNEY GENERAL OF CANADA

Defendants

ORDER AND REASONS

I. INTRODUCTION

[1] This is a motion by the Defendants under Rule 221 of the *Federal Court Rules*, SOR/98-106 [*Rules*] to strike the Plaintiffs' Amended Statement of Claim of March 26, 2015 [Amended Claim].

II. BACKGROUND

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

A. *History of the Litigation*

[3] This litigation was commenced on December 12, 2011, with the filing of the original Statement of Claim, which was amended in minor ways on January 19, 2012 [Original Claim].

[4] On August 9, 2013, the Original Claim was struck out in its entirety by Prothonotary Aalto, without leave to amend. Upon appeal from the decision of the Prothonotary, I struck the Original Claim in its entirety, but with leave to amend, by way of order on April 24, 2014 [Order of April 24, 2014].

[5] Appeal and cross-appeals of my Order of April 24, 2014 were dismissed by the Federal Court of Appeal on January 26, 2015. The Plaintiffs filed the Amended Claim on March 26, 2015. The Defendants now move to strike out this Amended Claim.

B. *The Amended Claim*

[6] The Plaintiffs' Amended Claim, while an amended version of the Original Claim, continues to seek a series of declarations relating to three basic assertions, as noted in my previous Order of April 24, 2014: first, that the *Bank of Canada Act*, RSC, 1985, c B-2 [*Bank Act*] provides for interest-free loans to the federal, provincial and municipal governments for the purposes of "human capital expenditures," and the Defendants have failed to fulfill their legal duties to ensure such loans are made, resulting in lower human capital expenditures by governments to the detriment of all Canadians; second, that the Government of Canada uses flawed accounting methods in relation to public finances, thereby understating the benefit of "human capital expenditures" and undermining Parliament's constitutional role as the guardian of the public purse; and third, that these and other harms are the result of Canadian fiscal and monetary policy being, in part, controlled by private foreign interests through Canada's involvement in international monetary and financial institutions.

[7] The pleadings of fact which accompany the Amended Claim define "human capital expenditures" as those that encourage the qualitative and quantitative progress of a nation by way of the promotion of the health, education and quality of life of individuals, in order to make them more productive economic actors, through institutions such as schools, universities,

hospitals and other public infrastructures. The Plaintiffs state that investment in human capital is the most productive investment and expenditure a government can make.

[8] The Amended Claim seeks nine declarations. The first is that ss 18(i) and (j) of the *Bank Act* require the Minister of Finance [Minister] and the Government of Canada to request, and the Bank of Canada to provide, interest-free loans for the purpose of human capital expenditures to all levels of government (federal, provincial and municipal).

[9] Second, the Plaintiffs ask the Court to declare that the Defendants have not only abdicated their statutory and constitutional duties with respect to ss 18(i) and (j) of the *Bank Act*, but that they have also, by way of a refusal to request and make interest-free loans under ss 18(i) and (j), caused a negative and destructive impact on Canadians through the disintegration of Canada's economy, its financial institutions, increases in public debt, a decrease in social services, as well as a widening gap between rich and poor, with the continuing disappearance of the middle class. In the accompanying facts to their Amended Claim, the Plaintiffs use a June 11, 2014 request of the Town of Lakeshore, Ontario as an example of an occasion when the Minister refused a request for an interest-free loan without regard to either the nature of the request or pertinent provisions of the *Bank Act*. The Plaintiffs say that the Minister's reasons for refusing the Town of Lakeshore's request are both financially and economically fallacious and not in accordance with statutory duties.

[10] Third, the Plaintiffs seek a declaration that s 18(m) of the *Bank Act*, and its administration and operation, is unconstitutional and of no force and effect. They say the Defendants have

abdicated their constitutional duties and handed them over to international, private entities whose interests have, in effect, been placed above those of Canadians and the primacy of the Canadian Constitution. The Plaintiffs state that no sovereign government such as Canada should ever borrow money from commercial banks at interest, when it can borrow from its own central bank interest-free, particularly when that central bank, unlike the banks of any other G-8 nation, is publically established, mandated, owned and accountable to Parliament and the Minister, and was created with that purpose as one of its main functions.

[11] Fourth, the Plaintiffs ask the Court to declare that the fact that the minutes of meetings involving the Governor of the Bank of Canada [Governor] and other G-8 central bank governors have been kept secret is *ultra vires* the Governor, as being contrary to the *Bank Act* – particularly s 24 – and ought to be considered unconstitutional conduct.

[12] The fifth declaration sought is that, by allowing the Governor to keep the nature and content of international bank meetings secret, by not exercising the authority and duty contained in ss 18(i) and (j) of the *Bank Act*, and in enacting s 18(m) of the *Bank Act*, Parliament has abdicated its duties and functions as mandated by ss 91(1)(a), (3), (14), (15), (16), (18), (19), (20) of the *Constitution Act, 1867*, as well as s 36 of the *Constitution Act, 1982*.

[13] The Plaintiffs' sixth and seventh declarations involve the manner in which the Minister accounts for public finances, which the Plaintiffs say is conceptually and logically wrong. The Plaintiffs seek a declaration that the Minister is required to list human capital expenditures — including those related to infrastructure as "assets" rather than "liabilities" in budgetary

accounting — as well as all revenues prior to the return of tax credits to individual and corporate tax payers, then subtract tax credits, then subtract total expenditures in order to arrive at an annual "surplus" or "deficit," as required by s 91(6) of the *Constitution Act, 1867*.

[14] The eighth declaration sought is that taxes imposed to pay for the interest on the deficit and the debt to private bankers, both domestic and foreign, are illegal and unconstitutional. The Plaintiffs claim that this is the result of a breach of the constitutional right(s) to "no taxation without representation" which occurs when the Minister fails to disclose anticipated revenues to Parliament before the return of anticipated tax credits, prior to determining whether an anticipated surplus or deficit will be incurred, in the tabling of the budget. This means that a full and proper Parliamentary debate cannot properly take place, thus breaching the right to no taxation without representation under both ss 53 and 90 of the *Constitution Act, 1867*, as well as the unwritten constitutional imperatives to the same effect. Also, it results in an infringement of the Plaintiffs' right to vote under s 3 of the *Charter*, which is tied to the right to no taxation without representation with respect to the Minister's constitutional violations. The result is a breach of the terms of the *Bank Act* relating to interest-free loans and the consequent constitutional violations by the Executive of its duty to govern, and its relinquishing of sovereignty and statutory decision-making to private foreign bankers.

[15] The ninth and final declaration sought is that the "privative clause" in s 30.1 of the *Bank Act* either (a) does not apply to prevent judicial review, by way of action or otherwise, with respect to statutorily or constitutionally *ultra vires* actions, or to prevent the recovery or damages based on such actions; or (b) if it does prevent judicial review and recovery, is unconstitutional

and of no force and effect, as breaching the Plaintiffs' constitutional right to judicial review and the underlying constitutional imperatives of the rule of law, Constitutionalism and Federalism.

[16] Besides the declaratory relief sought, the Plaintiffs also in the Amended Claim request damages in the amount of $10,000.00 each for individual Plaintiff: William Krehm, Anne Emmett, and for ten COMER Steering Committee [Steering Committee] members named in the Amended Claim, for the breach of their constitutional right of "no taxation without representation" and the inseparable infringement of the right to vote due to alleged constitutional breaches by the Minister. Further, the Plaintiffs request the return of the portion of illegal and unconstitutional tax, to be calculated and calibrated at trial, for each of the Plaintiffs and the members of the Steering Committing, consisting of the proportion of taxes to pay interest charges on the deficit, and debt between 2011 and the time of trial, paid by the Plaintiffs and Steering Committee members, due to the statutory and constitutional breaches of the Defendants' rights in refusing and/or failing to cover deficits in the budget by way of interest-free loans, as well as the breach of their right to no taxation without representation, to be calculated by the compounded interest changes set out in the budget, as a percentage of the budget, calculated as the same percentage paid by the Plaintiffs and Steering Committee members, to be calculated at trial.

III. ISSUES

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

1. it fails to comply with the leave to amend granted and fails to remedy the problems identified in the Order of April 24, 2014;

2. it seeks to add parties and new claims that are not permissible by virtue of the leave to amend and the *Rules*;

3. it fails to disclose a reasonable cause of action against the Defendants, or any one of them;

4. it is scandalous, frivolous or vexatious;

5. it is an abuse of process of the Court;

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

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

8. it seeks declaratory relief only available under s 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*] and in any event such relief is not available to the Plaintiffs;

9. the Plaintiffs are not entitled to seek an advisory opinion from the Court;

10. it seeks to adjudicate matters that are not justiciable;

11. it seeks to impose a fetter on the sovereignty of Parliament and seeks to overrule or disregard the privilege of the House of Commons over its own debates and internal procedures;

12. the Plaintiffs do not have a s 3 *Charter* right to any particular form of taxation and there is no causal connection, or legitimate expectation between their vote and the presentation of a budget before the House of Commons and resulting legislation;

13. it concerns matters outside the jurisdiction of the Court; and

14. the Plaintiffs do not have standing to bring the Amended Claim as of right, nor can they meet the necessary requirements for the grant of public interest standing.

