

FEDERAL COURT OF CANADA

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

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**PROCEEDINGS HEARD BEFORE
THE HONOURABLE MR. JUSTICE AALTO
in the Courts Administration Service, Federal Judicial Centre,
180 Queen Street West, Toronto, Ontario,
Courtroom 4A,
on Wednesday, December 5, 2012 at 10:48 a.m.**

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EXCERPT OF SUBMISSIONS BY MR. GALATI

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APPEARANCES:

Mr. Rocco Galati for the Plaintiffs

Mr. Peter Hajecek for the Defendants
Mr. David Tortel

Also Present:

Ms. Shirley Aciro Court Registrar
Mr. Joe Mischuk Usher

A.S.A.P. Reporting Services Inc. 8 (2013)

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1 Toronto, Ontario
2 — Upon commencing Mr. Galati's Submissions on
3 Wednesday, December 5, 2012 at 10:48 a.m.

4 MR. GALATI: What I propose to
5 do — it's okay if I refer to you as Mr. Aalto?

6 JUSTICE AALTO: Yes.

7 MR. GALATI: Or your honour? What
8 I am going to do is take the first hour of my time
9 to line up the ducks, because my friend and I, we
10 thought we would be a bit informal. We go back to
11 our days in the Department of Justice together. We
12 are actually friends not in the court sense, but we
13 have known each other for over 20 years.

14 What my friend has done is, with
15 respect, confused the issues here, and I need to
16 take you through some general observations and
17 principles on constitutional law before I take my
18 second hour to respond to my friend this morning.

19 JUSTICE AALTO: Fair enough.

20 MR. GALATI: In taking you through
21 those general principles, they will in part answer
22 some of my friend's arguments, but not necessarily
23 in totality. I think it's very important that I do
24 that. Those of us who went to law school before
25 the Charter came in —

1 JUSTICE AALTO: That includes me.

2 MR. GALATI: — yes — are fixated
3 on this notion of parliamentary supremacy. There
4 is no parliamentary supremacy left in Canada; it is
5 a constitutional supremacy. That's clear. So the
6 buck stops at the Constitution. Parliament can do
7 anything except transgress the Constitution. That
8 was true even pre-Charter, on certain underlying
9 constitutional principles.

10 But before we get there, I am
11 going to start with my general observations on the
12 claim. I am doing this so I can globalize my
13 submissions.

14 The first one is the general
15 observation that my friend keeps saying he's got no
16 facts; he's got evidence; he's got opinion. This
17 court has said very clearly that the line on a
18 pleading between facts and evidence is not a
19 distinct one, so one should avoid marrying, on a
20 motion to strike, the actual distinction between
21 fact and opinion. Where two people agree on an
22 opinion it becomes a fact for the purposes of a
23 motion to strike. Where they disagree, it's
24 arguably an opinion.

25 The first case I would like to

1 take you to, and my stuff is all in green,
2 volume 1, is the Liebmann case by Madam Justice
3 Reid, which is tab 45. This will be volume 2. You
4 will find that passage at page 11, paragraph 20.
5 On the motion before her, Madam Justice Reid stated
6 at paragraph 20:

7 "The line between pleading
8 facts and pleading evidence
9 is not a distinct one. I can
10 see no prejudice to the
11 defendants, arising in this
12 case, as a result of the
13 plaintiff setting out the
14 facts on which he relies in
15 the terms and with the
16 specificity noted above. I
17 do not see that this makes
18 the drafting of a defence
19 more complex or difficult.
20 Indeed, it may have obviated
21 the procedural step of
22 seeking particulars."

23 The second general observation is
24 found at volume 1, tab 25. My friend also does in
25 his submissions what the Federal Court of Appeal

1 said one should not do on a motion to strike. That
2 is the Arsenault case at tab 25. My friend wants
3 to reconfigure the claim to his binoculars, and the
4 Court of Appeal said you don't do that, either in
5 terms of facts or jurisdiction. You take the claim
6 as pleaded. That is at paragraphs 8 to 10 of that
7 case, from the Federal Court of Appeal.

8 JUSTICE AALTO: I understand that,
9 but there is the caveat to that proposition that if
10 the alleged fact is — let me simplify it — so
11 outrageous that it should not be accepted, then
12 just because it is there doesn't mean you start
13 from accepting that as a basis upon which this
14 claim may survive.

15 MR. GALATI: I agree, but it
16 doesn't mean that if a fact is complicated or
17 difficult to prove —

18 JUSTICE AALTO: Oh no, I agree
19 with that submission.

20 MR. GALATI: — it's not a fact.
21 It's not a fact. I am with you there, your honour.
22 However, what one cannot do, as my friend has done
23 in his factum — used the exact same words saying
24 the essence of the claim is this; the essence of
25 the claim is that — no, no. The claim is what it

1 is, as it is set out; not as my friend would like
2 to see it. That is very important. It's not how
3 Parliament, for instance, debates. It's about the
4 constitutional requirement. In the speech from the
5 throne, as an example, which is not just pageantry,
6 but the Queen cannot have her money until she walks
7 into Parliament and tells us what she is going to
8 do with the money in that session. Part of that is
9 we need to know how much money you have, how much
10 we have to spend and why. That is taxation with
11 representation, and I will get to that later. So
12 my friend can't requalify that argument to say it's
13 about internal debate procedure in Parliament.
14 That is not what it is at all. The second general
15 observation I want to make, and this is important
16 with respect to all of my friend's arguments, is
17 that this action in the main, if you read paragraph
18 1(a), is for declaratory relief.

19 JUSTICE AALTO: Mm-hmm.

20 MR. GALATI: There are facts pled
21 during the factual component of the claim that go
22 to the action or non-action of federal actors for
23 which — which are set out there as factual context
24 to the declaratory relief, but this action in
25 essence, apart from B, is purely an action for

1 declaratory relief.

2 Underlying the declaration sought,
3 whether they be on the interpretation of the Bank
4 of Canada Act provisions, or on the executive, the
5 minister of finance's requirements in the budgetary
6 process, but even the statutory interpretation
7 declarations we seek are underlined by ultra vires,
8 unconstitutional actions by federal state actors of
9 the executive. And so what we have is an action for
10 declaratory relief with respect to statutory
11 provisions and the conduct of the executive actors
12 who are statutorily and constitutionally charged
13 with executing their duties under that federal
14 statutory regime.

15 And so if I can refer you to tab 4
16 of my authorities in volume 1, rule 64 of the
17 Federal Court rules. And that reads:

18 "No proceeding is subject to
19 challenge on the ground that
20 only a declaratory order is
21 sought, and the Court may
22 make a binding declaration of
23 right in a proceeding whether
24 or not any constitutional
25 relief —"

1 JUSTICE AALTO: That is the Khadr
2 case.

3 MR. GALATI: — and so
4 consequential relief is — that's right, and I am
5 going to get to Khadr later. So there is
6 jurisdiction, not only under the rules for the
7 declaration, but also under the act under section
8 17(5) (b). You will find that at tab 3. I am sure
9 you don't need me to read it to you.

10 I will read one case on point. It
11 is the Edwards case by your sister prothonotary at
12 tab 43, rendered by Prothonotary Aronovitch. If
13 you go to the last paragraph of that decision,
14 paragraph 44, the last three lines say:

15 "Rule 64 of the Federal Court
16 Rules, 1998 permits the court
17 to grant a declaration
18 simpliciter in all
19 proceedings. Clearly
20 declaratory relief may be
21 sought as relief in an action
22 against the Crown pursuant to
23 section 17 of the Federal
24 Court Act."

