Federal Court  Cour fédérale

Date: 20130809

Docket: T-2010-11

Citation: 2013 FC 855

Toronto, Ontario, August 9, 2013

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

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

REASONS FOR ORDER AND ORDER

Introduction

[1] This is a novel proposed class action proceeding. It seeks, in essence, to compel the Defendants (Crown) to comply with the *Bank of Canada Act*,[1](*Bank Act*) and to take certain steps pertaining to monetary policy in Canada. This proceeding alleges wrongs of statutory and

constitutional abdication of action and infringement of all Canadian citizens' rights under various statutes and the *Charter of Rights and Freedoms* (the *Charter*).[2]

[2] The Plaintiff, Committee for Monetary and Economic Reform (COMER), is described in the Amended Statement of Claim (Claim) as an economic "think-tank" based in Toronto, founded in 1970, and dedicated to researching monetary and economic reform policies in Canada. The individual Plaintiffs are members of COMER who have an interest in economic policy (collectively the Plaintiffs are referred to as COMER).

[3] The Claim seeks many declarations relating to actions to be taken by the Bank of Canada and the Minister of Finance. The Claim also alleges a conspiracy and tortious conduct of the Crown to harm Canadians generally for which damages of $10,000.00 per Plaintiff and $1.00 for every Canadian citizen is claimed.

[4] The Crown has brought this motion to strike the Claim. The grounds alleged include the following:

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

ii) the Claim is scandalous, frivolous or vexatious;

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

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

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[1] R.S.C., 1985, c. B-2

[2] *Canadian Charter of Rights and Freedoms*, s 2, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Charter of Rights and Freedoms or the Constitution of Canada;

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

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

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

viii) the Plaintiffs, or any one of them, do not have standing to bring the Claim as of right and, furthermore, the Plaintiffs, or any one of them, do not satisfy the necessary requirements for the grant of public interest standing;

. . .

The Claim

[5] The core elements of COMER's Claim can be reduced to three parts:

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

[6] Each of the legal claims below relates to at least one of these pleaded allegations.

[7] On a motion to strike, the allegations in a statement of claim are accepted to be true.[3]

[3] see, *Operation Dismantle v. Canada* (1985), 1 S.C.R. 441 at para. 27

[8] The issue for determination is whether the Claim is so fatally flawed such as to be bereft of any chance of success and therefore should be struck.

Statutory claims

Bank Act Claims

[9] The causes of action claimed are chiefly concerned with three subsections of the *Bank Act*:

> 18. The Bank may
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> …
>
> *(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;*
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> *(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;*
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> . . .
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> *(m) open accounts in a central bank in any other country or in the Bank for International Settlements, accept deposits from central banks in other countries, the Bank for International Settlements, the International Monetary Fund, the International Bank for Reconstruction and Development and any other official international financial organization, act as agent or mandatory, or depository or correspondent for any of those banks or organizations, and pay interest on any of those deposits;*

[10] COMER claims that the Bank and other Crown actors have failed to comply with the requirements of subsections 18(*i*) and (*j*), which they interpret as requiring the Bank and the Minister of Finance to make interest-free loans for the purpose of municipal, provincial and federal "human capital expenditures".[4] The only individual case of a rejected loan appears to be the August 18, 2004, decision of the Minister of Finance to refuse a loan to the Town of Lakeshore, Ontario.[5]

[11] COMER also claims that the Crown's failure to make public the minutes of meetings between the Governor of the Bank and other central bank governors violates section 24 of the *Bank Act* (Bank as fiscal agent for Government of Canada), and is unconstitutional for unspecified reasons. Further, the Minister of Finance's failure to exercise proper control over the Bank is a violation of section 14 (public consultations).[6]

[12] They further plead that the fact that the Bank's monetary policy is dictated by private foreign banks and financial interests it is therefore contrary to unspecified parts of the *Bank Act*.[7]

<u>*Constitution Act, 1867* Claims</u>

[13] The Plaintiffs allege that allowing the secret meetings described above, by enacting subsection 18(*m*) of the *Bank Act*, violates subsections 91(1a) (public debt), 91(3) (taxation), 91(14)