IV. STATUTORY PROVISIONS

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

Powers and business	**Pouvoirs**
18. The Bank may	18. La Banque peut :
[…]	[…]
(i) make loans or advances for periods not exceeding six months to the Government of Canada or the government of a province on taking security in readily marketable securities issued or guaranteed by Canada or any province;	i) consentir des prêts ou avances, pour des périodes d'au plus six mois, au gouvernement du Canada ou d'une province en grevant d'une sûreté des valeurs mobilières facilement négociables, émises ou garanties par le Canada ou cette province;
(j) make loans to the Government of Canada or the government of any province, but such loans outstanding at any one time shall not, in the case of the Government of Canada, exceed one-third of the estimated revenue of the Government of Canada for its fiscal year, and shall not, in the case of a provincial government, exceed one-fourth of that government's estimated revenue for its fiscal year, and such loans shall be repaid before the end of the first quarter after the end of the fiscal year of the government that has contracted the loan;	j) consentir des prêts au gouvernement du Canada ou d'une province, à condition que, d'une part, le montant non remboursé des prêts ne dépasse, à aucun moment, une certaine fraction des recettes estimatives du gouvernement en cause pour l'exercice en cours — un tiers dans le cas du Canada, un quart dans celui d'une province — et que, d'autre part, les prêts soient remboursés avant la fin du premier trimestre de l'exercice suivant;
[…]	[…]
(m) open accounts in a central bank in any other country or in the Bank for International Settlements, accept deposits from central banks in other countries, the Bank for International Settlements, the International Monetary Fund,	m) ouvrir des comptes dans une banque centrale étrangère ou dans la Banque des règlements internationaux, accepter des dépôts — pouvant porter intérêt — de banques centrales étrangères, de la Banque des règlements

the International Bank for Reconstruction and Development and any other official international financial organization, act as agent or mandatary, or depository or correspondent for any of those banks or organizations, and pay interest on any of those deposits;

internationaux, du Fonds monétaire international, de la Banque internationale pour la reconstruction et le développement et de tout autre organisme financier international officiel, et leur servir de mandataire, dépositaire ou correspondant;

[…]

[…]

Fiscal agent of Canadian Government

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

Agent financier du gouvernement canadien

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

Charge for acting

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

Honoraires

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

To manage public debt

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

Gestion de la dette publique

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

Canadian Government cheques to be paid or negotiated at par

(3) The Bank shall not make any charge for cashing or negotiating a cheque drawn on the Receiver General or on the account of the Receiver General, or for cashing or

Encaissement des chèques du gouvernement canadien

(3) La Banque ne peut exiger de frais pour l'encaissement ou la négociation de chèques tirés sur le receveur général ou pour son compte et d'autres effets autorisant des paiements sur le

negotiating any other instrument issued as authority for the payment of money out of the Consolidated Revenue Fund, or on a cheque drawn in favour of the Government of Canada or any of its departments and tendered for deposit in the Consolidated Revenue Fund.	Trésor, ni pour le dépôt au Trésor de chèques faits à l'ordre du gouvernement du Canada ou d'un ministère fédéral.
[…]	[…]
No liability if in good faith	**Immunité judiciaire**
30.1 No action lies against Her Majesty, the Minister, any officer, employee or director of the Bank or any person acting under the direction of the Governor for anything done or omitted to be done in good faith in the administration or discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.	30.1 Sa Majesté, le ministre, les administrateurs, les cadres ou les employés de la Banque ou toute autre personne agissant sous les ordres du gouverneur bénéficient de l'immunité judiciaire pour les actes ou omissions commis de bonne foi dans l'exercice — autorisé ou requis — des pouvoirs et fonctions conférés par la présente loi.

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

Appropriation and Tax Bills	**Bills pour lever des crédits et des impôts**
53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.	53. Tout bill ayant pour but l'appropriation d'une portion quelconque du revenu public, ou la création de taxes ou d'impôts, devra originer dans la Chambre des Communes.

Recommendation of Money Votes

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

[…]

Application to Legislatures of Provisions respecting Money Votes, etc.

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

Recommandation des crédits

54. Il ne sera pas loisible à la Chambre des Communes d'adopter aucune résolution, adresse ou bill pour l'appropriation d'une partie quelconque du revenu public, ou d'aucune taxe ou impôt, à un objet qui n'aura pas, au préalable, été recommandé à la chambre par un message du gouverneur-général durant la session pendant laquelle telle résolution, adresse ou bill est proposé.

[…]

Application aux législatures des dispositions relatives aux crédits, etc.

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

Year for Two Years, and of the Province for Canada.

deux ans, et la province au Canada.

Legislative Authority of Parliament of Canada

Autorité législative du parlement du Canada

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

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

[…]

[…]

1A. The Public Debt and Property. (45)

1A. La dette et la propriété publiques. (45)

[…]

[…]

3. The raising of Money by any Mode or System of Taxation.

3. Le prélèvement de deniers par tous modes ou systèmes de taxation.

4. The borrowing of Money on the Public Credit.

4. L'emprunt de deniers sur le crédit public.

[…]

[…]

6. The Census and Statistics.	6. Le recensement et les statistiques.
[…]	[…]
14. Currency and Coinage.	14. Le cours monétaire et le monnayage.
[…]	[…]
16. Savings Banks.	16. Les caisses d'épargne.
[…]	[…]
18. Bills of Exchange and Promissory Notes.	18. Les lettres de change et les billets promissoires.
19. Interest.	19. L'intérêt de l'argent.
20. Legal Tender.	20. Les offres légales.
[…]	[…]

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

Democratic rights of citizens	**Droits démocratiques des citoyens**
3. 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.	3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.
Life, liberty and security of person	**Vie, liberté et sécurité**
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes

of fundamental justice.

[…]

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[…]

Commitment to promote equal opportunities

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

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

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

de justice fondamentale.

[…]

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[…]

Engagements relatifs à l'égalité des chances

36. (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à :

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

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

(c) providing essential public services of reasonable quality to all Canadians.	c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.
Commitment respecting public services	**Engagement relatif aux services publics**
(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.	(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

[21] The following provision of the *Rules* is applicable in these proceedings:

Motion to Strike	**Requête en radiation**
221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas:
(a) discloses no reasonable cause of action or defence, as the case may be,	(a) qu'il ne révèle aucune cause d'action ou de défense valable.
(b) is immaterial or redundant	(b) qu'il n'est pas pertinent ou qu'il est redondant ;
(c) is scandalous, frivolous or vexatious,	(c) qu'il est scandaleux, frivole ou vexatoire ;
(d) may prejudice or delay the fair trial of the action,	(d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

(e) constitutes a departure from a previous pleading, or	(e) qu'il diverge d'un acte de procédure antérieur ;
(f) is otherwise an abuse of the process of the Court,	(f) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgement entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

V. ARGUMENT

A. *Defendants' Submissions on the Motion*

(1) The Test on a Motion to Strike

[22] The Defendants say that 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: *Sivak et al v The Queen et al,* 2012 FC 272 at para 15 [*Sivak*]; *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 at para 17 [*Imperial Tobacco*]. While there is a rule that material facts in a statement of claim should be taken as true when determining whether the claim discloses a reasonable cause of action, this does not require the court to accept at face value bare assumptions or allegations which may be regarded as scandalous, frivolous or vexatious, or legal submissions dressed up as facts: *Operation Dismantle v The Queen,* [1985] 1 SCR 441 at para 27 [*Operation Dismantle*]; *Carten v Canada*, 2009 FC 1233 at para 31 [*Carten*].

(2) Reasonable Cause of Action

[23] The *Rules* require that the pleading of material facts disclose a reasonable cause of action. A pleading 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: *Carten*, above; *Sivak*, above; Rules 174 and 181 of the *Rules*. The Plaintiffs' Amended Claim fails to do this. Its allegations do not provide the necessary elements of each cause of action together with the material facts. Furthermore, it is not clear if the Plaintiffs continue to rely on the allegations of conspiracy and misfeasance as facts to support these allegations are not included in the pleadings. As a result, it cannot be said that the Amended Claim's assertions result in the liability of the Defendants, or any one of them.

[24] The Amended Claim includes amendments that are not permissible under the *Rules:* new parties (the Steering Committee members) and a cause of action not grounded in the facts already pleaded (the allegation of a breach of s 3 *Charter* rights) have been added. The Defendants further argue that the Amended Claim breaches the terms of the permission to amend by failing to cure the problems identified in the Order of April 24, 2014.

[25] The Defendants say that there is no constitutional duty to present the federal budget in the manner sought by the Plaintiffs. As a result, no breach of the principle of no taxation without representation has occurred. The Supreme Court of Canada has held that no taxation without representation means that the Crown may not levy a tax without the authority of Parliament: *Kingstreet Investments v New Brunswick*, [2007] 1 SCR 3 at para 14; *Constitution Act, 1867*, ss

53 and 90. The present circumstances suggest that this constitutional requirement has been satisfied.

[26] As the master of its own procedure, Parliament cannot be said to have a duty to legislate. No cause of action can result from failing to enact a law: *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 354-355 [*NB Broadcasting*]; *Telezone Inc v Canada (Attorney General)*, [2004] OJ No 5, 69 OR (3d) 161 (CA) [*Telezone*]; *Lucas v Toronto Services Board*, 51 OR (3d) 783 at para 10; *Moriss v Attorney General*, [1995] EWJ No 297 (England and Wales Court of Appeal) at para 38.

[27] Citing s 91(6) of the *Constitution Act, 1867*, the Plaintiffs allege that the accounting method employed in the budgetary process is unconstitutional. However, this subsection, "the Census and Statistics," is simply one of the classes of subjects enumerated in s 91 over which Parliament has exclusive legislative authority; it does not impose a duty to legislate and, as such, is of little help to the Plaintiffs. The Defendants point out that, in any event, much of what is being sought by the Plaintiffs is publically available from the Department of Finance. For example, *Tax Expenditures and Evaluations 2012* can be found online at http://www.fin.gc.ca/taxexp-depfisc/2012/taxexp12-eng.asp.

[28] With respect to the Plaintiffs' legitimate expectations argument, the Defendants state that it falls under the doctrine of fairness or natural justice, and does not create substantive rights: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26. The only procedure due to a Canadian citizen is that proposed legislation receive three readings in the

House of Commons and the Senate and that it receive Royal Assent: *Authorson v Canada (Attorney General),* 2003 SCC 39 [*Authorson*]. The procedural rights described by the Plaintiffs have never existed: *Penikett v The Queen*, 1987 CanLii 145 (YK CA) at 17-18.

[29] The Defendants say that the Plaintiffs' reliance on the *Magna Carta* does not assist them. While the document holds a seminal place in the development of Canadian constitutional principles, it has been displaced by legislation in both the United Kingdom and Canada. It has no contemporary independent legal significance or weight and is therefore "amenable to ordinary legislative change": *Rocco Galati et al v Canada,* 2015 FC 91 at para 74 [*Galati*].

[30] Parliamentary privilege, including its corresponding powers and immunities, ensures the proper functioning of Parliament and is one of the ways in which the constitutional separation of powers is respected: *Telezone*, above, at para 13; *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 21 [*Vaid*]. In *Authorson*, above, the Supreme Court affirmed its decision in *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753, indicating that the way in which a legislative body proceeds is a matter immune from judicial review and is one of self-definition and inherent authority. The United Kingdom *Bill of Rights of 1689*, 1 Will & Mar sess 2, c 2, partially codifies parliamentary privilege at article 9, precluding any court from impeaching or questioning the freedom of speech and debates or proceedings in Parliament: *Prebble v Television New Zealand,* [1994] UKPC 3, [1995] 1 AC 321 (JCPC); *Hamilton v al Fayed*, [2000] 2 All ER 224 (HL) [*Hamilton v al Fayed*].