25 I don't know if you were around in

1 federal court practice, your honour, prior to these
2 rules. Under former rule 16, 03, declaratory
3 relief could only be sought by way of action. Why?

4 Because it's recognized that declaratory relief
5 requires a trial with evidence and a factual
6 context before a declaration can be sought.

7 So where my friend thinks this
8 court has no jurisdiction to entertain this action
9 is perplexing.

10 The last source of jurisdiction
11 and general comment I'd like to make is section 2
12 of the Federal Court Act itself, which is found at
13 tab 3 of my authorities. I am sure you have read
14 this definition of a federal board or tribunal
15 until the cows have come home.

16 This action seeks not only
17 declaratory relief with respect to the
18 interpretation of federal statutes, but it also
19 seeks declaratory relief with respect to the
20 conduct of a federal board, commission, or other
21 tribunal which is defined under section 2 as
22 meaning "any body, person or persons having
23 exercising or purporting to exercise jurisdiction
24 or powers conferred by or under an act of
25 Parliament or", I would underline, "under an order

1 made pursuant to the prerogative of the Crown."

2 This court has jurisdiction to
3 review, constitutionally, Crown prerogative.
4 Again, Khadr did that with respect to — with
5 foreign relations.

6 With those general observations, I
7 will now turn to what I say I would beg you to
8 consider, the underlying constitutional principles
9 that must be reviewed when you are moving to strike
10 an action.

11 You cannot simply by analogy take
12 a lot of the cases my friend has before you which
13 have to do with private actions between private
14 individuals and say Parliament has made a choice.
15 Those don't apply where the Constitution is not
16 engaged or where the Constitution is not invoked.

17 You have to keep that in mind when
18 you are looking at this action.

19 I am going to take you through
20 some of the principles which completely contradict
21 the fanciful assumptions of my friend here as to
22 how our system works or should work.

23 The first line of cases I am going
24 to take you through — because this claim is for
25 declarations as to the unconstitutional provisions

1 and executive action; secondly, the damages arising
2 out of the — or sought in this claim arise from
3 that unconstitutional executive and state actor
4 action and inaction — I'm going to first take you
5 through the restraint on Parliament and executive
6 action with respect to the Constitution.

7 The first case I would like to
8 take you through briefly is found in volume 1 of my
9 authorities.

10 Some of the stuff I am going to
11 read you sounds like old law-school stuff, and
12 unfortunately, those not used to constitutional
13 litigation just gloss over it as if it were a
14 sermon from their parish, as it were. But these
15 are very important holdings of the Supreme Court of
16 Canada with respect to where Parliament's ability
17 to legislate stops. Or delegate, for that matter.

18 Tab 6 is the first authority I
19 would like to read. As you have heard from my
20 friend, this is for parliamentarians, this belongs
21 to MPs, and all of this. This is the Nova Scotia
22 Attorney General v. Canada Attorney General case
23 from 1951 — pre-Charter, obviously — and this was —
24 — the federal Parliament wanted to delegate certain
25 duties and jurisdiction to the provincial

1 governments.

2 You would think this is a matter
3 between governments and between different
4 parliaments, and the citizen has no say.

5 If you turn over the page to
6 page 3, what the Supreme Court of Canada said, and
7 this goes to a lot of my friend's submissions and I
8 have side-barred it, is that:

9 "The Constitution does not
10 belong either to Parliament
11 or to the Legislatures; it
12 belongs to the country and it
13 is there that citizens of the
14 country will find the
15 protection of the rights to
16 which they are entitled. It
17 is part of that protection
18 that Parliament cannot (sic)
19 legislate..."

20 And it goes on.

21 So this case is very clear on the
22 fact that neither the federal Parliament nor the
23 provincial parliaments own and keep the
24 Constitution in their back pocket, as it were. It
25 belongs to the citizens, and even on an issue of

1 division of power, the legislatures' right to
2 legislate and delegate stops with the
3 constitutional framework.

4 I raise that case to pause as well
5 because while my friend may be reading Chaoulli to
6 you, where certain Charter rights are invoked, the
7 Charter is not the be all and end all of the
8 Constitution. Whenever there is a constitutional
9 requirement or imperative invoked, you can replace
10 Charter for that. It's of equal importance, more
11 so according to this case.

12 The second case I would like to
13 refer you to is at the next tab at tab 7, and that
14 the Air Canada and B.C. Attorney General case,
15 1986. What is important about this case is that
16 even though it was decided post-Charter, the court
17 was not dealing with Charter issues here.

18 There is a fiction running around
19 that is expressed and repeated by a lot of my
20 friends at the DOJ, and some judges, that you
21 cannot mandamus a minister or Crown to do anything
22 and that ministers of the Crown purporting to exert
23 prerogative power can't be mandamus. This case
24 says otherwise.

25 JUSTICE AALTO: I think I agree

1 with that proposition, Mr. Galati. I can think of
2 several cases in this court the last year or two.

3 MR. GALATI: Right.

4 JUSTICE AALTO: Where exactly that
5 has happened.

6 MR. GALATI: But this was always
7 in the law. It's not a development of the law.

8 This case, if I may, just one
9 brief passage out of it, paragraph 12, this was a
10 case where in B.C. you needed a fiat from the
11 lieutenant-governor to sue the Crown for taxes that
12 were owed because a statute had been declared
13 unconstitutional. The attorney general refused the
14 fiat, advising the lieutenant-governor not to grant
15 it. They took judicial review, and the Supreme
16 Court of Canada said that the attorney general, as
17 the chief legal officer, had the duty to give the
18 correct constitutional advice to the lieutenant-
19 governor and that he was under constitutional duty
20 to accept that correct constitutional advice.

21 At paragraph 12 with the sentence
22 that starts that turns over the page, it states:

23 "All executive powers,
24 whether they derive from
25 statute" —

1 And I would underline:

2 "Whether they derive from
3 statute, common law or
4 prerogative must be adapted
5 to conform to constitutional
6 imperatives."

7 I highlight paragraph 14 and 19,
8 21, and 22, for the moment.

9 So we see here that the Supreme
10 Court of Canada, even before the Charter, firmly
11 put its foot down and said wait, both with respect
12 to Parliamentary supremacy, so-called, and with
13 respect to Crown prerogative of the minister, the
14 buck always stops at the Constitution. If there
15 are constitutional claims made, it is not an answer
16 to say defer to Parliament. It is not an answer to
17 say the minister is invoking prerogative. That
18 does not wash — I'm sorry, that does not wash in
19 terms of the constitutional imperatives and
20 requirements.

21 The next case post-Charter I would
22 refer your honour to is the Quebec secession
23 reference, which is at tab 8 of my authorities.

24 As you recall, the Quebec
25 secession reference set out four non-exhaustive

1 pillars of our constitutional framework. Two of
2 them are the rule of law and constitutionalism.

3 I direct you first to page 23,
4 paragraphs 70 and 71 of that case.

5 The Supreme Court of Canada,
6 starting paragraph 70, in discussing the underlying
7 constitutional pillars of constitutionalism and
8 rule of law which even the Parliament cannot
9 breach, states at paragraph 70:

10 "The principles of
11 constitutionalism and the
12 rule of law lie at the root
13 of our system of government.

14 The rule of law, as observed
15 in Roncarelli, is a
16 fundamental postulate of —"

17 JUSTICE AALTO: Mr. Hajacek was
18 talking about law school. The very first case I
19 ever read was Roncarelli and Duplessis.

20 MR. GALATI: There you go. One of
21 my favourites.

22 JUSTICE AALTO: Fundamental
23 constitutional principle.

24 MR. GALATI: That is carried
25 forward, your honour, right through the Charter and

1 post-Charter. At the last three sentences of that
2 paragraph:

3 "At its most basic level, the
4 rule of law vouchsafes to the
5 citizens and residents of a
6 stable, predictable and
7 ordered society in which to
8 conduct their affairs."