[4] Para 1(a)(i)
[5] Para 19
[6] Paras 44 and 46
[7] Para 11

(currency), 91(15) (banking), 91(16) (savings banks), 91(18) (bills of exchange) and 91(20) (legal tender) of the *Constitution Act, 1867 Act*.[8]

[14] COMER alleges that the impugned accounting methods (of not listing revenues collected prior to the return of tax credits) violate subsection 91(5).[9]

[15] COMER further claims that subsection 18(*m*) of the *Bank Act*, which allows the Bank to open accounts in other countries' central banks and international financial organizations, is unconstitutional.[10]

Charter Claims

[16] COMER alleges that the harms described in the Claim constitute violations of sections 7 (life, liberty and security of the person), 15 (equality) and 36 (equalization) of the *1982 Act*.[11] They also argue the failure to provide interest-free loans to the provinces violates the constitutional guarantee of equalization under section 36.[12]

Claims Arising from Unwritten Constitutional Principles

[17] COMER alleges that the harms flowing from the lack of interest-free loans are violations of the underlying right of equality, the underlying constitutional principle of federalism, and the constitutional right that statutes are not to be rendered impotent.[13]

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[8] Para 1(a)(v)
[9] Para 39.
[10] Para 1(a)(iii)
[11] Para 47
[12] Para 21
[13] Para 47

[18] The impugned accounting methods are said to violate the constitutionally mandated principle that the Crown can only impose taxes for expenditures as set out in the Throne Speech and with the consent of the House of Commons.[14]

[19] It is also alleged that section 30.1 of the *Bank Act* is unconstitutional, if it is interpreted to preclude judicial review, based on the constitutional right to judicial review.[15]

[20] COMER alleges that the Minister of Finance's refusal of the loan to the Town of Lakeshore violated an unspecified constitutional duty.[16]

Tort Claims

[21] The Crown and certain inter-governmental organizations, as alleged in the Claim are engaged in the tortious conduct of conspiracy by engaging in an agreement for the use of unlawful means to cause injury to COMER and all other Canadians.[17]

Positions of the Parties

[22] The parties filed extensive written representations and case law in support of their respective positions. Those submissions focused on the overriding issue on this motion as to whether the various alleged causes of action are bereft of any chance of success and therefore should be struck.

[14] Para 45
[15] Para 1(a)(ix)
[16] Para 21
[17] Para 41

Crown's Position

[23] In essence, the Crown argues there is no reasonable cause of action made out because the requisite elements of the causes of action have not been pleaded. This is not an attack on the possibility of any of the causes of action being justiciable, but simply that they lack the precision or particularization necessary to support such allegations.

[24] With respect to the tort of misfeasance in public office, the Crown argues that the elements of the tort have not been pled. It is a necessary component of the tort that the public officers' misconduct was deliberate and unlawful. They must have been aware of that illegality and they must be identified.[18]

[25] The Claim only refers to the state of mind of the impugned officials as "wittingly and/or unwittingly in varying degrees of knowledge and intent". The identity of the individuals alleged to have committed this tort is not pleaded. Therefore, the Crown argues that COMER has not met this required element.

[26] With respect to the allegation of statutory breach, the Crown argues there is no tort of statutory breach[19] and the remedy for statutory breach is judicial review. In any event, the legislation allegedly breached is permissive and obligates no official to take any action.

[18] see, *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198 at para. 25
[19] see, *The Queen v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at p. 22

[27] Material facts have, similarly, the Crown argues, not been pleaded with respect to the tort of conspiracy. An agreement between two or more persons, as well as intent, is required to make out this tort. The Claim does not disclose the identity of officials alleged to have engaged in such conduct, the type of agreement entered into, and other necessary details.

[28] COMER's claim that the federal budgetary process violates either subsection 91(5) or (6) of the *Constitution Act, 1867* discloses no reasonable cause of action because those subsections are simply classes of subjects within federal legislative authority and impose no duties. The *Bank Act* provides that no action lies against public officials for anything done in good faith under the *Bank Act*.

[29] The Crown contends that the *Charter* is not engaged. The Claim fails to disclose material facts showing a causal relationship between any of the Crown's actions and the alleged *Charter* breaches, as state action is a necessary element of a breach of section 7 of the *Charter*. For example, there is no freestanding constitutional right to health care.[20] COMER alleges no differential treatment on the basis of an enumerated or analogous ground under section 15 of the *Charter*.