[31] Once a category of privilege is established, it is not the courts but Parliament that may determine whether a particular exercise of privilege is necessary or appropriate: *Parliament of Canada Act*, RSC 1985, c P-1, ss 4-5 [*Parliament of Canada Act*]; *Pickin v British Railways Board*, [1974] AC 765 (HL) at 790; *Vaid*, above, at para 29. Recognized categories of privilege include freedom of speech and control over debates and proceedings in Parliament: *Vaid*, above. The Defendants assert that the budget debate, its presentation, supporting papers and associated legislation fall under this category of privilege: *Roman Corp v Hudon's Bay Oil & Gas Co,* [1973] 3 SCR 820 at 827-828; *NB Broadcasting*, above.

[32] By virtue of ss 53 and 54 of the *Constitution Act, 1867*, "Money Bills" must originate in the House of Commons, and the Governor General must grant a recommendation for the expenditure of public funds. There is no suggestion in the Amended Claim that these requirements have not been satisfied.

[33] COMER, as an unincorporated association, cannot benefit from the protection provided for the electoral rights of citizens provided by s 3 of the *Charter*. While this protection could apply to the two individual Plaintiffs, provided they are Canadian citizens, neither has plead such a cause of action. The Amended Claim makes no suggestion that the Plaintiffs' access to "meaningful participation" in the electoral process – what the Supreme Court has determined is protected by s 3 – has been in any way affected: *Figueroa v Canada (Attorney General*), [2003] 1 SCR 912 at para 27.

[34] In order for a cause of action to be brought under the *Charter*, at least a threat of violation of a *Charter* right must be established: *Operation Dismantle*, above, at para 7. The Amended Claim does not demonstrate a link between the actions of any of the Defendants and the alleged s 3 harms. The Defendants further submit that s 3 has never been interpreted to encompass any rights or legitimate expectations that a claimant's elected representatives will enact any particular measures or refrain from doing so.

[35] With respect to the Plaintiffs' damages claim for the return of allegedly unconstitutional taxes, the Defendants assert that no factual support has been brought forward to support such a claim.

[36] The Defendants also address several other allegations in the Amended Claim. As regards the alleged misfeasance by public officers in the withholding of anticipated total revenue, the Defendants say that the necessary elements of the tort – including any alleged state of mind of a person involved, wilful default, malice or fraudulent intention – are not made out: *St John's Port Authority v Adventure Tours Inc*, 2011 FC 198 at para 25. Of note is the absence of facts that would support a finding of deliberate and unlawful misconduct of a public officer, or that a public officer was aware that his or her conduct was unlawful and likely to harm the Plaintiffs: *Odhavji v Woodhouse*, 2003 SCC 69 at paras 23, 28-29. In terms of the nominate tort of statutory breach, the Supreme Court of Canada has established that it does not exist: *The Queen v Saskatchewan Wheat Pool*, [1983] 1 SCR at 225. Even so, the remedy for a breach of statutory duty by a public authority is judicial review for invalidity: *Holland v Saskatchewan*, 2008 SCC at para 9.

[37] The Plaintiffs also make a claim of conspiracy, but again fail to plead the material facts necessary to support such an allegation, such as the identity of the officials engaged in the conduct, the type of agreement entered into, the time the agreement was reached, the lawful or unlawful means that were to be used, and the nature of the intended injury to the Plaintiffs. Other requirements that are missing include an agreement between two or more persons and intent to injure: G.H.L. Fridman, *Introduction to the Canadian Law of Torts*, 2nd ed (Markham: Butterworths, 2003) at 185.

[38] The Plaintiffs plead that, through s 24 of the *Bank Act*, Parliament has allowed the impugned actions by the Government of Canada. However, the Defendants point out that this provision has nothing to do with the keeping of minutes by the Bank. In addition, the Plaintiffs have not provided the grounds necessary to demonstrate how s 30.1, which 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 any powers or duties under the *Bank Act*, would affect their rights.

(3) Declaratory Relief

[39] The Defendants make a series of submissions in relation to the Plaintiffs' claim for declaratory relief. First, they say the Federal Court has jurisdiction to issue declaratory and coercive remedies only as prescribed in the *Federal Courts Act*. Section 18 indicates that extraordinary remedies can only be obtained on an application for judicial review under s 18.1. Subsection 18.4(2) allows the Court to direct that an application for judicial review be treated

and proceeded with as an action, but does not authorize the Plaintiffs to initiate a request for declaratory or coercive relief in an action.

[40] The requirements for proper judicial review, as set out by s 18.1, include that only someone who is "directly affected by the matter in respect of which relief is sought" may bring an application. The Plaintiffs are not directly affected.

[41] The Plaintiffs' claim damages for a "return of the portion of illegal and unconstitutional tax." The Defendants say that it is hard to see how these taxes can be claimed without impugning the legality of the instruments that gave rise to their increase. Additionally, the law is clear that the Plaintiffs may only seek to attack administrative action by state actors by way of judicial review: *Telezone*, above, at para 52.

[42] Second, in order to claim declaratory relief, entitlement must be established. The Supreme Court of Canada has held that a declaration of unconstitutionality is a declaratory remedy for the settlement of a real dispute: *Khadr v Canada (Prime Minister)*, 2010 SCC 3 [*Khadr*]. Before the court can issue a declaratory remedy, it must have jurisdiction over the issue at bar, the question before the court must be real and not theoretical, and the person raising it must have a real interest in raising it. The Defendants say that the Plaintiffs have not met any of these requirements.

[43] Third, the Plaintiffs are not entitled to refer matters for an advisory opinion. As determined in the Order of April 24, 2014, the Plaintiffs are asking that the Court declare that

their reading of the *Bank Act* and the Constitution is correct. This is akin to asking the Court for an advisory opinion. Without an adequate description of how a private right or interest has been affected, the Plaintiffs have not demonstrated a statutory grant of jurisdiction by Parliament that the Court can rule on and find that statutory and constitutional breaches have occurred.

[44] Fourth, declaratory relief necessitates a real dispute between the parties and cannot be issued in response to one that is merely hypothetical: *Operation Dismantle*, above, at para 33; *Diabo v Whitesand First Nation*, 2011 FCA 96; *Re Danson and the Attorney-General of Ontario*, (1987) 60 OR (2d) 679 at 685 (CA). A real dispute is not present here.

[45] Fifth, the Plaintiffs have no real interest or right that has been affected by the interpretation or operation of s 18 of the *Bank Act*. As noted in the Order of April 24, 2014, despite claiming to be acting for "all other Canadians," the Plaintiffs have failed to produce a pleading demonstrating how "all other Canadians" have been impacted in a way that constitutes an infringement of an individual or collective right. The Court is confined to declaring contested legal rights, and cannot give advisory opinions on the law generally: *Gouriet v Union of Post Office Workers*, [1978] AC 435 at 501-502 [*Gouriet*].

(4) Justiciability

[46] Justiciability is a normative inquiry that involves looking to the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication: *Friends of the Earth - Les Ami(e)s de la Terre v Canada (Governor in Council)*, 2009 FCA 297 [*Friends of the Earth*].

[47] The Defendants argue that the Court can, and in this case should, deal with statutory interpretation on a motion to strike: *Les Laboratoires Servier v Apotex Inc*, 2007 FC 837 at para 38. The Defendants state that it is critical to note that s 18 of the *Bank Act*, which enumerates the business and powers of the Bank of Canada, states that the Bank "may" do what is listed at paragraphs (a) through (p). The Plaintiffs want paragraphs (i) and (j) 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. Such mandatory language is not present and to invoke it borders on absurdity as it would suggest that Parliament did not follow through on its very purpose for creating a Bank of Canada, as set out in the *Bank Act's* preamble: to regulate credit and currency in the best interest of the economic life of the Canadian nation.

[48] If the *Bank Act* is to be read as imperative, the Defendants say that it will become necessary for the Court to detail the occasions when the Government of Canada "must" request loans and the Bank "must" provide them. Without these specifications, any declaration made by the Court will be meaningless, and the courts will not make a declaration where "it will serve little or no purposes": *Terrasses Zarolega Inc v RIO*, [1980] 1 SCR at 106-107.

[49] The Defendants point out that absent "objective legal criteria," the Court should decline to hear a matter since such a proceeding would entail significant consideration of policy matters, which are beyond the proper subject matter for judicial review: *Friends of the Earth*, above. at para 33.

[50] In asking for a declaration that the Minister and the Government of Canada be required to request interest-free loans for "human capital" and or "infrastructure" expenditures, the Plaintiffs are not merely seeking an interpretation of the *Bank Act*; they are seeking a coercive order. Section 18 does not support such a request. The Defendants argue that whether a particular loan should be sought by the Government of Canada and made by the Bank is an inappropriate matter for judicial involvement, both institutionally and constitutionally.

[51] Furthermore, the *Bank Act* does not set out any requirements in regards to how the Bank ought to exercise its lending powers. Loan-making is clearly subject to the Bank's discretion and contemplation of a wide range of circumstances that the Bank is best-positioned to weigh and consider.

[52] The Defendants say that under the Plaintiffs' plan, the task of regulating credit and currency in the best interest of the economic life of Canada would become the responsibility of the Court, which would have to pronounce the requirements for loans on an *ad hoc* basis, with coercive orders.

[53] Furthermore, the Plaintiffs' amendments have not addressed the deficiency related to the so-called improper "handing-off" to international institutions. The Defendants suggest that the Plaintiffs want the Court to instigate a grand inquisition in regard to monetary and fiscal matters. This is not the proper role of the Court and there is no such duty on the Defendants.

[54] The allegation of "handing-off" to international institutions is not a legal cause of action and is not justiciable. It is not concerned with the objective legality of an action or inaction, but instead with the abstract concept of "private interests" being placed above the "interests of Canadians." Only the people of Canada can, through the election of their representatives, determine the interests of Canadians.

[55] Government policy decisions and issues that are better decided by a branch of government are non-justiciable: *Imperial Tobacco*, above, at para 72; Lorne M Sossin: *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell: Toronto, 1999) at 4-5.

[56] The Defendants say that the Amended Claim attacks the way in which Canada develops and implements fiscal and monetary policy, as well as its participation in international economic organizations. It attempts to address abstruse issues relating to the governance of the Bank of Canada and fiscal policy-making – things that are properly the concern of governments, not the judiciary: *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 302; *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424 at para 36; *RJR- MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 21, 68; *Archibald v Canada*, [1997] 3 FC 335 at paras 54, 83.

[57] The Amended Claim is so broad and general in its parameters that it defies judicial manageability.

(5) Court's Jurisdiction

[58] The Defendants say that the test for determining if a matter is within the Federal Court's jurisdiction is stipulated in *ITO-International Terminal Operators LTD v Miida Electronics*, [1986] 1 SCR 752 at 766 [*ITO-International*]:

> 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*.