9 Then at paragraph 71, third line from the top:

10 "Secondly we explained..."

11 They are referring to the Manitoba Language
12 Reference.

13 "...that the rule of law
14 requires the creation and
15 maintenance of an actual
16 order of positive laws which
17 preserves and embodies the
18 more general principles of
19 normative order..."

20 And that it regulates the
21 relationship between the state and the individual,
22 and that must be regulated by law.

23 "Taken together, these three
24 considerations make up a
25 principle of profound

1 constitutional and political
2 significance."

3 Then at paragraph 73 and 74 the
4 Supreme Court makes the — I'm sorry, before I get
5 there, the Supreme Court at paragraph 72 states in
6 the middle of the paragraph:

7 "This court has noted on
8 several occasions that with
9 the adoption of the
10 Charter..."

11 and the Constitution Act, 1982, I would add, your
12 honour,

13 "...the Canadian system of
14 government was transformed to
15 a significant extent from a
16 system of parliamentary
17 supremacy to one of
18 constitutional supremacy."

19 Which addresses a lot of my
20 friend's arguments that Parliament is master of its
21 own house unless — unless there's a constitutional
22 issue at play. And I will get to the budgetary
23 process later.

24 It's the Constitution that is
25 supreme, not Parliament.

1 Then at paragraphs 73 and 74 the
2 Supreme Court in the Quebec secession reference
3 makes the point that democracy — as one of the
4 four pillars, as you'll recall, of
5 constitutionalism, the rule of law, democracy,
6 federalism, and respect for minorities — I'm sorry,
7 they enunciated five pillars — democracy does not
8 end with majority rule in Parliament. That is what
9 the Constitution is there to temper and what the
10 courts are there to adjudicate. They say that
11 democracy does not end with majority rule.

12 Parliament just can't do what it
13 wants. There are constitutional constraints, even
14 though they have been elected, to what it can or
15 cannot do.

16 JUSTICE AALTO: Mm-hmm.

17 MR. GALATI: And in fact at pages
18 24 and 25 they make the point that constitutional
19 rule overrides majority rule.

20 I have taken you through some
21 general principles on the restraint of Parliament
22 and the executive in terms of their actions. I now
23 want to take you through some constitutional
24 principles on Parliament's restraint and
25 executives' restraint when they don't take action,

1 which is equally offensive under our constitutional
2 framework.

3 The first case, of course, where
4 they enunciated this is the Vriend decision, which
5 is found at tab 10 of my book of authorities, pages
6 23 and 24 of that decision.

7 It's the heading that starts with
8 "Application of the Charter", "application of the
9 Charter to a Legislative Omission."

10 The Crown in that case had argued
11 that the Constitution can't apply to omissions,
12 only overt acts by the Parliament or by the
13 executive. The Supreme Court rejected that
14 argument. I am not going to take you through the
15 whole thing, but I will take you to the summary
16 found at paragraph 56 where the court says:

17 "It is suggested that this
18 appeal represents a contest
19 between the power of the
20 democratically elected
21 legislatures to pass the laws
22 they see fit and the power of
23 the courts to disallow those
24 laws or to dictate that
25 certain matters be included

1 in those laws. To put the
2 issue in this way is
3 misleading and erroneous.
4 Quite simply, it is not the
5 courts which limit the
6 legislatures, rather it is
7 the Constitution which must
8 be interpreted by the courts
9 that limits the
10 legislatures."

11 Now here we are talking about
12 legislative inaction.

13 JUSTICE AALTO: If I am
14 understanding, part of the Crown's position is that
15 the inaction that is alleged in the statement of
16 claim relates to certain provisions of the bank act
17 and those provisions are not mandatory provisions;
18 they are permissive provisions, that the Bank of
19 Canada may do this, this, or the other.

20 MR. GALATI: Right.

21 JUSTICE AALTO: It does not say
22 the Bank of Canada shall do this, that, or the
23 other.

24 MR. GALATI: I will get to —

25 JUSTICE AALTO: And what

1 subjective analysis does one have to go through to
2 decide whether or not it's appropriate to enforce
3 those, or objective analysis.

4 MR. GALATI: I will get to that in
5 two seconds, after I finish with Khadr.

6 JUSTICE AALTO: Okay.

7 MR. GALATI: Thank you. I will
8 skip ahead to answer your question because it is
9 fresh on your mind. If you look at the Khadr case
10 at tab 71, as you noted already, the Supreme Court
11 of Canada mandamused, or made an order against the
12 minister of foreign affairs with respect to the
13 minister's prerogative over foreign affairs.

14 JUSTICE AALTO: Mm-hmm.

15 MR. GALATI: And why? Because the
16 minister failed to act. It's not that he did
17 anything against Mr. Khadr; the minister simply
18 refused to act. And so, flowing from Vriend, where
19 a legislature refuses to include once there is a
20 scheme in place, that can lead to constitutional
21 violations. But ministers of the Crown are state
22 actors, can also breach the Constitution by
23 refusing to act.

24 That goes up as far and as high as
25 the ultimate discretion any minister can exercise

1 over a prerogative. There is no higher discretion
2 known in our law. Yet the court in Khadr said
3 twice you haven't acted and this has caused a
4 constitutional breach.

5 Let me quickly address the "may"
6 versus "shall" issue, before I get back to the
7 general discussion. Why don't we turn up the Bank
8 of Canada Act.

9 JUSTICE AALTO: Give me a sec
10 while I finish my note on this point, Mr. Galati.
11 All right; the bank act?

12 MR. GALATI: Yes, let me address
13 the "may" versus "shall" argument. Let's first
14 turn to section — I need your honour to understand
15 that under section 17 of the Bank of Canada Act,
16 the minister of finance is the holder of all
17 shares, capital shares of the bank on behalf of Her
18 Majesty. He is the sole shareholder for Her
19 Majesty the Queen, which really, in real terms,
20 means he is the sole shareholder under the statute
21 to the people of Canada, so it's not as if he is
22 some nominal minister here. Under 17, he is the
23 sole shareholder.

24 Under section 14, which is equally
25 important, of the Bank of Canada Act, the minister

1 of finance, contrary to popular myth out there, has
2 the final say. He can direct the governor of the
3 bank to do anything. The minister is in charge.
4 Although he doesn't tend to engage in the day-to-
5 day operations, statutorily, the minister
6 incarnate —

7 JUSTICE AALTO: We are back to the
8 Diefenbaker-Coyne affair.

9 MR. GALATI: That may be nice
10 political intrigue, but it doesn't define the
11 statute. The statute makes it clear. And I just
12 noticed Mr. Coyne, may he rest in peace, only
13 passed away a few months ago at 102.

14 JUSTICE AALTO: Yes.

15 MR. GALATI: However, that doesn't
16 — that whole affair, as intriguing as it was,
17 doesn't dictate the statutory framework. Under 14,
18 the minister is in charge.

19 Let's go to section 18 where my
20 friend says it's permissive rather than mandatory.

21 As your honour knows, probably, from hearing
22 submissions ad nauseam on the word "may", "may" can
23 be interpreted in three separate ways. The first
24 meaning of "may" is complete discretion in the
25 hands of the decision-maker, subject of course to

1 the doctrine of reasonableness under Baker, which I
2 argued at the Supreme Court.

3 The second meaning of "may" is
4 that the body has a power to do what it does, but
5 doesn't necessarily have the discretion. When they
6 say "the bank may," it is conferring an authority,
7 a power on the bank.