[30] The Crown further contends that COMER's claim is outside this Court's jurisdiction as it fails to meet the three-part test set out in *ITO-International Terminal Operators Ltd v. Miida Electronics Inc*.[21] In *ITO*, the Supreme Court considered the jurisdiction of the Federal Court in the

[20] see, *Toussaint v. Canada (Attorney General)*, 2011 FCA 213
[21] [1986] 1 S.C.R. 752

context of an admiralty action. The Supreme Court determined that jurisdiction in the Federal Court depends on three factors:

1. There must be a statutory grant of jurisdiction by the Federal Parliament.
2. There must be an existing of body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be a "law of Canada" as the phrase is used in s. 101 of the *Constitution Act*, 1867 [page 766].

[31] The Crown argues that the claims against the Bank fails the first step since the *Federal Courts Act*[22] does not grant jurisdiction over statutory corporations acting in the name of the Crown.[23] Ministers of the Crown may not be personally sued for acting in their representative capacity, although the Crown concedes that it would be vicariously liable for their official actions under the *Crown Liability and Proceedings Act.*[24]

[32] At the second and third stages of the *ITO* test, the Crown argues the tort elements of the Claim lack an existing body of federal law which nourishes the statutory grant of jurisdiction. The existing body of law must be a detailed statutory framework, while the torts of conspiracy and misfeasance in public office remain emanations of provincial law. The alleged *Charter* infringements are not sufficient to ground the claim in a law of Canada as required at the third stage of the *ITO* test.

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[22] R.S.C. 1985, c. F-7
[23] see, *Rasmussen v. Breau*, [1986] 2 FC 500
[24] R.S.C., 1985, c. C-50

[33] The Crown also maintains that COMER lacks standing. They lack private interest standing because there has been neither an interference with a private right nor damages peculiar to them resulting from an interference with a public right. In turn, COMER lacks public interest standing because the alternative procedure of a judicial review brought by parties directly affected is available.

[34] Finally, the Crown argues that the claim is not justiciable. The subject matter of monetary, currency and financial policies is not suitable for determination by a court. There are no objective legal criteria by which to evaluate the Claim of COMER. Judicial adjudication is not appropriate given that economic policy-making is the province of government.

COMER's Position

[35] COMER submits that the high threshold for striking out the Claim has not been met.

[36] The claim for misfeasance in public office as alleged in the Claim has been properly pleaded so it is argued by COMER. That is, the Crown actors are knowingly or in a willfully blind fashion refusing to give effect to the *Bank Act*. COMER pleads that neither Parliament nor the executive can abdicate its duty to govern. With respect to the conspiracy claim, COMER argues that each and every individual need not be named, as there are often unknown co-conspirators.

[37] COMER, for these various reasons maintain that it is not plain and obvious that subsection 91(6) of the *Constitution Act, 1867* does not impose a duty, and that regardless there is an independent constitutional duty to outline all revenues and expenditures. COMER alleges that

sections 53, 54 and 90 of the *Constitution Act, 1867*, require that all taxing provisions must emanate from Parliament.

[38] On the *Charter* claims, COMER argues that the availability of health care was determined to constitute a section 7 interest in *Chaoulli v. Quebec (Attorney General),*[25] and the reduction in other government services endangers life. No comparator group is needed for a section 15 claim and the Plaintiffs' claim engages the notion of substantive equality.

[39] With respect to jurisdiction of the Federal Court to entertain the Claim, COMER argues this Court has jurisdiction to issue declarations concerning statutes such as the *Bank* A*ct*, as well as having jurisdiction over federal public actors, tribunals and Ministers of the Crown. COMER maintains they have private interest standing in asserting the rights breached with respect to such federal actors, and, in the alternative, have public interest standing. COMER argues that simply because a subject deals with socio-economic matters does not mean it is non-justiciable, as evidenced by the extensive federalism jurisprudence concerning banking and trade and commerce.

[40] The political questions doctrine cannot be used to prevent adjudication of constitutional and statutory rights. Justiciability should not be confused with enforceability; a matter may be justiciable even if only declaratory relief is available as a remedy.