[59] As regards the first component of the test, there is no statutory grant for a suit to be brought against the Bank of Canada. It has been determined that s 17 of the *Federal Courts Act*, which provides that the Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown, does not apply to a statutory corporation acting as an agent of the Crown. Therefore, the Bank of Canada, a statutory corporation created by the *Bank Act*, cannot be said to be the Crown or a Crown Agent. The powers in s 18 are not fiscal agent powers, but rather powers that the Bank of Canada is entitled to exercise in its own right.

[60] Also, the Court has no jurisdiction over a Minister of the Crown. He or she may not be sued in his or her representative capacity; the Queen is the only proper defendant in an action against the Crown: *Peter G White Management v Canada*, 2006 FCA 190.

[61] The Defendants also say that the second part of the *ITO-International* jurisdictional test has not been met. It is not fulfilled simply by the fact that an allegedly misused power emanates from a federal statute. The Plaintiffs do not have specific rights, nor is there a detailed, corresponding statutory framework. The allegations against the Defendants relating to the abdication of statutory and constitutional duties can only be grounded in negligence, civil conspiracy or misfeasance. These matters are based on tort law and would properly be applied by the provincial courts.

[62] As regards the third portion of the test, s 3 of the *Charter* is not properly characterized as a "law of Canada" in the s 101 sense. To support this statement, the Defendants apply the reasoning in *Kigowa v Canada (Minister of Employment and Immigration)*, [1990] 1 FC 804 at para 8, which examined ss 7 and 9 of the *Charter*.

(6) Standing

[63] As a final issue, the Defendants assert that the Plaintiffs do not have standing to bring this claim. Their private rights have not been interfered with, nor have they suffered special damages specific to them from an interference with a public right: *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at paras 18-22 [*Finlay*].

[64] A general disdain for a particular law or governmental action is not enough to meet the standard of "genuine interest" for public interest standing. A stronger nexus than what is presented in the Amended Claim is required between the party making the claim and the

impugned legislation: *Canadian Council of Churches v Canada*, [1992] 1 SCR 236; *Marchand v Ontario* (2006), 81 OR (3d) 172 (SCJ).

B. *Plaintiffs' Response to Defendants' Motion*

[65] The Plaintiffs assert, to the extent that the Order of April 24, 2014 refused to strike the declaratory relief (the bulk of the Amended Claim), and ruled that it is justiciable, that this motion to strike is an abuse of process because *res judicata* and issue estoppel apply.

(1) The Test on a Motion to Strike

[66] In terms of the general principles that ought to be applied on a motion to strike, the Plaintiffs assert that the facts pleaded by the Plaintiffs must be taken as proven: *Canada (Attorney General) v Inuit Tapirasat of Canada*, [1980] 2 SCR 735; *Nelles v Ontario* (1989), DLR (4th) 609 (SCC) [*Nelles*]; *Operation Dismantle*, above; *Hunt v Carey Canada Inc* [1990] 2 SCR 959 [*Hunt*]; *Dumont v Canada (Attorney General)*, [1990] 1 SCR 279 [*Dumont*]; *Nash v Ontario* (1995), 27 OR (3d) 1 (Ont CA) [*Nash*]; *Canada v Arsenault*, 2009 FCA 242 [*Arsenault*].

[67] The Plaintiffs echo the test referenced by the Defendants, asserting that a claim can be struck only in plain and obvious cases where the pleading is bad beyond argument: *Nelles*, above, at para 3. The Court has provided further guidance in *Dumont*, above, that an outcome should be "plain and obvious" or "beyond doubt" before striking can be invoked (at para 2). Striking cannot be justified by a claim that raises an "arguable, difficult or important point of law": *Hunt*, above, at para 55.

[68] The novelty of the Amended Claim is not reason in and of itself to strike it: *Nash*, above, at para 11; *Hanson v Bank of Nova Scotia* (1994), 19 OR (3d) 142 (CA); *Adams-Smith v Christian Horizons* (1997), 3 OR (3d) 640 (Ont Gen Div). Additionally, matters that are not fully settled by the jurisprudence should not be disposed of on a motion to strike: *RD Belanger & Associates Ltd v Stadium Corp of Ontario Ltd* (1991), 5 OR (3d) 778 (CA). In order for the Defendants to succeed, the Plaintiffs state that a case from the same jurisdiction that squarely deals with, and rejects, the very same issue must be presented: *Dalex Co v Schwartz Levitsky Feldman* (1994), 19 OR (3d) 215 (CA). The Court should be generous when interpreting the drafting of the pleadings, and allow for amendments prior to striking: *Grant v Cormier – Grant et al* (2001), 56 OR (3d) 215 (CA).

[69] The Plaintiffs also remind the Court that the line between fact and evidence is not always clear (*Liebmann v Canada*, [1994] 2 FC 3 at para 20) and that the Amended Claim must be taken as pleaded by the Plaintiffs, not as reconfigured by the Defendants: *Arsenault*, above, at para 10.

(2) Constitutional Claims

[70] As regards the general principles to be applied to their constitutional claims, the Plaintiffs state that, as previously plead to the Prothonotary and to me, the Constitution does not belong to either the federal or provincial legislatures, but rather to Canadians: *Nova Scotia (Attorney General) v Canada (Attorney General)*, [1951] SCR 31 [*Nova Scotia (AG)*]. Parliament and the Executive are bound by constitutional norms, and neither can abdicate its duty to govern: *Canada (Wheat Board) v Hallet and Carey Ltd*, [1951] SCR 81 [*Wheat Board*]; *Re George*

Edwin Gray, (1918) 57 SCR 150 [*Re Gray*] at 157; *Reference re Secession of Quebec*, [1988] 2 SCR 217 [*Reference re Secession of Quebec*].

[71] Furthermore, the Supreme Court of Canada has held that legislative omissions can lead to constitutional breaches (*Vriend v Alberta*, [1998] 1 SCR 493) and that all executive action and inaction must conform to constitutional norms: *Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539; *Khadr*, above.

[72] With respect to the budgetary issue, the Plaintiffs submit that: (a) contrary to *Arsenault*, the Defendants misstate the Plaintiffs' Amended Claim; and (b) that s 3 of the *Charter* is intrinsically tied to the right of no taxation without representation and/or any other underlying right directly connected to the right to vote.

[73] The Plaintiffs say the Defendants misstate and fail to properly respond to the constitutional question. Two erroneous submissions and assumptions have been made. First, it is not plain and obvious that s 91(6) does not impose a duty, or that it is not arguable: *Wheat Board*, above; *Re Gray*, above, at 157; *Reference re Secession of Quebec*, above. Second, the Defendants have overlooked that the constitutional, primary duty in the budgetary process, is to outline all revenues and expenditures. This duty has evolved from the *Magna Carta* and is tied to the constitutional right to no taxation without representation. The Defendants have removed and failed to reveal the true revenue(s) to Parliament, which is the only body that can constitutionally impose tax and therefore approve the proposed spending. The Minister of Finance has essentially

removed the ability of Parliament to properly review, debate and pass the budget's expenditures and corresponding tax provisions.

[74] The Plaintiffs' position is misconstrued by the Defendants as an attempt to argue a right in the *Magna Carta*. All that is stated, the Plaintiffs argue, is that the right can be traced back to the *Magna Carta* and is codified by ss 53, 54 and 90 of the *Constitution Act, 1867*. It is submitted that the tort actions, which are founded in this right and the inseparable right to vote under s 3 of the *Charter*, may be "novel," but comply with the rules of pleading and the Order of April 24, 2014, while meeting the test for a reasonable cause of action.

[75] Furthermore, the tort action was not, and should not be, framed in public misfeasance or conspiracy. Rather, the actions of the Minister of Finance, with respect to the budgeting process, and those of the Bank of Canada officials who relegated or abdicated their duty, relate to the constitutional breaches and torts pleaded.

(3) Declaratory Relief

[76] On the issue of declaratory relief, the Plaintiffs say that the Defendants' submissions on the topic are, in any event, misguided and contrary to the jurisprudence. The Plaintiffs argue that the issue has already been decided by my Order of April 24, 2014 and was upheld by the Court of Appeal when it dismissed the Defendants' cross-appeal. Therefore, the matter constitutes *res judicata*, issue estoppel and abuse of process: *City of Toronto v CUPE, Local 79*, [2003] 3 SCR 77.

[77] Declaratory relief goes to the crux of the constitutional right to judicial review: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 27-31; *Singh v Canada (Citizenship and Immigration)*, 2010 FC 757 at para 38; *Canada v Solosky*, [1980] 1 SCR 821 at 830. The Supreme Court of Canada has recently reaffirmed the scope of the right to declaratory relief, indicating that it cannot be statute-barred: *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 134, 140 and 143.

[78] The Defendants ignore ss 2 and 17 of the *Federal Courts Act* as well as Rule 64 of the *Rules*. The Court has held that declaratory relief is available, and may be sought, under s 17 of the *Federal Courts Act*: *Edwards v Canada* (2000) 181 FTR 219 [*Edwards*]; *Khadr*, above.

(4) Justiciability

[79] As regards the issue of justiciability, noting that the Supreme Court of Canada has stated that the constitutionality of legislation has always been a justiciable issue, the Plaintiffs argue that just because the subject-matter at hand deals with socio-economic matters does not make it non-justiciable.

[80] The Plaintiffs argue that the Defendants have "figure-skated" from the notion of justiciability to that of a "political question." The Plaintiffs state:

> The "Political question" doctrine is an old doctrine adopted early in the jurisprudence over "pure questions of policy" or "choice" over "policies" *over which no statutory nor constitutional dimensions exists over which the Court can adjudicate*. In a word the subject-matter did *not* involve asserted statutory or constitutional rights. This is not the situation in the within case.

[81] In terms of issues dealing with socio-economic policies that the Supreme Court of Canada has found to be justiciable, the Plaintiffs point to the following:

- Whether "wage and price" controls were within the competence of the federal Parliament: *Reference re Anti-Inflation Act, 1975*, [1976] 2 SCR 373;
- Whether the limits on transfer payments between the federal government and provincial governments could unilaterally be altered: *Reference re Canada Assistance Plan (Canada)*, [1991] 2 SCR 525 [*CAP Reference*];
- A challenge by an individual regarding whether transfer payments by the federal government to the provincial governments with respect to welfare payments were illegal because the province was breaching certain provisions of the Canada Assistance Plan: *Finlay*, above.

[82] The Plaintiffs assert that the clear test for justiciability is whether there is a "sufficient legal component to warrant the intervention of the judicial branch": *CAP Reference*, above, at para 33. The Amended Claim meets this test. When social policies are alleged to infringe or violate *Charter*-protected rights, they must be scrutinized; this does not exclude "political questions": *Chaoulli v Quebec (Procureur general)*, 2005 SCC 35 at paras 89, 183, 185. In such cases the question before the court is not whether the policy is sound, but rather whether it violates constitutional rights, which is a totally different question: *Operation Dismantle*, above, at 472.