8 The third meaning of "may" is when
9 that authority is statutorily set out, there is
10 argument that when the preconditions are set out
11 for exercising that authority, it turns into a
12 "shall."

13 If you look at section 18 of the
14 Bank of Canada Act, and the heading tells it all:
15 "Business and powers of the bank." It says "The
16 bank may," blah, blah, blah.

17 Is that "may" an unfettered
18 discretion? By terms of statutory framework, your
19 honour, if the minister of finance is in charge,
20 how can it be an unfettered discretion? It has to
21 be an authority or power. The minister is in
22 charge. The minister is the shareholder of the
23 bank under 17, and the minister is the boss under
24 section 14 and can issue a directive to the bank
25 governor.

1 So how can the "may" on the first
2 argument under section 18 be anything but a power
3 or authority? Not a discretion.

4 Now, on the issue of whether or
5 not that authority turns into a "shall", I can
6 refer your honour to tab 28 of my authorities,
7 which is a tax case, the Bitumar case from this
8 court, the Federal Court. At tab 28, pages 8 and 9
9 of that decision, you have this court adopting the
10 House of Lords and the Bishop of Oxford case, where
11 this court has said, "as a general rule" — if you
12 see the second paragraph that is side-barred, your
13 honour:

14 "It's a general rule the word
15 'may' in a statutory
16 provision is usually regarded
17 as permissive and is not
18 given a mandatory connotation
19 unless the context clearly
20 indicates a contrary
21 intention. Permissive words
22 may be construed as creating
23 a duty where they confer a
24 power."

25 I submit that section 18 confers a

1 power, for the reasons I just outlined.

2 "The exercise of which is
3 necessary to effectuate a
4 legal right."

5 My clients say the exercising of
6 that power must be effected to effectuate their
7 constitutional rights in various forms.

8 "The question whether words
9 prima facie discretionary are
10 intended to make the exercise
11 of a power imperative in all
12 cases must be solved from the
13 context of the particular
14 provisions and general scope
15 and objects of the enactment
16 conferring power."

17 Now, if I am thinking what you are
18 thinking, you are saying how does that help me on a
19 motion to strike? The answer to that is: When do
20 we decide this issue of statutory interpretation?
21 On a motion to strike? Clearly the answer is no.
22 It's left best to the trial judge.

23 And that doesn't come from me, it
24 comes from the Supreme Court of Canada. If your
25 honour turns to tab 4 — I'm sorry, I think it's

1 tab 15. Yes, tab 15 of my book of authorities.
2 Very short decision, but very weighty and very on
3 point to the issue before us. It's the Dumont case
4 versus the Attorney General, where the plaintiffs
5 or applicants were seeking declaratory relief with
6 respect to various federal statutes. If you turn
7 there. It's a five-paragraph decision, Madam
8 Justice Willson speaking for the court. Paragraph
9 3 states:

10 "Issues as to the proper
11 interpretation of the
12 relevant provisions of the
13 Manitoba Act and the
14 Constitution Act and the
15 effect of the impugned
16 ancillary legislation upon
17 them would appear to be
18 better determined at trial
19 where a proper factual base
20 can be laid."

21 It would be somewhat presumptuous,
22 I would respectfully submit, to resolve this issue
23 of whether that "may" confers a power and whether
24 that "may" be subject to mandamus was a duty given
25 the complex factual matrix of both the composition

1 of the Bank of Canada, its history, the reasons it
2 was created for, which were for the very reasons my
3 clients say they have basically made those
4 provisions and appendix provisions, and abdicated
5 their responsibility to govern.

6 All this cannot be determined on a
7 motion to strike before you. The interpretation of
8 that issue is for the trial judge.

9 If I can go back, then, to my
10 general observations — and I wanted to give you
11 the answer so that it was fresh in your mind, your
12 honour.

13 In my general observations I was
14 outlining —

15 JUSTICE AALTO: We are doing fine
16 on time. I see you keep checking the clock.

17 MR. GALATI: I don't wear anything
18 I can lose. I always lose watches.

19 JUSTICE AALTO: Pens and cuff
20 links.

21 MR. GALATI: And my current wife
22 says partners, as well. I can't hold onto them.

23 I have taken you through pre-
24 Charter restraint both on Parliament and executive
25 with respect to Constitution constraint. I have

1 taken you through restraint on Parliament and
2 executive inaction in Vriend and Khadr, and
3 obviously the rhetorical question is: Who gets to
4 determine that? The courts get to determine that,
5 where that line is drawn, where Parliament can't
6 cross.

7 Of course that trite proposition
8 was summarized and globalized by the Supreme Court
9 of Canada in Dunsmuir at tab 9 of my authorities.
10 And I want to briefly take you through Dunsmuir. I
11 am sure you are not under this misimpression, but I
12 think my friends may be, that the constitutional
13 right to judicial review is restricted to the
14 procedural vehicle of an application for judicial
15 review as we understand it under sections 18 and
16 18(1). That is not the case.

17 Judicial review writ large is the
18 court simply reviewing the legislation and actions
19 of the executive, whether it be in a judicial
20 review application or an action. It matters not.
21 And so this action before you in the constitutional
22 sense is understood by the Dunsmuir decision of the
23 Supreme Court of Canada as a judicial review of
24 certain parts, certain parts of the Bank of Canada
25 Act. It is judicial review of the conduct and

1 inaction of the executive members who are charged
2 with statutory duties under those federal pieces of
3 legislation.

4 I point your honour to paragraphs
5 27 through to 33 of Dunsmuir and briefly pause.
6 There you have a brief but weighty summary of the
7 constitutional right to judicial review. My
8 clients have a constitutional right, subject to the
9 other meaning, the other issues of standing and
10 justiciability and all of that, to constitutional
11 review, the conduct — the terms of the Bank of
12 Canada Act and the conduct of the executive in
13 exercising their duty under that act as well as the
14 minister of finance in the budgetary process.

15 At paragraphs 27 and 28 the
16 Supreme Court underlines why judicial review is
17 all-important. It is the lever. It's is really
18 the lever on which the rule of law and
19 constitutionalism balances. The interaction
20 between the state and the individual is based on
21 the court's review of the constitutionality and
22 vires action of both administrative tribunals and
23 Parliament.

24 So at paragraph 27 and 28 you see
25 the court states:

1 "As a matter of
2 constitutional law, judicial
3 review is intimately
4 connected with the
5 preservation of the rule of
6 law. It is essentially that
7 constitutional foundation
8 which explains the purpose of
9 judicial review and guides
10 its function and operation."

11 On and on. And at paragraph 28:

12 "By virtue of the rule of law
13 principle, all exercises of
14 public authority must find
15 their source in law. All
16 decision-making powers have
17 legal limits, derived from
18 the enabling statute itself,
19 the common or civil law or
20 the Constitution. Judicial
21 review is the means by which
22 the courts supervise those
23 who exercise statutory
24 powers, to ensure that they
25 do not overstep their legal

1 authority. The function of
2 judicial review is therefore
3 to ensure the legality, the
4 reasonableness and the
5 fairness of the
6 administrative process and
7 its outcomes."

8 Paragraph 31, which is important
9 to this case because my friends rely on section
10 30.1 of the Bank of Canada Act that purports as a
11 privative clause to bar any action against Her
12 Majesty or the bank or anybody from exercising
13 authority under the act. Well of course we know
14 from Dunsmuir that is all fine and dandy; there is
15 an exception. That privative clause cannot be
16 invoked to bar constitutional issues. And that is
17 at paragraph 31. It states:

18 "The legislative branch of
19 government cannot remove the
20 judiciary's power to review
21 actions and decisions of
22 administrative bodies for
23 compliance with the
24 constitutional capacities of
25 the government. Even a

1 What we have is my friend saying
2 we — you have no jurisdiction to issue declaratory
3 relief on the proper interpretation of federal
4 statutes and you have no jurisdiction to engage in
5 an analysis as to whether some of those statutes
6 have been constitutionally breached and you have no
7 jurisdiction to review executive action for alleged
8 constitutional breaches.