Discussion

[41] Against these competing positions, it must be remembered that the test for striking an action is a high one. The action must be bereft of any chance of success and as noted above just because it is a novel cause of action it does not automatically fail.[26]

[42] The Supreme Court of Canada has recently summarized the principles to be applied on a motion to strike. In *R. v. Imperial Tobacco Canada Ltd.*,[27] the Chief Justice, writing for the Court made the following observations regarding a motion to strike:

> 17. The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. Supreme Court Rules. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: Odhavji Estate v. Woodhouse, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of [page 67] success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, Syl Apps Secure Treatment Centre v. B.D., 2007 SCC 38, [2007] 3 S.C.R. 83; Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735.
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> 21. Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised [page68] on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before Hedley Byrne & Co. v. Heller & Partners, Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have

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[25] 2005 SCC 35
[26] see, for example, *Hunt v. Carey* [1990] 2 S.C.R. 959 and *Operation Dismantle, supra*
[27] 2011 SCC 42

> been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in Donoghue v. Stevenson. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
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> . . .
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> 25. Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way - in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the [page 70] law and the litigation process, the claim has no reasonable chance of succeeding.

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

No Reasonable Cause of Action

[44] Has the tort of misfeasance in public office been made out in the Claim? The misfeasance alleged is that the Defendants have abdicated their responsibility to enforce legislation. Here COMER seeks through the auspices of this proceeding to force the Crown to enforce laws of Canada which it alleges are not being followed.

[45] As the Federal Court of Appeal noted in *St. John's Port Authority*[28] each essential element of the tort must be clearly pleaded. Vague generalizations are insufficient. The Claim must be particularized.

[46] In this case, the Claim at times reads like an economics text postulating arguments as to why Canadian monetary and financial policy are dictated by private foreign bank and financial interests such as the International Monetary Fund, the Bank of International Settlements and the Financial Stability Board. All of these institutions are based outside Canada.

[47] It is argued that the Claim sufficiently pleads this cause of action. As examples of this cause of action the Claim states, *inter alia*:

- The Plaintiffs state, and the fact is, that Policies such as interest rates, and other policies set by the Bank of Canada are set in consultation, and at times, but mostly at the direction of the "Financial Stability Board" ("FSB"), established after the 2009 "G-20" London Summit in April 2009 . . . [para. 7]
- . . . The Plaintiffs further state, and fact is [*sic*] that since 1974, there has been a gradual, but sure, slide into reality that the Bank of Canada and Canada's monetary policy are in fact, by and large, dictated by private foreign bank and financial interests [para. 11]
- The Plaintiffs state, and the fact is, that no sovereign government such as Canada, under any circumstances, should borrow money from commercial banks, at interest, when it can instead borrow from its own central bank, interest free . . .[para. 18]

[28] 2011 FCA 198

- The Plaintiffs state, and the fact is, that the Minister's reasons for refusing what was requested from the Town of Lakeshore's Council, is both financially and economically fallacious and not in accordance with his statutory duties . . .[para. 21]
- The Plaintiffs state, and the fact is, that the defendant' (officials) are wittingly and/or unwittingly, in varying degrees, knowledge, and intent, engaged in a conspiracy, along with the BIS, FSB, an [*sic*] IMF, to render impotent the Bank of Canada Act, as well as Canadian sovereignty over financial, monetary, and socio-economic policy, and in fact, by-pass the sovereign rule of Canada . . . [para. 41]

[48] These excerpts together with other similar allegations in the Claim are said to make out the tort of misfeasance by public officers. These types of allegations do not meet the stringent standard set out in *St. John's Port Authority*.[29] They are general statements of economic policy and argument. They do not support a cause of action and are therefore struck.

[49] The failure of the government to take certain actions regarding human capital or other monetary steps may be the subject of judicial review in the right decision-making environment but the Claim as currently drafted regarding misfeasance in public office is bereft of any chance of success.

[50] The claim for conspiracy is also bereft of any chance of success. As currently drafted there is no particularization of the parties alleged to be involved in the conspiracy. There are general statements about alleged conspiracies by finance ministers and unnamed others along with

[29] supra, 2011 FCA 198

international monetary agencies to undermine the provisions of the *Bank Act*. Such allegations do not meet the test for proper pleading.