[83] The declaratory relief and damages sought in the Amended Claim are, according to the Plaintiffs, grounded in the interpretation of the *Bank Act*, and the constitutional duties and requirements of the budgetary process. These have not been respected. The Constitution, as a result, is being structurally violated and the Plaintiffs' rights are being infringed.

[84] The Defendants have confused the notion of justiciability with that of enforceability by not properly distinguishing between the declaratory relief and tort relief sought, and in viewing some of the declaratory relief as non-enforceable. The statutory right to seek declaratory relief is provided for by Rule 64 of the *Rules*, whether or not any consequential relief is or can be claimed. In addition, the Supreme Court of Canada has recognized that instances may exist where it is appropriate to declare but not enforce a right: *Khadr*, above.

(5) Standing

[85] Finally, the Plaintiffs submit that they clearly have standing to bring forward these justiciable issues on the facts pleaded. This standing is personal, but it is also public interest-based and is in line with recent jurisprudence: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45; *Galati*, above.

[86] The Supreme Court of Canada has ruled that the Constitution does not belong to the federal or provincial governments, but to Canadian citizens (*Nova Scotia (AG)*, above), and that it is a tool for dispute resolution, of which one of the most important goals is to serve well those who make use of it: *Reference Re Residential Tenancies Act*, [1996] 1 SCR 186 at 210.

[87] The Plaintiffs submit that it is time to revisit the issue of standing with respect to the constitutional validity of statutes and executive actions. In cases like the present one, concerned with the constitutional validity of statutes and/or executive actions by way of declaratory relief, public interest standing is a constitutional right.

VI. ANALYSIS

[88] Pursuant to my Order of April 24, 2014 (as endorsed by the Federal Court of Appeal on January 6, 2015), the Plaintiffs have now served and filed the Amended Claim and the Defendants have brought a second motion to strike.

[89] The background to this dispute is set out in my Order of April 24, 2014.

A. *The Amendments*

[90] While the Amended Claim maintains the declaratory relief described in paragraphs 1 to 10 substantially intact from their previous pleading, the Plaintiffs have dropped the allegations that the unlawful actions of the Defendants violate ss 7 and 15 of the *Charter*. Instead, the Plaintiffs now seek, as part of their declaratory relief, a declaration:

> […]
>
> viii) that taxes imposed to pay for the interest on the deficit and debt to private bankers, both domestic and particularly foreign, are illegal and unconstitutional owing to,
>
> A/ the breach of the constitutional right(s) to no taxation without representation resulting from the Finance Minister's failure to disclose full anticipated revenues to MPs in Parliament, before the return of anticipated tax credits, prior to determining whether an anticipated surplus or deficit will be incurred, in the tabling of the budget, in that a full and proper debate cannot properly ensue as a result, thus breaching the right to no taxation without representation under both ss.53 and 90 of the ***Constitution Act, 1867***, as well as the

> unwritten constitutional imperatives to the same effect;
>
> B/ the infringement of the Plaintiffs' right to vote, under s. 3 of the ***Charter***, tied to the right to no taxation without representation with respect to the Minister of Finance's constitutional violations;
>
> C/ breach of the terms of the ***Bank of Canada Act***, with respect to interest-free loans, and the consequent constitutional violations, by the Executive, of its duty to govern, and relinquishing sovereignty and statutory decision-making to private foreign bankers;
>
> […]

[91] The Plaintiffs have also made it clear that their tort claims are not based upon public misfeasance and/or conspiracy. The new damages claim reads as follows:

> […]
>
> (b) damages in the amount of:
>
> i) $10,000.00 each for the Plaintiffs William Krehm and Ann Emmett, as well as the ten (10) named COMER Steering Committee members, named in paragraph 2(a) of the within statement of claim, for the breach of their constitutional right of "no taxation without representation" and the inseparable infringement of the right to vote under s. 3 of the Charter, as tied to the right and imperative against no taxation without representation, due to the constitutional breaches by the Minister of Finance with respect to the budgetary process; and
>
> ii) return of the portion of illegal and unconstitutional tax, to be calculated and calibrated at trial, for each of the Plaintiffs and members of COMER's Steering Committee, consisting of the proportion of taxes, to pay

> interest charges on the deficit, and debt, between 2011 and the time of trial, paid by the Plaintiffs and Steering Committee members of COMER, due to the statutory and constitutional breaches of the Defendants in refusing and/or failing to cover deficits in the budget by way of interest-free loans, as well as the breach of their right to no taxation without representation, to be calculated by the compounded interest changes set out in the budget, as a percentage of the budget, calculated as the same percentage paid by the Plaintiffs and Steering Committee members, to be calculated and calibrated at trial;
>
> […]

[92] Other amendments throughout the Amended Claim either bolster the claims with more facts (e.g. paras 15(h) and 22) or reflect the basic shifts referred to above (see paras 39, 41, 43 and 47).

B. *Rule 221 – Motion to Strike*

[93] As with the previous strike motion, there is no disagreement between the parties as to the basic jurisprudence that governs a motion to strike under Rule 221. For purposes of this motion, I adopt the principles set out in paras 66 and 68 of my Order of April 24, 2014. Essentially, the test for striking an action is a high one and the Defendants must show that it is plain and obvious, assuming the facts pleaded to be true, that the pleadings disclose no reasonable cause of action or that there is no reasonable prospect that the claim will succeed. See *Imperial Tobacco*, above, at paras 17, 21 and 25.

[94] As I found in my Order of April 24, 2014, this claim remains both novel and ambitious, but this does not mean that it is plain and obvious, assuming the facts pleaded to be true, that it does not give rise to a reasonable cause of action or that there is no reasonable prospect that it will not succeed at trial.

C. *Grounds for the Motion*

[95] The Defendants have raised a significant number of grounds for striking the Amended Claim. I will deal in turn with those grounds that I feel have substance and relevance.

(1) Budget Presentation and Taxation

[96] As regards the declaratory relief sought in paras 1(a)(vi) to (viii) of the Amended Claim dealing with the presentation of the Federal Budget by the Minister of Finance, that Defendants argue as follows:

> 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. This constitutional requirement was satisfied here.
>
> 13. Parliament is master of its procedure. It is well recognized that there is no duty on Parliament to legislate. There is no cause of action for the omission of Parliament to enact any law.
>
> 14. The plaintiffs allege that the accounting method used in the budgetary process is a breach of ss. 91(6) *Constitution Act, 1867*, 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 *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.
>
> 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.
>
> [footnotes omitted]

[97] The facts supporting the Plaintiffs' request for declaratory relief on this issue are set out in paras 25-43 of the Amended Claim. The main judicial point is stated as follows:

> [39] The Plaintiffs state, and the fact is, that the above "accounting method" used in the budgetary process are [*sic*] not in accordance with accepted accounting practices, are conceptually and logically wrong, and have the effect of perpetually making the real and actual picture of what total "revenues", "total expenditures", and what the annual deficit/surplus" [sic] actually is, what the annual "deficit/surplus" actually is, in any given year, and what, as a result the standing national "debt" is. Moreover, and more importantly, the Plaintiffs state, and fact is [sic], that such "accounting" methods foreclose any actual or real debate, or consideration, by elected MPs, in Parliament, as the actual financial picture is not

> available nor disclosed to either Parliamentarians nor the Canadian public. The Plaintiffs state, and the fact is, that such accounting method breaches s. 91(6) of the ***Constitution Act, 1867*** and the duty of the Defendant(s) to maintain accurate "statistics", and the ability of MPs in Parliament to fully and openly debate the budget, which breaches the Plaintiffs' right(s) to "no taxation without representation" and also infringes their right to vote under s. 3 of the ***Charter,*** as tied to the no right to taxation without representation.
>
> […]
>
> [41] The Plaintiffs state, and the fact is, that this failure and/or calculated choice by the Defendant Minister of Finance to withhold anticipated total revenue, before the subtraction of anticipated tax credits, along with anticipated expenditures, in the budget bill(s), violates the Plaintiffs' constitutional right to no taxation without representation as guaranteed by ss. 53 and 90 of the ***Constitution Act, 1867***, and unwritten constitutional imperative underlying it, dating back to the ***Magna Carta***, as well as diminishes, devalues and infringes on their right to vote under s. 3 of the ***Charter*** with respect to taxation as tied to deficit, debt, and the availability to debate the alternative of avoiding both by, ***inter alia***, exercising the interest-free Bank of Canada loans under s. 18 of the ***Bank of Canada Act***.

[98] It is true, as the Defendants say, that the Plaintiffs take issue with the way the Minister presents the federal budget to Parliament. However, the allegations set out above are not just that the Minister's accounting methods are fallacious because they fail to take account of human capital and do not appropriately take tax credits into account. If this was the point of the claims, then clearly it would be nothing more than a debate about proper accounting procedures in the context of the federal budget. However, the Plaintiffs provide the facts about how the federal budget is presented to Parliament and say why they think it is inappropriate before they go on to state the legal basis of their claim. And the legal basis of the claim is that the Minister's

accounting methods and practices breach s 91(6) of the *Constitution Act, 1867* because they mean the Defendants are not maintaining and presenting accurate statistics, which in turn breaches s 3 of the *Charter* because, in the end, inaccurate and misleading statistics prevent any meaningful debate on the budget in Parliament. This means in turn that MPs cannot fulfil their representative function and the Plaintiffs (at least the individual Plaintiffs) are therefore being taxed without any real representative input on the budget. This undermines s 3 of the *Charter* and the guarantees under ss 53 and 90 of the *Constitution Act, 1867*. This is my understanding of the Amended Claim on this issue.

[99] Clearly, the Plaintiffs disagree with the way the Minister compiles and presents the budget to Parliament. They know that this, in itself, is not a legal issue they can bring to the Court. So they have hitched their complaints to s 91(6) of the *Constitution Act, 1867*, s 3 of the *Charter* and the no taxation without representation principle. Can this hitching be equated with any previous application of the constitutional principles and provisions cited and relied upon? Not to my knowledge. But that is not the issue before me. *Charter* litigation generally suggests that the Supreme Court of Canada may find a *Charter* or constitutional breach that has not been previously identified.

[100] The Plaintiffs' target is the executive branch of government as embodied in the Minister of Finance. It is the Minister's actions that are alleged to thwart the Parliamentary process and to breach the *Constitution Act, 1867* and s 3 of the *Charter*. It has to be admitted that the arguments underlying the Plaintiffs' assertion of a Constitution and a *Charter* breach appear at this stage to be somewhat novel and esoteric but, as I have already said, this is not a sufficient ground for

saying that they disclose no reasonable cause of action or that there is no reasonable prospect of success at trial.