9 JUSTICE AALTO: You should stay
10 out of the fray, in other words.

11 MR. GALATI: You should stay home
12 and golf. Peter is my friend, but that is a silly
13 argument. There's federal state actors, federal
14 statutes. Jurisdiction is there. Anytime you have
15 that jurisdiction, then you can invoke the
16 Constitution. Otherwise this court would never be
17 doing any constitutional work. That is just a
18 nonsensical argument.

19 If somebody came in here and said
20 I want to challenge the Ontario educational act, we
21 know you don't have jurisdiction even if it's under
22 the Constitution because it's not buttressed by
23 federal law. Once it is buttressed by federal law,
24 once you are into section 2 of the Federal Court
25 Act, once you are into rule 64, once you are into a

1 one proceeding. Mr. Justice Russell, interpreting
2 TeleZone and everything else at pages 18 to 22 said
3 yes, we can all have it in one.

4 The issue in Sivak is the
5 institutional bias on constitutional grounds of the
6 IRB with respect to the Czech Roma. It is a
7 constitutional issue.

8 I got leave, I perfected the
9 applications, moved to convert into an action, it
10 was converted all into one, and Mr. Justice Russell
11 said of course you can do this. This is what
12 TeleZone and all the other cases say we can do
13 because the matter is in the same court.

14 That is only there to make the
15 point that judicial review of administrative and
16 state action on constitutional grounds can also
17 include an action.

18 At fifteen minutes before my first
19 hour, I will take you very briefly —

20 JUSTICE AALTO: Can I stop you
21 briefly, Mr. Galati? Why don't we go for another
22 15 minutes so you can finish your first hour, we
23 will take a break, and you can continue.

24 MR. GALATI: After this point I
25 will have done with my general principles and be

1 ready to address my friend's attacks on the
2 pleadings.

3 I want to again highlight and put
4 to rest this fallacy that there is a deference to
5 Parliament's choices when we are engaging in
6 constitutional review.

7 Deference to Parliament's choice
8 only applies when they make policy choices within
9 their head of power and within their purview in the
10 statute. Of course we shouldn't be able to double-
11 guess their choices, but we can certainly double-
12 guess their choices if they infringe the
13 Constitution.

14 JUSTICE AALTO: I agree.

15 MR. GALATI: We don't make the
16 choice for them.

17 JUSTICE AALTO: In general I agree
18 with that proposition, Mr. Galati, but here it begs
19 the question: Is there a policy decision as to why
20 sections (i) and (j) of the bank act have not been
21 implemented? And therefore, if it falls into
22 policy, why are we treading on that?

23 MR. GALATI: Have you seen an
24 expression of policy on that issue?

25 JUSTICE AALTO: Not — there is no

1 reference to it in the statement of claim.

2 MR. GALATI: There is no — and my
3 friend could have put evidence in on this motion
4 apart from the no cause of action; he didn't. My
5 point is that is for the trial judge on the
6 evidence to determine, whether it is policy or
7 statutory or constitutional requirement. It is not
8 for you on this motion to strike. You can't assume
9 that it's policy on this motion, just from a bare
10 reading of the act, and say I am going to strike
11 it. Dumont says you don't do that. The Supreme
12 Court of Canada says you don't do that.

13 As you know, your honour, everyone
14 in this procedure on a motion to strike sometimes
15 starts sliding over the line, myself included,
16 getting into the merits rather than staying
17 focussed on, at this juncture, can I determine the
18 issue. And my respectful submission is no, you
19 don't determine that issue at this juncture.

20 JUSTICE AALTO: Okay.

21 MR. GALATI: On the issue of
22 deference to Parliament's choices, let me take to
23 the Chaoulli case at tab 35 of my authorities,
24 which is the health care case. It's quite clear;
25 my friend has a case called Toussaint, and I was

1 involved in other proceedings with Ms. Toussaint in
2 the Federal Court of Appeal on the humanitarian and
3 compassionate legislation under the Immigration and
4 Refugee Protection Act.

5 I am not disputing my friend's
6 context that nobody has a pre-standing right to
7 health care as a constitutional matter. But the
8 Supreme Court of Canada in Vriend and in Chaoulli
9 said once but Parliament manages a choice on what
10 they are legislating on and what they are doing,
11 well that choice is subject to constitutional
12 review. It is not enough to say we have made this
13 choice and go home.

14 If I could refer you to paragraphs
15 85 to 89 —

16 JUSTICE AALTO: What tab are you
17 at, Mr. Galati?

18 MR. GALATI: Tab 35, your honour,
19 volume 1 of my authorities.

20 My friend took you through the
21 breakdown of who made what decision on what basis.

22 I am going to make this a very respectful
23 submission to you, is that even if only three
24 judges in the Supreme Court of Canada ruled this on
25 this Charter, it's good enough for you today on

1 this motion. The trial judge may come to
2 distinguish Chaoulli, but —

3 JUSTICE AALTO: I am not about the
4 overrule the Supreme Court of Canada.

5 MR. GALATI: Even three judges.
6 At paragraph 85 of that decision, entitled "Level
7 of Deference Required", paragraph 85 the Supreme
8 Court states:

9 "In the past, the Court has
10 considered the question of
11 the basis of its power of
12 judicial review."

13 And it's Hunter and Southam;
14 Vriend, which I took you through; the Quebec
15 secession reference, which I took you through. And
16 then states:

17 "However, as can be seen from
18 the large number of
19 interveners in this appeal,
20 differences of views over the
21 emergence of a private health
22 care plan have a polarizing
23 effect on the debate, and the
24 question of the deference
25 owed to the government by the

1 courts must be addressed.
2 Some of the interveners urge
3 the courts to step in, while
4 others argue that this the
5 role of the state. It must
6 be possible to base the
7 criteria for judicial
8 intervention on legal
9 principles and not on a
10 socio-political discourse
11 that is disconnected from
12 reality."

13 At paragraph 87 the court
14 continues:

15 "It cannot be said that the
16 government lacks the
17 necessary resources to show
18 that its legislative action
19 is motivated by a reasonable
20 objective connected with the
21 problem it has undertaken to
22 remedy. The courts are an
23 appropriate forum for a
24 serious and complete debate."

25 They cite G. Davidov, saying that

1 "'Courts do not have to
2 define goals, choose means or
3 come up with ideas. They do
4 not have to create social
5 policies; they just have to
6 understand what the other
7 branches have created. No
8 special expertise is required
9 for such an understanding.'
10 In fact, if a court is
11 satisfied that all the
12 evidence has been presented,
13 there is nothing that would
14 justify it in refusing to
15 perform its role on the
16 ground that it should merely
17 defer to the government's
18 position. When the courts
19 are given tools they need to
20 make a decision, they should
21 not hesitate to assume their
22 responsibilities. Deference
23 cannot lead the judicial
24 branch to abdicate its role
25 in favour of the legislative

1 branch or the executive
2 branch."

3 At paragraph 89:

4 "The courts have a duty to
5 rise above political debate.
6 They leave it to the
7 legislatures to develop
8 social policy. But when such
9 social policies infringe
10 rights that are protected by
11 the charters, the courts
12 cannot shy away from
13 considering them. The
14 judicial branch plays a role
15 that is not played by the
16 legislative branch."