[51] The tort of conspiracy requires an agreement between two or more persons who intend to injure by unlawful means.[30] The only pleading in the Claim is that the "defendants' (officials) are wittingly and/or unwittingly, in varying degrees, knowledge, and intent, engaged in a conspiracy . . .". There are no names of those involved in the alleged conspiracy. Further, what does in "varying degrees" mean? There are no material facts which support a claim for conspiracy.

[52] This part of the claim must also be struck.

Is the Charter Engaged?

[53] The claim under section 15 of the *Charter* is the right to equality and equal protection under the law. A claim under section 15 requires that there be differential treatment between the claimants and others. There is no distinction pleaded in the Claim based on an analogous or enumerated ground. The Supreme Court was clear in *Withler v. Canada (Attorney General)*,[31] that the notion of substantive equality is a requirement for a successful section 15 claim. The Court stated at paras. 41 and 63 as follows:

> [41] As McIntyre J. explained in *Andrews*, equality is a comparative concept, the condition of which may "only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises" (p. 164). However, McIntyre J. went on to state that formal comparison based on the logic of treating likes alike is not the goal of s. 15. What s. 15(1) requires is substantive not formal equality.

[30] see, for example, G.H.L. Fridman, *Introduction to the Law of Canadian Torts*, 2nd ed. (Butterworths/LexisNexis, Markham, July 2003) at p. 185

[31] 2011 SCC 12

. . .

> [63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step in the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

[54] Applying this to the current case, the claim is asserted on behalf of all Canadians. There is no distinction pleaded based on an enumerated or analogous ground. The *Bank Act* policies and economic policies apply to all Canadians and no relevant comparator of discrimination is identified. The Supreme Court confirmed this approach in *Canadian Egg Marketing Agency v. Richardson,*[32] wherein it is stated "[p]rovided the federal government treats all people within the country equally, it does not discriminate". Therefore, this part of the Claim must also be struck.

[55] Section 7 of the *Charter* deals with life, liberty and security of the person. As pleaded this section of the *Charter* is not engaged. The Claim is generalized with respect to the section 7 claim only alleging that "by a reduction, elimination and or fatal delay of health care services, education and other human capital expenditures and services". There is no causal connection pleaded in the Claim connecting the government economic policies and actions to a breach of section 7. I am in agreement with the argument of the Crown as set out in paragraphs 18 through 22 of their written submissions particularly the analysis of the application of *Blencoe v. British Columbia (Human Rights Commission).*[33] In *Blencoe,* the Supreme Court stated:

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[32] [1998] 3 S.C.R. 157 at para. 161 [emphasis in original]
[33] [2000] 2 S.C.R. 307

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

[56] The Supreme Court has also clearly held that section 7 rights do not encompass positive rights. In *Gosselin v. Quebec (Attorney General),*[34] the Supreme Court noted that a section 7 claim must arise "as a direct result of a determinative state action that in and of itself deprives the claimant of the right to life, liberty or security of the person". No negative infringement or state prohibition of a section 7 interest has been pleaded. This Claim must be struck.

Jurisdiction of the Court

[57] The jurisdictional issue raised by the Crown engages the three part test set out in *ITO* as discussed above. The Crown argues that this Court has no jurisdiction to entertain tort claims against Federal authorities.

[58] However, pursuant to sections 2, 17 and 18 of the *Federal Courts Act*, the wording is sufficiently wide to capture these types of claims against federal actors and Crown servants. It is therefore not plain and obvious that this Court is without jurisdiction to entertain claims seeking declaratory relief as here.

Plaintiff's Standing

[59] With respect to the issue of standing, there is now a plethora of cases setting the parameters of both private and public interest standing. In a recent decision Hughes, J. in *United Steel Workers v. MCI*,[35] reviewed the case law relating to public interest standing and summarized the current approach of courts as follows:

> [13] To summarize these decisions, I view the current jurisprudence with respect to public interest standing to be:
>
> - The Court is to take a flexible, discretionary approach.
> - Three factors are to guide the Court in its considerations:
> - Does the case raise a serious justiciable issue?
>
> Does the party bringing the proceeding have a real stake or genuine interest in the outcome?
>
> Is the proposed proceeding a reasonable and effective means for bringing the matter to Court?
>
> - The Court should take a liberal and generous approach in its consideration of the matter.