[101] The Plaintiffs reiterated the same points clearly in their oral arguments:

> The case before you is there is an executive breach of a constitutional requirement by the Minister of Finance with respect to the budget process, and that as a result the legislation that comes out of Parliament breaches the constitutional right to no taxation without representation. Why? The MPs are blindfolded.
>
> [Transcript of Proceedings p 38, lines 17-23]
>
> The right to vote includes the right to effective representation. If the MPs are blinded by executive constitutional breaches by the Minister of Finance, how does that ensure effective representation?
>
> [Transcript of Proceedings p 39, lines 1-5]
>
> [N]owhere in the pleadings are we asking Parliament to legislate. We are simply saying that there's an abdication of executive and parliamentary duty with respect to the budget as pleaded. That is a different matter.
>
> And the failure to act applies equally to the executive as it does to the legislative with respect to constitutional breaches….
>
> [Transcript of Proceedings p 39, lines 15-21]
>
> And the actual revenues are not presented to Parliament. That is what we have pleaded. That is the fact.
>
> [Transcript of Proceedings p 46, lines 20-22]
>
> At paragraph 22, I set out the codification of these principles in sections 53, 54, and 90, and then state that by removing and not revealing the true revenues of Parliament, which is the only body which can constitutionally impose tax and thus approve the

> proposed spending from the speech from the throne, the Minister of Finance is removing the elected MPs' ability to properly review and debate the budget and pass its expenditure and corresponding taxing provisions through elected representatives of the House of Commons. The ancient constitutional maxim of no taxation without representation was reaffirmed post-Charter by the Supreme Court of Canada in the Education Reference.
>
> [Transcript of Proceedings p 50, line 21 to p 51, line 5]

[102] It seems to me that these arguments and assertions cannot apply to COMER itself, which has no right to vote. As regards the individual Plaintiffs, even assuming they pay tax, the allegations remain abstract and theoretical. A central allegation – unsupported by facts – is that MPs are voting blind and have been hoodwinked by the Minister of Finance. There are no facts pleaded to support this bald allegation. MPs may well understand the issues raised by the Plaintiffs concerning budgetary accounting practices, but may have decided to accept them. The Plaintiffs are alleging that Parliament is being misled by the Minister, but that the Plaintiffs are not.

[103] There are no facts to say which MPs represent the individual Plaintiffs and whether those MPs have been approached and asked to deal with the issues raised in this claim or whether, having been made aware of the Plaintiffs' concerns, those MPs have voted for or against the budget. If MPs for the individual Plaintiffs have been apprised of the problem then, no matter how they vote, it is difficult to see how the Plaintiffs are not represented in Parliament on this issue. Representation does not mean that MPs must vote in accordance with the wishes of individual constituents. If representative MPs have not been contacted, then it is difficult to

understand why the individual Plaintiffs have come to Court to ask that it make findings about their rights of representation in Parliament.

[104] On the other hand, if MPs, or at least those which represent the individual Plaintiffs are aware of the accounting concerns that the Plaintiffs raise, then it seems to me there can be no undermining of the voting and representation rights of the individual Plaintiffs.

[105] There are no facts in the pleadings to suggest that any MPs are "voting blind" or are being misled by the Minister of Finance. Similarly, there are none to establish that Parliament does not monitor and assess the budgetary process, including the way the budget is compiled and presented by the Minister of Finance. The logic of the Amended Claim is that if Parliament is not adopting and acting upon the Plaintiffs' concerns about the budgetary process then Parliamentarians are blind. This is an unsupported assertion. It is not a fact.

[106] There is nothing more than a bald assertion that the Minister of Finance is "blindfolding" his Parliamentary colleagues and leading them astray to the detriment of the individual Plaintiffs, and, presumably, all Canadians with a right to vote.

[107] Even at an abstract level, this seems far-fetched, to say the least. The Plaintiffs are asking the Court to simply assume that Parliament does not have the wherewithal to understand the way the budget is compiled and presented. The logic here is that, because the budget is not being presented as the Plaintiffs think it ought to be presented, their Parliamentary representatives are being hoodwinked by the Minister of Finance and obviously do not know what they are doing

when they pass a budget. This position is presumptive and unsupported by any facts. It remains an abstract debate about how the budget should be presented.

[108] Bald assertions, without supporting facts, are not sufficient to satisfy the rules of pleading. See Rule 174 and accompanying jurisprudence.

[109] There is nothing in the facts as pleaded in the Amended Claim to suggest that Parliament is not fully aware of the criticisms levelled by the Plaintiffs against the Minister of Finance and that parliamentarians are not free to question and debate any budget presented from the perspective of those criticisms. Hence, there is nothing to support the allegation that the ability of MPs in Parliament to fully and openly debate the budget is impeded in any way. Further, if the Minister of Finance, in compiling the budget, chooses not to take "human capital" into account and/or chooses to withhold anticipated total revenue, before the subtraction of anticipated tax credits, along with anticipated expenditures, in budget bills, these choices also become the will of Parliament following the established procedures for debating and passing budgets. The Plaintiffs can have no right to insist that Parliament should only debate and pass budgets in accordance with the principles and procedures which they approve of and advocate. If the Plaintiffs disagree with the process then, like everyone else, they have access to their own Parliamentary representatives. Hence, in my view, there is no factual basis in the Amended Claim to support an allegation that the *Constitution Act, 1867*, s 3 of the *Charter* or any constitutional principle is breached on the principle of no taxation without representation. If the individual Plaintiffs have a vote, then they are fully represented in Parliament, and it is Parliament that decides whether or not to pass the budget presented by the Minister of Finance in

accordance with its own procedures. No facts are pleaded to suggest that Parliament is not fully aware of the kinds of criticisms that the Plaintiffs have raised in this action against the Minister and the budgetary process, or that Parliament is not aware that the budgetary process is not open to the kinds of criticisms that the Plaintiffs allege in their Amended Claim.

[110] The Supreme Court of Canada made the following general point in *Authorson*, above, at para 38, quoting *Reference re Resolution to Amend the Constitution*, above:

> 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".

[111] The Plaintiffs are not attacking any particular budget legislation that may have had an impact upon them that gives rise to a cause of action in any court of law. They are attacking the Parliamentary process that they say is used to present, debate and pass budget bills into law. They want the Court to interfere, albeit on Constitutional and *Charter* grounds, with the way Parliament goes about its business. In my view, the jurisprudence is clear that the Court cannot

do this. The same conclusions must be reached even if the Court looks at the matter from the perspective of "when legislation is enacted and not before." Budget bills are passed in accordance with a self-regulating process in Parliament during which MPs can raise the issues of concerns to the Plaintiffs. There are no facts pleaded to suggest that the Plaintiffs are not as fully represented in Parliament on budget bills as they are on any other bill.

[112] As the House of Lords made clear in *Hamilton v al Fayed*, above:

> 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 performances 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."

[113] This is confirmed by s 18 of the *Constitution Act, 1867* and s 4 of the *Parliament of Canada Act*. The privileges, immunities and powers of the Senate and House of Commons and their members are matters of self-definition and regulation by Parliament. In my view, the presentation, debate and passing of the federal budget allows for no role by the Courts. In the present case, no facts are pleaded to support a case that Parliament is not cognizant of the Minister's methodology or the perspectives of the Plaintiffs, or is being blinded.

[114] As far as the *Constitution Act, 1867* and s 3 of the *Charter* are concerned, COMER, as an unincorporated association, has no electoral rights. As regards the individual Plaintiffs, there are no facts pleaded to suggest that they do not have effective representation in Parliament when it comes to budget bills. In *Reference Re Provincial Electoral Boundaries (Saskatchewan),* [1991] 2 SCR 158 at 1836, the Supreme Court of Canada explained what representation means:

> 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 right to bring one's grievances and concerns to the attention of one's government representative…
>
> [emphasis in original]

[115] Representation does not mean that the Plaintiffs have a right to force Parliament to proceed in a way that better suits their view of the appropriate way to present and pass a budget, and they have not pleaded facts to show that any particular budget legislation has negatively impacted a legal right that they enjoy.

[116] There is nothing in the Amended Claim to suggest that the individual Plaintiffs do not enjoy the same meaningful participation in the electoral process as any other Canadian voter. See *Figueroa*, above, at para 27. The Plaintiffs do not lack effective representation simply because budget bills are not presented and dealt with in accordance with their views of what they should or should not contain, and there is no suggestion that they lack a voice in the deliberations of government because they are unable to bring their grievances and concerns to the attention of the MPs who represent them. In my view, Constitutional and *Charter* protection cannot mean that individual voters have the right or the expectation that their views on the appropriate presentation and enactment of any particular piece of legislation will be followed by Parliament. This is not to say that voter concerns about the way that Parliament enacts legislation are not legitimate concerns. However, how Parliament proceeds is a matter of self-definition (see *Authorson*, above) unless, of course, there is some "overriding constitutional or self-imposed statutory or indoor prescription." In my view, notwithstanding the able arguments of Plaintiffs' counsel, the Plaintiffs do not plead anything in the Amended Claim to establish an overriding Constitutional prescription or a breach of s 3 of the *Charter* that could ground their claim for declaratory relief or damages for this aspect of their claim. The Plaintiffs don't even attempt to litigate any particular budget legislation. They focus their claim instead upon the budget compilation and Parliamentary process itself, and I think the jurisprudence is clear that the Court simply cannot go there. Article 9 of the *Bill of Rights of 1688/89* also prevents the Court from entertaining any action against any member of Parliament which seeks to make them personally liable for acts done or things said in Parliament. See *Hamilton v al Fayed*, above.

[117] In my view, then, those allegations of the Amended Claim that raise the taxation issue and seek relief based upon the *Constitution Act, 1867* and s 3 of the *Charter*, and the principle of no taxation without representation have to be struck because it is plain and obvious that they disclose no reasonable cause of action and have no reasonable prospect of success.

(2) *Bank Act* Issues

[118] The balance of the Amended Claim deals with alleged breaches of the *Bank Act* by the Minister of Finance and the Government of Canada. In its essentials, this aspect of the claim has not changed since I reviewed the Plaintiffs' previous Amended Statement of Claim in April, 2014.