17 I want to pause at Chaoulli
18 because on these motions to strike, one of the most
19 unfair things that is done is often my friends get
20 up there from the Department of Justice and say,
21 look at what the Supreme Court looked in the case.
22 This is the kind of evidence they look to, and
23 then say the plaintiffs in this case haven't
24 pleaded that. Of course not. There was a trial
25 here. The factual underpinnings here came after

1 evidence and trial. You cannot transplant in
2 particular reference to what kind of evidence.

3 I plan on behalf of my clients, if
4 this is not struck, to present the evidence to
5 support the facts that are pleaded, which are
6 provable. Unlike Operation Dismantle, these facts
7 are provable. Doesn't matter that it deals with a
8 couple of international organizations and some
9 private banks abroad. We have experts. We have
10 people here in Canada. These things, the facts
11 alleged in the statement of claim, can be proven.

12 And so the other passages in
13 Chaoulli are found at paragraphs 183 and 185 of the
14 decision, and that is the issue of justiciability.

15 They reject, they reject the government's position
16 that because these are health-care choices made by
17 the Parliament and because they are complex and
18 they involve this and this they are not
19 justiciable. They are justiciable. If you can
20 prove the facts and point to a constitutional
21 right, of course they are justiciable.

22 We are alleging facts. We are
23 alleging constitutional breaches, both under the
24 structural imperatives of the Constitution Act,
25 1867 and 1982, and a few Charter breaches.

1 And so these are provable facts.
2 That is all we need to do right now, is outline the
3 facts. They are provable, but you can't say you
4 don't have the evidence, because I can't be caught
5 in a Catch-22 of not having the evidence to support
6 the facts, but when I present evidence it's
7 inappropriate in the proceedings.

8 JUSTICE AALTO: Mm-hmm.

9 MR. GALATI: That is not fair to
10 the plaintiffs. So that is with respect to the
11 Parliament's choices. Then — again, I am going to
12 take you through it, but I refer you back to tab 7
13 of the book of authorities and I will end the hour
14 with this, or 35 minutes, as it were.

15 The same holds true with executive
16 action, even if it is royal prerogative. I take
17 you back to the Air Canada and B.C. Attorney
18 General case at tab 7. I take you to paragraphs 12
19 and 20 of that decision. I have taken you through
20 12 already, that says all executive action,
21 including that of pure Crown prerogative, must
22 comply with constitutional imperatives.

23 At paragraph 20 the court
24 dismisses this notion that that just means that the
25 attorney general must make a decision and it stops

1 there. The parallel would be Parliament made a
2 choice. Here the attorney general made a choice
3 not to recommend a fiat to suit the Crown. You see
4 what the Supreme Court says at page 8 of the
5 decision:

6 "The attorney general is the
7 lieutenant-governor's
8 principal legal advisor and
9 the legal member of the
10 executive council. In giving
11 advice..."

12 Three lines down:

13 "...the attorney general must
14 conform to the requirements
15 imposed by the federal
16 structure of the
17 Constitution. He is bound to
18 advise the lieutenant-
19 governor to grant his fiat.
20 I cannot accept the
21 proposition advanced by
22 Callaghan J. in the court of
23 appeal to the effect that the
24 attorney general complied
25 with his duty to advise the

1 lieutenant-governor when he
2 advised them to refuse a
3 fiat."

4 I point to the Chaoulli and the
5 Air Canada cases to say that neither Parliament nor
6 the executive can, in the face of a viable, non-
7 frivolous constitutional objection, say but we have
8 made our choice; go home. That would subjugate the
9 Constitution to Parliament and the executive when,
10 under our system, Parliament and the executive are
11 bound by the Constitution.

12 With that I will give Madam
13 Reporter a break. I don't know if you want to take
14 the lunch now?

15 JUSTICE AALTO: I wanted to
16 canvass timing. Are we on time?

17 MR. GALATI: Yes. If we take half
18 an hour now —

19 JUSTICE AALTO: I agree with you,
20 Mr. Galati. We will take a longer break so people
21 can grab some sustenance if they need it. It's
22 twenty to twelve. We will come back at 12:15 and
23 you have got another hour and Mr. Hajecek has?

24 MR. GALATI: Half an hour. We
25 will finish before two.

1 JUSTICE AALTO: Two is, there is a
2 little wiggle room in the two o'clock. Let's be
3 fair to people and we will make it 12:30. We've
4 got time. We will finish.

5 — Luncheon recess taken at 11:43 a.m.

6 — On resuming at 12:31 p.m.

7 JUSTICE AALTO: Mr. Galati, I
8 think you still have the floor.

9 MR. GALATI: Thank you.

10 JUSTICE AALTO: And in this hour
11 of your time, you are going to review in greater
12 detail the positions of the Crown respecting the
13 statement of claim.

14 MR. GALATI: Right.

15 JUSTICE AALTO: And why they
16 amount to a cause of action that should be allowed
17 to survive.

18 MR. GALATI: Right. Before I do
19 that, on the last point that I left before on the
20 deference to Parliament, I just have 30 seconds,
21 one last reference I need to point to you.

22 JUSTICE AALTO: Yes?

23 MR. GALATI: Which is the Vriend
24 case at tab 10, paragraphs 52 and 53. This is very
25 important. I'm sorry I omitted it. I didn't have

1 my glasses on at the time.

2 What the Supreme Court of Canada
3 in Vriend said in paragraphs 52 and 53 is, in
4 paragraph 52 they basically say that as long as you
5 are in the ballpark of the constitutional
6 challenge, you don't make early decisions on this
7 until it's fleshed out.

8 And then paragraph 53 — and the
9 reason they say that, in paragraph 52, they say at
10 the top of page 24:

11 "At this preliminary stage no
12 judgment should be made as to
13 the nature or validity of
14 this matter or subject.
15 Undue emphasis should not be
16 placed on the threshold test
17 since this could result in
18 effectively and unnecessarily
19 removing significant matters
20 from a full Charter
21 analysis."

22 If I hadn't been clear, whenever I
23 read Charter in many of the cases, it's my
24 respectful submission that any constitutional
25 analysis is equally of the same weight.

1 nature of the considerations
2 of legislative deference in
3 Charter analysis. The
4 deference very properly due
5 to the choices made by the
6 legislature will be taken
7 into account in deciding
8 whether a limit is justified
9 under section 1 of the
10 Charter..."

11 This is very important because
12 that necessarily means at trial.

13 "...and again in determining
14 the appropriate remedy for a
15 breach."

16 I will leave that, then, to say
17 that at this juncture, on a motion to strike, it is
18 my respectful view that where the issue is one of
19 construction of the vires of a statute or the
20 constitutional challenge to legislation or to
21 executive action, it is not proper to come to a
22 determination at this juncture.

23 Let me then go to my friend's
24 particular attacks on these pleadings.

25 I take your direction not to go

1 over the test, so I am going to skip over. I am
2 now going to basically follow my memo, your honour.

3 JUSTICE AALTO: Okay.

4 MR. GALATI: And this response to
5 his memo, chronologically in terms of his
6 memorandum on the motion. And so if you can turn
7 then, I am going to skip from three to six, which
8 is the test on a motion to strike.

9 JUSTICE AALTO: Yes.

10 MR. GALATI: And start at page 7
11 of my memo, which is the position of the
12 defendants.

13 JUSTICE AALTO: You never use the
14 phrase "misfeasance in public office" in the
15 statement of claim, but in essence the Crown is
16 arguing it's dressed up in other ways, but that is
17 in essence what it is: misfeasance in public
18 office by failing to abide by the provisions of the
19 bank act and the purporting of the budget, and the
20 like.