[60] In this case the individual Plaintiffs have standing to assert rights but only if there is interference with a private right and they have suffered damages as a result. Although the written representations and argument set out greater detail of the premise upon which rights relating to expectations and declarations that the budgetary process and constitutional requirements impinged their rights, it is not clear from the pleading that these are sufficient to give private interest standing.

[61] However, with respect to public interest standing, in taking a flexible, liberal and generous approach to the issues raised in the Claim, it cannot be said at this juncture that COMER does not meet the test for public interest standing. If the claims are sufficiently amended to satisfy the requirements of pleading, the claims would meet the first part of the test by raising serious issues to be tried. COMER has a genuine interest in economic policy. There appears not to be an alternative

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[34] [2002] 4 S.C.R. 429 at para. 213

reasonable and effective means to bring the matter to Court. However, this is not the end of the matter.

Is the Claim Justiciable?

[62] As noted by the Crown in its submissions, the justiciability of a matter refers to its suitability for determination by a Court. It involves the subject matter for determination by the Court, its presentation and the appropriateness of judicial determination.[36]

[63] This Claim has as its subject matter economic policy and socio-economic matters. In and of itself that does not make it non-justiciable. It depends upon a reading of the legislation and what obligations are imposed by that legislation. As noted by Barnes, J. in *Friends of the Earth*:

> ***Justiciability***
>
> [24] The parties do not disagree about the principles of justiciability but only in their application in these proceedings. They agree, for instance, that even a largely political question can be judicially reviewed if it "possesses a sufficient legal component to warrant a decision by a court": see *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at para. 27, 83 D.L.R. (4th) 297. The disagreement here is whether the questions raised by these applications contain a sufficient legal component to permit judicial review. The problem, of course, is that "few share any precise sense of where the boundary between political and legal questions should be drawn": see Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999) at p. 133.
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> [25] One of the guiding principles of justiciability is that all of the branches of government must be sensitive to the separation of function within Canada's constitutional matrix so as not to inappropriately intrude into the spheres reserved to the other branches: see *Doucett-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at paras. 33 to 36 and

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[35] 2013 FC 496

[36] see, *Friends of the Earth v. Canada (Governor in Council)*, [2009] 3 F.C.R. 201 at para. 25; aff'd 2009 FCA 297

C.U.P.E. v. Canada (Minister of Health), 2004 FC 1334 at para. 39, 244 D.L.R. (4th) 175. Generally a court will not involve itself in the review of the actions or decisions of the executive or legislative branches where the subject matter of the dispute is either inappropriate for judicial involvement or where the court lacks the capacity to properly resolved it. These concerns are well expressed in *Boundaries of Judicial Review: The Law of Justiciability in Canada*, above, at pp. 4 and 5:

> Appropriateness not only includes both normative and positive elements, but also reflects an appreciation for both the capacities and legitimacy of judicial decision-making. Tom Cromwell (now Mr. Justice Cromwell of the Nova Scotia of Appeal) summarized this approach to justiciability in the following terms:
>
> The justiciability of a matter refers to its being suitable for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors. This appropriateness may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it.
>
> While it is helpful to develop the criteria for a determination of justiciability, including factors such as institutional capacity and institutional legitimacy, it is necessary to leave the content of justiciability open-ended. We cannot state all the reasons why a matter may be non-justiciable. While justiciability will contain a diverse and shifting set of issues, in the final analysis, all one can assert with confidence is that there will always be, and always should be, a boundary between what courts should and should not decide, and further, that this boundary should correspond to predictable and coherent principles. As Galligan concludes, "Non-justiciability means no more and no less than that a matter is unsuitable for adjudication."
>
> [Footnotes omitted.] [Emphasis in original.]

[26] While the courts fulfill an obvious role in the interpretation and enforcement of statutory obligations, Parliament can, within the limits of the constitution, reserve to itself the sole enforcement role: see *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, [1989] S.C.J.