[119] I think it is useful to bear in mind the grounds of the Defendants' cross-appeal that the Federal Court of Appeal was asked to consider in January, 2015 and which it dismissed:

> 1. The Judge erred in fact and law in finding that there are alleged breaches or issues in the Plaintiffs' Amended Statement of Claim ("Claim") that are justiciable;
>
> 2. The judge erred in law by finding that s. 18 of the *Bank of Canada Act* could not be interpreted in a motion to strike, but would require full legal argument on a full evidentiary record;
>
> 3. The judge erred in law by finding that had the learned Prothonotary determined s. 18 of the *Bank of Canada Act* to be a "legislative imperative" that the Claim would then become justiciable;
>
> 4. The judge erred in law by finding that even if s. 18 of the *Bank of Canada Act* is permissive, that this does not dispose of the matter of justiciability;

> 5. The judge erred in fact and in law by finding that the Claim does not require the Court to adjudicate and dictate competing policy choices and that objective legal criteria exist to measure the Plaintiffs' allegations;
>
> 6. The judge erred in law and in fact by characterizing the Claim as one which requires the Court to assess whether the Defendants have acted, and continue to act, in accordance with the *Bank of Canada Act* and the *Constitution*;
>
> 7. The judge erred in fact and in law by finding that relevant and material facts have actually been pleaded in the Claim in support of the declarations sought that the policies and actions allegedly pursued by the Defendants have not complied with the Bank of Canada Act and the Constitution;
>
> 8. The judge erred in law in finding on a motion to strike that any allegations in the Claim of breach of statute and/or of constitutional obligations may be justiciable depending on whether the Plaintiffs can establish a reasonable cause of action though appropriate and future amendments;
>
> …

[120] It also has to be borne in mind that in my Order of April 24, 2014, I did not say that the Plaintiffs were likely to succeed with their *Bank Act* claims. All I said was that the claims had to be struck in their entirely because, as they stood, they did not disclose a reasonable cause of action and had no prospect of success. The Federal Court of Appeal endorsed this position.

[121] I concluded that the "full import of the *Bank Act* and what is required of Canada and those Minister and officials who act, or don't act, in accordance with the Bank Act is at the heart of this dispute" (para 72) and that:

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

[122] I said the *Bank Act* claims "*could be* justiciable and appropriate for consideration by the Court"(emphasis added) because the Plaintiffs do give their account of the socio-economic problems that arise from alleged breaches of the *Bank Act* and related constitutional principles. I concluded that this provided context for the alleged breaches in the claims because the Court needs to understand the Plaintiffs' version of what is at stake and what flows from the alleged breaches:

> [75] The difficult boundary between what a court should and should not decide will arise time and again in a case like the present. However, the issue is not whether the Court should mandate the Government and the Bank to adopt the economic positions espoused and advocated by the Plaintiffs. Nor will the Court be deciding whether a particular policy is "financially or economically fallacious," although this kind of accusation does appear in the Claim. In my view, the

> Court is being asked to decide whether particular policies and acts are in accordance with the Bank Act and the Constitution. If justiciability is a matter of "appropriateness," then the Court is the appropriate forum to decide this kind of issue. In fact, the Court does this all the time. The Supreme Court of Canada has made in clear that the Parliament of Canada and the executive cannot abdicate their functions (see *Wheat Board*, above) and that the executive and other government actors and institutions are bound by constitutional norms. See *Reference re Secession of Quebec*, above, and *Khadr*, above.

[123] From a *res judicata* perspective, it has to be borne in mind that the portions of the claim related to the *Bank Act* were struck under Rule 221. My comments about justiciability – "could be justiciable and appropriate for consideration by the Court," –not "are justiciable" simply went to Prothonotary Aalto's findings that they were not justiciable because they involved matters of policy rather than law. I was simply pointing out that legal issues could be distinguished from policy issues, so that the *Bank Act* claims could become justiciable "subject to what I have to say about other aspects of the Claim…." And when I say the "facts are pleaded on these issues," (para 76) the "issues" I am referring to are the facts that distinguish the law from policy. The Plaintiffs are right to point out that I thought the *Bank Act* claims could go forward, but this was subject to issues of jurisdiction and what I had to say about the other aspects of the claim, and the Federal Court of Appeal endorsed this reasoning and this approach to the claims.

[124] The reason I said the *Bank Act* claims "could be justiciable and appropriate for consideration by the Court" is because, as drafted, these claims give rise to problems of jurisdiction and justiciability that the Plaintiffs should have the opportunity to resolve by way of

amendments. Now that amendments have been made the Court has to decide whether the Plaintiffs have resolved these problems.

[125] The grounds brought forward by the Defendants in the present Rule 221 motion, as well as the arguments of the Plaintiffs, have to be considered in light of what the Court has already ruled about the *Bank Act* claims and what the Federal Court of Appeal has endorsed.

[126] The Plaintiffs fault the Defendants for again raising arguments on justiciability that the Court has already decided and the Federal Court of Appeal has endorsed. As a reading of my Order of April 24, 2014 shows, my conclusions on justiciability at that time were subject to serious reservations. I concluded that there were legal issues in the claims (breaches of the *Bank Act* and the Constitution) that the Court could deal with and that could be distinguished from the socio-economic policy assertions in the claims: "In my view, the Court is being asked to decide whether particular policies and acts are in accordance with the Bank Act and the Constitution. If justiciability is a matter of 'appropriateness,' then the Court is the appropriate forum to decide this kind of issue."

[127] I did not conclude, however, that the claims as drafted were sufficient to allow the Court to carry out this function (otherwise I would not have struck them under Rule 221), and I went on to point out that the *Bank Act* and related Constitutional claims had to be struck, and indicated what the Plaintiffs needed to do by way of amendment to allow the Court to consider the legal (as opposed to the socio-economic policy aspects) of the claims. It has to be borne in mind that I struck all of the claims and that the Federal Court of Appeal did not just endorse what I said

about justiciability; it also endorsed my decision to strike all of the claims and my reasons for doing so. So the important issue before me at this juncture is not whether the Court *could* examine and rule on the legal aspects of the claims; the issue is whether the amendments are sufficient to allow the Court to do this, and whether they overcome the problems I identified that compelled me to strike all of the claims in 2014.

[128] To be fair to both sides of this dispute, my Order of April 24, 2014 may sometimes confuse issues of jurisdiction and justiciability. The Federal Court of Appeal seemed to have no problem with this and, however these concerns should be characterized, I did set them out in some detail and I will discuss them here as I described them in my Order of April 24, 2014. The Defendants may not be entirely wrong when they characterize those problems as being about justiciability rather than jurisdiction.

[129] In my Order of April 24, 2014, I went on to examine the jurisdictional problems that arose in the Amended Statement of Claim that was then before me:

> [86] As I have concluded that it is not plain and obvious that the breach of statutory and constitutional obligations and the declaratory relief sought is not justiciable, all I can do at this juncture is decide whether the Court has the jurisdiction to deal with this aspect of the Claim. If amendments are made to portions of the Claim that are struck, this issue may have to be re-visited.
>
> [87] At this stage in the proceedings, s. 17 of the *Federal Courts Act* appears sufficiently wide enough to give the Federal Court concurrent jurisdiction where relief is sought against the Crown. This doesn't end the matter, of course, and the Defendants have asked the Court to examine and apply the *ITO v Miida*

Electronics Inc, [1986] 1 SCR 752 at p. 766 [*ITO*], jurisdictional test.

[88] Given the Federal Court of Appeal decision in *Rasmussen v Breau*, [1986] 2 FC 500 at para 12, to the effect that the *Federal Courts Act* only applies to the Crown *eo nomine*, and not to a statutory corporation acting as an agent for the Crown, it is difficult to see why the Bank should be named as a Defendant. However, the main problem in the way of determining jurisdiction at this stage is that the Plaintiffs have yet to produce pleadings that adequately set out how any private or other interest has been affected by the alleged statutory and constitutional breaches. The Plaintiffs are asking the Court to declare that their view of the way the Bank Act and the Constitution should be read is correct, and that breaches have occurred. This is akin to asking the Court for an advisory opinion, and I see nothing in the jurisprudence to suggest that the Court has the jurisdiction to provide this kind of ruling in the form of a declaration.

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

[90] It seems to me that the fundamental problem of how the Plaintiffs can simply come to the Court and request declarations that their interpretations of the Bank Act and the Constitution are correct is the reason why they have attached tortious and Charter breaches to their Claim. They know that they need to show how

> individual rights have been infringed but, as of yet, they have not even set out in their pleadings how their own rights have been infringed, let alone the rights of "all other Canadians."
>
> [91] This means that, in terms of the *ITO* principles, the Plaintiffs have yet to show a statutory grant of jurisdiction by the federal Parliament that the Court can entertain and rule on the Claim as presently constituted (i.e. simply declare that statutory and constitutional breaches have occurred without an adequate description in the pleadings of how a private right or interest has been affected and the grounds for a valid cause of action), and they have yet to cite an existing body of federal law which is essential to the disposition of the case and which nourishes such a statutory grant of jurisdiction. The Plaintiffs do not have any specific rights under the legislation which they cite and they have provided no statutory or other framework for the exercise of any rights. They may be able to do these things with appropriate amendments to the pleadings. As yet, however, I cannot see how the Court acquires the jurisdiction to provide the declaratory relief that is sought.
>
> [emphasis in original]

[130] It seems to me that the Plaintiffs have not resolved these problems in the Amended Claim.

[131] The Plaintiffs take a very forceful and wide view on the availability of declaratory relief and the Court's jurisdiction to grant such relief. The Plaintiffs take the position that

> any citizen has a constitutional right, subject to frivolous and vexatious or no jurisdiction of the Court, to bring a public interest issue to the Court.
>
> [Transcript of Proceedings p 62, lines 25-27]

[132] Even if I were to accept this broad approach to standing, I still have to decide the jurisdictional issue which I could not decide in April, 2014 for the reasons quoted above that were endorsed by the Federal Court of Appeal, and which, to use the Plaintiffs' own logic, I must accept as *res judicata*. I said that the Plaintiffs could not just ask the Court for an advisory opinion on these *Bank Act* issues because "I see nothing in the jurisprudence to suggest that the Court has the jurisdiction to provide this kind of ruling in the form of a declaration." In retrospect, I might have characterized this as a justiciability issue but, in my view, the terminology doesn't matter because I decided that the problem was that the Plaintiffs were asking for a free-standing declaration that amounted to an advisory opinion and the Court is not in the business of granting free-standing opinions.

[133] The Plaintiffs' position on this issue is as follows:

> You have at paragraph 29 the ruling in Dunsmuir with respect to judicial review as a constitutional right. And Dunsmuir and other cases see judicial review writ large. It's not the procedural avenue of judicial review by way of application as opposed to by way of action. Under section 17 this Court has ruled one can seek declaratory relief by way of action, and that is in my factum.
>
> But if I can refer Your Lordship to paragraph 31, where I actually extract the portions from the Manitoba Métis case, and they are italicized and bolded at pages 242 and 243.
>
> "Citing Thorsen, the Supreme Court of Canada in this case", which is 2013 case," states: 'The constitutionality of legislation has always been a justiciable issue. The right of the citizenry to constitutional behaviour by Parliament can be vindicated by declaration that legislation is invalid or that a public act is ultra vires.'"