21 MR. GALATI: Right, and that I let
22 for the Court of Appeal answer, again. No. That
23 is the way he is saying it is. I didn't use
24 "misfeasance in public office" for good reason.
25 This is not the tort at common law or under

1 administrative law, a misfeasance of public office.

2 It may be, as well; but what we are talking about
3 are actions and inactions of the executive that
4 simply breach constitutional constraints, actions
5 and inactions which breach constitutional rights
6 both to the structural imperatives of the
7 Constitution and the Charter.

8 My first point, your honour, is
9 that whether you call this public misfeasance or
10 conspiracy, the bottom line is, this is a
11 complaint, a constitutional challenge and a request
12 for declaratory relief for the actions and
13 inactions of the executive with respect to the Bank
14 of Canada Act and with respect to the minister of
15 finance's constitutional duties in presenting the
16 budget that underlie this claim.

17 I will get to the conspiracy in a
18 second, but at the end of the day, it doesn't
19 matter what you call these things. It's the
20 actions and inactions. They either breach
21 constitutional rights or they don't, and if they
22 do, and if the facts are set out as to why, it goes
23 to trial. It doesn't get struck.

24 JUSTICE AALTO: Mm-hmm, okay.

25 MR. GALATI: And so on the first -

1 and that is why I put it in quotes. I am simply
2 following my friends, my friend's at paragraph 7 of
3 my memo, following my friends.

4 JUSTICE AALTO: No, I understood
5 that. Yes. I figured out your game plan here.

6 MR. GALATI: And I say that in
7 paragraph 7, what I just said to you.

8 And that leads to the fact that
9 neither Parliament nor the executive — and I took
10 you through the cases this morning; I'm not going
11 to do it again — can abdicate its constitutional
12 duty to govern. That is what is happening here.

13 And you have the old cases of
14 Hallett and Grey and Carey. You have Grey. You
15 have the Quebec secession reference. Friend at tab
16 10 and Khadr at tab 71. All those cases say that.

17 Let me go to the — and I am not
18 going to take you through them again.

19 Let me go to page 9 of my memo and
20 the so-called conspiracy allegations.

21 If my friend had asked me for
22 particulars of who all that you know are engaged in
23 the conspiracy, I am sure I could give him more
24 names than the three ministers and the
25 organizations we set out. I don't know if that is

1 required. If it is required, I can easily amend to
2 provide those. That could have been dealt with by
3 a request for particulars. I simply name the
4 members of the conspiracy on an institutional basis
5 in terms of the ministers and the organizations,
6 the BIS, the IMF and the private bankers in Basel
7 that gave our governor of the Bank of Canada his
8 marching order on fiscal and interest and other
9 policies. I can provide the names of the heads of
10 those institutions.

11 But one thing that is wrong in my
12 friend's assertion on any conspiracy, and quite
13 frankly is embarrassing and wrong with some of the
14 jurisprudence in this court, he cites Sivak that I
15 argued before Mr. Justice Russell. It is on appeal
16 to the Court of Appeal. This notion that you can't
17 name unknown conspirators is wrong. I am going to
18 take you to the cases. It's wrong. You can have
19 unknown conspirators and duped conspirators.

20 So you can have conspirators that
21 are unknown to the victims, and duped conspirators
22 who don't know that they are part of a conspiracy,
23 for instance the mule that runs the drugs without
24 knowing it's in the luggage to the airport.

25 The Hunt v. Carey case, which is

1 at the same time the seminal case on a motion to
2 strike, is also a conspiracy case. You will find
3 that at tab 14 of my book of authorities.

4 If you go to tab 14 — and I am
5 not going to bore you with the long verse. At
6 pages 15 through 17, the court, in looking through
7 the history of the tort of conspiracy makes the
8 point that it coming from the criminal law. Like a
9 lot of torts come from the criminal law — assault,
10 illegal confinement and all — it comes from the
11 criminal law of conspiracy.

12 If you look at paragraph 10 of my
13 memorandum at page 9, you will see various cases
14 from the Supreme Court and the Ontario Court of
15 Appeal which clearly state that unknown
16 conspirators may be put in an indictment.

17 JUSTICE AALTO: Of course, I
18 accept that you can't necessarily always name each
19 and every individual who may be a participant in a
20 conspiracy because you may not know them all. But
21 surely you must know one or two.

22 MR. GALATI: I know the minister
23 of finance and I know the minister of national
24 revenue. I know the institution of the Bank of
25 International Settlements. I know the institution

1 of the IMF and all that. If you want the heads and
2 directors and all the people who run those
3 organizations, I will name them, but in doing that
4 I have named the co-conspirators and I have said
5 what they are conspiring to do, what they have
6 effected to do. There is no deficiency in the
7 pleadings in that respect.

8 JUSTICE AALTO: There is no —
9 well, the only deficiency is, and it's why I was
10 asking Mr. Hajecek about amending, is that there is
11 a deficiency in respect of the identity of the
12 conspirators, but the pleading of conspiracy
13 appears to be there, the elements of it. And
14 Mr. Hajecek's argument was, well, perhaps it could
15 be amended. He wasn't conceding completely that it
16 could; and in any event, it must be considered in
17 light of the justiciability issue.

18 MR. GALATI: Sure.

19 JUSTICE AALTO: Which is an
20 umbrella issue to much of what is here.

21 MR. GALATI: How is this for
22 justiciability? People often accuse me of being a
23 conspiracy theorist and I say to them, you must be
24 a coincidence theorist. There is a reason why
25 conspiracy is a Criminal Code offence.

1 Conspiracies actually are undertaken every day.

2 What is a conspiracy? What I have
3 pleaded in paragraph 41, pursuant to Hunt v. Carey.

4 It's the use of legal or illegal means in an
5 agreement to harm X.

6 JUSTICE AALTO: Mm-hmm.

7 MR. GALATI: Or it's the use of
8 illegal means which a person ought to have known
9 would harm X. What do we have here? We have the
10 minister of finance, who is the sole shareholder
11 and ultimate authority under the Bank of Canada
12 Act, who is refusing to exercise the authority for
13 which Parliament actually set the bank up in the
14 first place, to float loans to the various levels
15 of government interest-free for their human capital
16 infrastructure programs. Why? Because it was
17 decided by a group of private bankers over in Basel
18 in 1974 when we joined that private group of
19 bankers - they are private individuals - that they
20 would dictate our policies with respect to the
21 floating of loans.

22 So it was decided - and it is
23 pleaded - that in 1974 the Bank of Canada would no
24 longer, in an arbitrary and absolute fashion, do
25 what it was created to do.

1 So the effect as is pleaded is
2 that the Bank of Canada gives loans to commercial
3 banks, those private individuals, at zero to one
4 per cent interest currently, and then those banks
5 lend it back to our government at two per cent
6 interest or three per cent interest, commercial
7 rates. That is the conspiracy. They are
8 circumventing the act. They are circumventing
9 Canadian sovereignty.

10 In passing, and I will get to the
11 Charter arguments in a second, just think, your
12 honour, of what the impact is. That is unequal
13 treatment of all Canadian citizens because our Bank
14 of Canada is giving private bankers in Europe and
15 the States and here in Canada interest rates less
16 favourable than the Bank of Canada is willing to
17 give to Canadian citizens under its mandate. That
18 is discriminatory, with dire consequences that are
19 pleaded in terms of the decay of socio-economic
20 programs and the society at large.

21 It's all pleaded and I will get to
22 it in a second.

23 So the conspiracy; my friend has a
24 problem with the conspiracy because he thinks it is
25 difficult to prove. That is a different issue. I

1 have pled the facts of the conspiracy. If he wants
2 particulars or more names, I will give it to him,
3 but it does not make the pleading bad or
4 insufficient to the point of it being struck.