No. 80 at paras. 68 to 70. Such a Parliamentary intent must be derived from an interpretation of the statutory provisions in issue – a task which may be informed, in part, by considering the appropriateness of judicial decision-making in the context of policy choices or conflicting scientific predictions.

. . .

[31] The justiciability of all of these issues is a matter of statutory interpretation directed at identifying Parliamentary intent: in particular, whether Parliament intended that the statutory duties imposed upon the Minister and upon the GIC by the KPIA be subjected to judicial scrutiny and remediation

. . .

[33] If the intent of s. 5 of the Act was to ensure that the Government of Canada strictly complied with Canada's Kyoto obligations, the approach taken was unduly cumbersome. Indeed, a simple and unequivocal statement of such an intent would not have been difficult to draft. Instead s. 5 couples the responsibility of ensuring Kyoto compliance with a series of stated measures some of which are well outside of the proper realm of judicial review. For instance, s. 5(1)(a)(iii.1) requires that a Climate Change Plan provide for a <u>just transition</u> for workers affected by greenhouse gas emission reductions and s. 5(1)(d) requires an <u>equitable distribution</u> of reduction levels among the sectors of the economy that contribute to greenhouse gas emissions. <u>These are policy-laden considerations which are not the proper subject matter for judicial review. That is so because there are no objective legal criteria which can be applied and no facts to be determined which would allow a Court to decide whether compliance had been achieved</u>: see *Chiasson v. Canada*, 2003 FCA 155, 226 D.L.R. (4th) 351 at para. 8.

[34] It is not appropriate for the Court to parse the language of s. 5 into justiciable and non-justiciable components, at least, insofar as that language deals with the content of a Climate Change Plan. This provision must be read as a whole and it cannot be judicially enforced on a piecemeal basis. While the failure of the Minister to prepare a Climate Change Plan may well be justiciable, an evaluation of its content is not. Indeed the various obligations under the Act for the Minister and others to prepare, publish and table the required reports, regulations and statements are all coupled with the mandatory term "shall". That word is construed as imperative in a statutory context, and when used it almost

> always creates a mandatory obligation: see the *Interpretation Act*, R.S.C., 1985, c. I-21, s. 11. So far as I can determine, the word "ensure" found in s. 5 and elsewhere in the KPIA is not commonly used in the context of statutory interpretation to indicate an imperative.
>
> . . .
>
> [38] . . . I note, as well, that s. 6 of Act says only that the GIC "may" make regulations. That language is clearly not mandatory. This, I think, was the basis for the admonition by Lord Browne-Wilkinson in *R. v. Secretary of State for the Home Department*, [1995] 2 ALL E.R. 244 (H.L.), to the effect that without clear statutory language the courts have no role to play to in requiring legislation to be implemented. This, he said, would tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction. The language of ss. 7(1) and ss. 7(2) is sufficiently unclear that I do not think that it was intended to override the clearly permissive meaning of the words "may make regulations" in ss. 6(1) of the Act.

[64] The issues in dispute in this Claim are "policy-laden" as they require a consideration of economic policy and the relief sought requires the Government of Canada to take certain steps regarding "interest-free loans" for "human capital" expenditures. What objective legal criteria can be applied to interpret these provisions when economic issues such as those raised are matters of government policy? COMER may not agree with the policy but the Court is not the vehicle for declaring that the Government change that policy if no legislative imperative exists. The *Bank Act* in section 18 is a permissive section in that the powers to be exercised "may" be exercised. This allows for discretion and considerations of policy in the implementation of those powers under the *Bank Act*. There is no requirement that "interest-free loans for human capital" be made.

[65] In my view, this Claim is similar in circumstance to that in *Friends of the Earth*. It is a policy-laden matter that is within the purview of Parliament and is not therefore justiciable. The Claim founders on the shoals of justiciability. As noted by Dean Lorne Sossin:

> Whether in the normative or positive sense, "appropriateness" has emerged as the most common proxy for justiciability… Appropriateness not only includes both normative and positive elements, but also reflects an appreciation for both the capacities and legitimacy of judicial decision-making…While justiciability will contain a diverse and shifting set of issues, in the final analysis, all one can assert with confidence is that there will always be, and always should be, a boundary between what courts should and should not decide, and further, that this boundary should correspond to predictable and coherent principles[37].