> That is paragraph 134 that is extracted. That is exactly what my clients seek with respect to the actions of the Minister of Finance and the resulting constitutional breach of their right to vote – of their right not to be taxed without effective representation by their MPs, because they're blindfolded by the Minister of Finance and what he does not deliver, which is a constitutional requirement, we say.
>
> And then over the page from paragraph 140, the Supreme Court states:
>
> "The Courts are the guardians of the Constitution and cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionally and the rule of law demand no less."
>
> And then the passage that really answers my friend at paragraph 143 of Manitoba Métis Federation – an Inc., by the way, a corporation brought the challenge.
>
> "Furthermore, the remedy available under this analysis if of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available."
>
> That statutorily reproduced under rule 64 of the Federal Courts Act, My Lord, which is reproduced at paragraph 32 of my factum, and this court in Edwards, which is right below that, has ruled that the declaratory relief may be sought in an action under section 17, which was have done. And then which is consistent with the Supreme Court of Canada jurisprudence in Khadr and Thorsen.
>
> [Transcript of Proceedings p 54 line 8 to p 55, line 28]

[134] The Plaintiffs appear to be of the view that, as a think-tank, they can simply come to Court and ask the Court to declare that the Minister of Finance and the Government of Canada are required to do certain things under the *Bank Act*, and that they have abdicated their constitutional duties, and allowed international private entities to trump the interests of

Canadians. COMER has no Constitutional or *Charter* rights to assert and the individual Plaintiffs are no differently situated from any other Canadian and have no demonstrable individual Constitutional and *Charter* rights to assert. In the Amended Claim, the Plaintiffs collectively remain a think-tank, seeking the Court's endorsement of alleged *Bank Act* and Constitutional breaches related to the *Bank Act* and international institutions.

[135] Having been given the opportunity to amend, there are still no material facts in the Amended Claim that link the impugned legislative scheme embodied in the *Bank Act* to an effect on themselves as Plaintiffs. Their argument is that freestanding declarations on the constitutionality of laws and legal authority are always available to any Canadian citizen.

[136] Since my Order of April 24, 2014 was considered by the Federal Court of Appeal, the Federal Court of Appeal has had occasion to consider and pronounce in some detail on what the Court can do with pleadings that contain freestanding requests for declaratory relief. In *Mancuso v Canada (National Health and Welfare),* 2015 FCA 227 [*Mancuso*], the Federal Court of Appeal provided the following guidance:

> [31] The appellants allege that their action can nonetheless proceed to trial on the basis of the surviving paragraphs. It is not problematic, in their view, that there are no material facts in the statement of claim, including none that link the impugned scheme to an effect on themselves as plaintiffs. They base this argument on the proposition that freestanding declarations on the constitutionality of laws and legal authority are always available.
>
> [32] On this latter point, there is no doubt. Free-standing declarations of constitutionality can be granted: *Canadian Transit Company v. Windsor (Corporation of the City),* 2015 FCA 88. But the right

to the remedy does not translate into licence to circumvent the rules of pleading. Even pure declarations of constitutional validity require sufficient material facts to be pleaded in support of the claim. Charter questions cannot be decided in a factual vacuum: *Mackay v. Manitoba*, above, nor can questions as to legislative competence under the *Constitution Act, 1867* be decided without an adequate factual grounding, which must be set out in the statement of claim. This is particularly so when the effects of the impugned legislation are the subject of the attack: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.

[33] The Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 46 articulated the pre-conditions to the grant of a declaratory remedy: jurisdiction over the claim and a real as opposed to a theoretical question in respect of which the person raising it has an interest.

[34] Following *Khadr*, this Court in *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101 (leave to appeal granted) at paras. 77-79 highlighted the danger posed by a generic, fact-free challenge to legislation – in other words, a failure to meet the second *Khadr* requirement. Dawson JA noted that legislation may be valid in some instances, and unconstitutional when applied to other situations. A court must have a sense of a law's reach in order to assess whether and by how much that reach exceeds the legislature's vires. It cannot evaluate whether Parliament has exceeded the ambit of its legislative competence and had more than an incidental effect on matters reserved to the provinces without examining what its legislation actually does. Facts are necessary to define the contours of legislative and constitutional competence. In the present case, this danger is particularly acute; as the judge noted, the legislation at issue pertains to literally thousands of natural health supplements.

[35] This is not new law. While the plaintiffs point to *Solosky v. The Queen*, [1980] 1 S.C.R. 821 for the proposition that there is a broad right to seek declaratory relief, *Solosky* also notes that there must be "a 'real issue' concerning the relative interests of each [party]." The Court cannot be satisfied that this

> requirement is met absent facts being pleaded which indicate what that real issue is and its nexus to the plaintiffs and their claim for relief.

[137] In the present case, the Plaintiffs have not, in their Amended Claim, pleaded facts to demonstrate a "real" issue concerning the relative interests of each party, and the nexus of that real issue to the Plaintiffs and their claim for relief. Although as I pointed out in my Order of April 24, 2014, the Plaintiffs do distinguish between legal issues and policy issues, the legal issues remain theoretical with no real nexus to some interest of the Plaintiffs, other than an interest in having the Court endorse their opinion on the *Bank Act* issues raised.

[138] The Plaintiffs have not addressed the jurisdictional problems I referred to in paras 85 to 91 of my Order of April 24, 2014 and/or what might generally be referred to as the jurisdiction of the Court to entertain, or its willingness to grant, free-standing requests for declaration.

[139] Apart from the taxation issues which I have concluded are not justiciable for reasons set out above, the Plaintiffs have made little attempt in their amendments to rectify the problems I raised in my Order of April 24, 2014. The declaratory relief related to the *Bank Act* remains the same. The damages claimed in 1(b)(ii) appear to be based upon s 3 of the *Charter* and the no taxation without representation principle, which I have found to be non-justiciable.

[140] The Plaintiffs have urged me to treat my Order of April 24, 2014 and the Federal Court of Appeal decision on that judgement as *res judicata*. If I do this then I have to say that in their Amended Claim the Plaintiffs have still provided no legal or factual basis for the infringement of their private rights, and the declarations remain nothing more than a request that the Court

provide an advisory opinion that supports their view of the way the *Bank Act* and the Constitution should be read.

[141] In order to overcome this problem in their first Amended Statement of Claim, the Plaintiffs hitched their declaratory relief to ss 7 and 15 of the *Charter* and various tort claims, all of which they have now abandoned. In their stead, they have now hitched the declaratory relief to claims based on s 3 of the *Charter* and Constitutional guarantees of no taxation without representation, which I have found to be non-justiciable. This leaves the Court in the same situation as it found itself in April, 2014:

> [91] This means that, in terms of the *ITO* principles, the Plaintiffs have yet to show a statutory grant of jurisdiction by the federal Parliament that the Court can entertain and rule on the Claim as presently constituted (i.e. simply declare that statutory and constitutional breaches have occurred without an adequate description in the pleadings of how a private right or interest has been affected and the grounds for a valid cause of action), and they have yet to cite an existing body of federal law which is essential to the disposition of the case and which nourishes such a statutory grant of jurisdiction. The Plaintiffs do not have any specific rights under the legislation which they cite and they have provided no statutory or other framework for the exercise of any rights. They may be able to do these things with appropriate amendments to the pleadings. As yet, however, I cannot see how the Court acquires the jurisdiction to provide the declaratory relief that is sought.

[142] It seems to me that the Federal Court of Appeal in *Mancuso*, above, has now made it clear that a claim for a pure declaration must establish through pleading sufficient material facts that the Court has jurisdiction over the claims "and a real as opposed to a theoretical question in respect of which the person raising has an interest."

[143] I do not wish to denigrate, or even downplay, the Plaintiffs' concerns about the way that Parliament has dealt with economic and monetary issues. But not all concerns can be translated into legal action that can, or should, be dealt with by a court of law. Rather than supplement their previous ss 7 and 15 *Charter* claims, and their previous tort claims, the Plaintiffs have abandoned those claims altogether and have now come up with claims based upon s 3 of the *Charter* and Constitutional guarantees of no taxation without representation. As able as their arguments are, the sudden switch to a new game plan suggests that the Plaintiffs are not able to remove their concerns from the political realm and to characterize them in such a way that they can be dealt with by this Court.

[144] It seems to me, then, that the latest Amended Claim discloses no reasonable cause of action and has no prospect of success at trial. It also seems to me that the Plaintiffs are still asking the Court for an advisory opinion in the form of declarations that their view of the way the *Bank Act* and the Constitution should be read is correct. It also seems to me that they have failed to show a statutory grant of jurisdiction by Parliament that this Court can entertain and rule on their claim as presently constituted, or that they have any specific rights under the legislation which they invoke, or a legal framework for any such rights. As the Supreme Court of Canada pointed out in *Operation Dismantle*, above, the preventive function of a declaratory judgment must be more than hypothetical and requires "a cognizable threat to a legal interest before the Court will entertain the use of its process as a preventative measure" (para 33). The Court is not here to declare the law generally or to give an advisory opinion. The Court is here to decide and declare contested legal rights. See *Gouriet*, above, at 501-502.

D. *Other issues*

[145] The Defendants have raised a number of other issues going to the adequacy and appropriateness of the Amended Claim but, in light of the fundamental problems I have dealt with above, I see no point in going any further with my analysis.

E. *Leave to Amend*

[146] The Plaintiffs have asked the Court to consider, as an alternative form of relief, that they be allowed to proceed on the declaratory relief in their Amended Claim, with leave to amend any struck portions with respect to the damages portion of the claim.

[147] As set out above, I do not think that, even for the declaratory relief sought, that the Plaintiffs have been able to raise their claim above a mere request for an advisory opinion. In addition, as further explained above, given that the Plaintiffs have not been able to rectify the fundamental issues I pointed out in my Order of April 24, 2014, and have not suggested any way in which they could be rectified, I see no point in allowing an amendment. Having previously permitted the Plaintiffs such an opportunity, their response convinces me that, for reasons given, they have no scintilla of a cause of action that this Court can or should hear. Without having any real legal interest at stake, the Plaintiffs remain a think tank seeking to have the Court endorse their political and academic viewpoint. Amendments are not going to change this.

ORDER

THIS COURT ORDERS that

1. The Plaintiffs' latest Amended Claim is struck in its entirety;
2. Leave to amend is refused;
3. Costs are awarded to the Defendants.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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