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

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

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

> cannot be ascertained in a meaningful way and it therefore defies judicial manageability.
>
> . . .
>
> 56. The Plaintiffs are concerned with the way in which Canada develops and implements fiscal policy and monetary policy and Canada's participation in international economic organizations. As indicated, the Claim deals not with specific aspects of legislation, but rather with abstract issues relating to Bank of Canada governance and the role of global markets.
>
> . . .
>
> 62. The Plaintiffs seek to litigate precisely the types of issues which have been deemed beyond the appropriate scope for adjudication by Canadian courts. Rather than pointing to specific actions or policies governed by the *Act*, the Claim asks this Court to re-write the processes governing the Bank of Canada and Canada's involvement with groups like the BIS, FIS and the IMF. The Claim seeks to have the Court mandate to government and to the Bank of Canada the economic positions advocated by the Plaintiffs.
>
> 63. The Plaintiffs admit they are interested chiefly in targeting policy: "policies such as interest rates, and other policies set by the Bank of Canada", alleging these are being developed "in consultation" with or "at the direction of" the FSB and related organizations. More generally, there is a focus on "monetary and financial policy" (and related "economic and social policies") which Plaintiffs view as deficient insofar as they are "dictated by private foreign bank and financial interests." This request runs contrary to the proper scope of judicial involvement. Whether or not a policy is "financially or economically fallacious" is not a matter for the judiciary to decide, but for the government as mandated by the electorate.

[67] The citations have been omitted from these paragraphs but a review of those cases supports these submissions.[38]

[38] The cases cited and considered by the Court include: Chaudhry *v. Canada*, 2010 ONSC 6092; *Ontario (Attorney General) v. Fraser*, [2012] 2 S.C.R. 3; *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; and, *Archibald v. Canada*, [1997] 3 FC 335

[68] The position of COMER that the issues are justiciable relies upon such cases as *Chaoulli v. Quebec (Attorney General)*[39]*; Reference Re Canada Assistance Plan (B.C.)*[40]*; Reference Re: Anti-Inflation Act (Canada)*[41]*;* and, *Manitoba (Attorney General) v. Canada (Attorney General) [Patriation Reference]*.[42] These are all cited for the proposition that Courts have not shied away from issues that engage interpretation of statutes or constitutional duties or rights. All that is required for the Court to entertain the Claim is a subject matter that has "a sufficient legal component to warrant the intervention of the judicial branch".[43] Further, *Chaouilli* is cited for the proposition that "There is nothing in our constitutional arrangement to exclude 'political questions' from judicial review where the Constitution itself is alleged to be violated".[44]

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

[70] In the end result, I am not persuaded that the Claim is justiciable. The Claim focuses on matters such as the Minister's decision being "financially and economically fallacious" (para. 21); that Provinces are getting more interest-free loans than others (para. 21 (d); decisions are based on "the reasoning that such loans would increase annual deficits" (para. 24); "it is long recognized that investment and expenditure in human capital is the most productive investment and expenditure a

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[39] [2005] 1 S.C.R. 791
[40] [1991] 2 S.C.R. 525
[41] [1976] 2 S.C.R. 373
[42] [1981] 1 S.C.R.
[43] *Canada Assistance Plan Reference, supra*
[44] supra, [2005] 1 S.C.R. 791 at para. 183

government can make etc. These few examples from the Claim, of which there are many more, resonate with policy making implications not legal considerations.

Leave to Amend

[71] There is ample authority in this Court and in the jurisprudence generally that where a claim has some kernel of a legitimate claim it should not be tossed aside but permitted to be amended to determine if the clam in law can be cured.[45]

[72] Given that the Claim, in my view, is not justiciable, leave to amend will not cure the defects. Leave to amend is therefore not granted.

Conclusion

[73] Thus, for the reasons given, the motion is granted and the Claim is struck without leave to amend. As noted at the outset, this was a novel Claim. In the circumstances, there should be no costs.

[45] see, for example, *Collins v. Her Majesty the Queen*, 2011 FCA 140; and, *Simon v. Canada*, 2011 FCA 6

ORDER

THIS COURT ORDERS that:

1. The within Claim is struck without leave to amend.

2. There shall be no costs.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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