5 Can I just give you the page
6 references on those cases? I won't take you to
7 them where — if you accept that you can name
8 unknown conspirators I am not going to take you
9 through them. Okay.

10 Let's go now to the so-called,
11 what my friend calls an accounting method.

12 JUSTICE AALTO: Mm-hmm.

13 MR. GALATI: Maybe I should find
14 another line of work, but I find even from a friend
15 a sort of a belittling of a constitutional
16 requirement as a mere accounting method.

17 Let's step back for a second.

18 In every session of Parliament
19 when the Governor General knocks on the door of the
20 House of Commons as representative of the Queen,
21 it's not that they are engaging in pageantry. It
22 is a constitutional requirement that the Queen or
23 her representative go into the Commons and request
24 an appropriation of monies through the Commons, to
25 the taxing power, so that it can spend. And in

1 order to do that, the government has to articulate
2 — the Queen has to articulate what it plans to
3 spend on. That is the budget.

4 Now, since the Magna Carta and the
5 English bill of rights there has been a
6 constitutional right — and I want to pause here,
7 your honour. To whom does a constitutional right
8 to no taxation without representation accrue?
9 Every private subject of the realm. Every citizen
10 of Canada has that right. It is not an issue about
11 public standing, public interest standing. Every
12 Canadian citizen, because they are subject to the
13 terms of taxation in this country, has a
14 constitutional right to not be taxed — by whom? By
15 Parliament — without representation.

16 Now, when the revenues and the
17 proposed expenditures in the budget are presented
18 by the Governor General from the throne speech to
19 Parliament, it's impossible to fathom how
20 representation by the MPs of Canadian citizens is
21 being affected if those MPs are not given one side
22 of the ledger, the total revenues.

23 Now, I want to take you through
24 the education reference case. And my friend is
25 right. You don't need to go past what I have

1 extracted. Of course you are free to read it, and
2 this is at page 10, I set out that sections 53, 54,
3 and 90 of our Constitution are codifications of
4 that constitutional right going right back to Magna
5 Carta and more clearly focussed in the English bill
6 of rights.

7 In paragraph 14 I say by removing
8 and not revealing the true revenues to Parliament,
9 which is the only body which can constitutionally
10 impose tax, and thus approve the proposed spending
11 from the speech from the throne, the minister of
12 finance is removing the elected MPs' ability to
13 properly review and debate the budget and pass its
14 expenditure and corresponding taxing provisions to
15 the elected representatives of the House of
16 Commons. The ancient constitutional maxim of no
17 taxation without representation was reaffirmed
18 post-Charter by the Supreme Court of Canada in the
19 Ontario education reference.

20 Then I extract the portion from
21 that case, which is found at tab 34, in which the
22 Supreme Court, Mr. Justice Iacobucci, takes us
23 through the history of that constitutional right.

24 Now, my friend, he can choose to
25 use Google for historical research; I recommend

1 against it, but this is nothing to laugh at.
2 Revolutions, the Magna Carta, the English bill of
3 rights which was on the heels of the English Civil
4 War were fought over these rights.

5 And so Parliament has to be eyes
6 open when it taxes; otherwise the citizens' right
7 to no taxation without representation is affected.

8 Can I direct your honour to the
9 last-quoted paragraph from that case, that refers
10 to this view is affirmed in Westbank First Nation,
11 at page 11.

12 JUSTICE AALTO: Mm-hmm.

13 MR. GALATI: Mr. Justice Gonthier
14 states in that case:

15 "The Canadian Constitution
16 through the operation of
17 section 53 of the
18 Constitution Act demands that
19 there should be no taxation
20 without representation. In
21 other words, individuals
22 being taxed in a democracy
23 have the right to have their
24 elected representatives
25 debate whether their money

1 should be appropriated and
2 determine how it should be
3 spent."

4 My friend says so what; that
5 doesn't apply to this case. It certainly does,
6 because if you notice from the pleadings, we run a
7 deficit in this country without knowing whether or
8 not we need to, which relates to the commercial
9 interest that every citizen is paying to the
10 commercial banks, because the Bank of Canada, the
11 same finance minister, is not extending interest-
12 free loans to cover that debt.

13 So if Parliamentarians, just in
14 the words of Mr. Justice Gonthier and the Supreme
15 Court of Canada, don't have the total revenue, they
16 can't debate whether or not they should shave tax
17 credits or whether they should, as the government
18 recommends, run a deficit.

19 My clients aren't saying we get to
20 dictate to Parliament how that debate will result.

21 They may still run a deficit. We are not debating
22 parliamentary procedure here. Our challenge is
23 outside the doors of Parliament, and our challenge
24 is based on this: Every citizen has the right not
25 to be taxed without representation in Parliament.

1 And the Supreme Court in Canada says that means
2 they have be able to meaningfully debate what is
3 being spent. You can't do that if you don't know
4 what is actually coming in.

5 The question is: Are my clients
6 going to win on this issue? Don't know. Is it
7 frivolous? We can't say that. It is right within
8 the terms and explanation of the Supreme Court of
9 Canada on what no taxation without representation
10 means. It's clearly there. It's not for
11 Parliament to decide. The right of no taxation
12 without representation is the right of the citizen
13 against Parliament. It's a constitutional right.

14 JUSTICE AALTO: Yes. And so you
15 say, because Parliament doesn't know what the books
16 and records are really all about, they can't debate
17 the issue, and they can't determine what would be
18 the appropriate policy.

19 MR. GALATI: And I could say to my
20 MP —

21 JUSTICE AALTO: You are concerned
22 about the policy, but you are not seeking to
23 influence the policy.

24 MR. GALATI: No.

25 JUSTICE AALTO: You are seeking to

1 have the information available to be debated.

2 MR. GALATI: Right. I want to
3 have the right to call my MP and say hey, Bob, we
4 have given away 150 billion in tax credits. Why
5 don't you push for shaving 40 billion in tax
6 credits so we don't have to pay interest on the
7 deficit this year? It doesn't dictate to
8 Parliament how it decides, it gives — it affects
9 my right as a citizen to no taxation without
10 representation.

11 It's a very clear, simple, and
12 quite frankly, difficult argument to refute. My
13 friend says wait, my clients haven't asked the
14 minister of finance for those, and there is no
15 pleading.

16 JUSTICE AALTO: I was just about
17 to ask if you can get it through the Access to
18 Information Act.

19 MR. GALATI: Read the pleadings.
20 It's not available. The Carter Commission on
21 Taxation complained about this in the 1960s. It's
22 not available. The government does not release it.
23 It's unconstitutional, what they are doing. But
24 it is not available, and if my friend has it, I
25 would love to get it.

1 MR. HAJECEK: I actually do.

2 MR. GALATI: Yeah? What were the
3 tax credits last year?

4 MR. HAJECEK: It's on the
5 department of finance web site, I think. I can
6 pull it up for you, if you like.

7 MR. GALATI: But they don't break
8 down who are getting the credits.

9 MR. HAJECEK: Not the people, but.

10 MR. GALATI: Now my friend is
11 giving support to my argument. This is a trial
12 issue. We are exchanging evidence here.

13 MR. HAJECEK: If my friend wants
14 to give evidence —

15 MR. GALATI: No, no, it's
16 pleading. It's in the pleading.

17 JUSTICE AALTO: Nobody is giving
18 evidence. It's just a curious bind that we are all
19 in. There seems to be a vacuum of information.

20 MR. GALATI: I have it under the
21 tax law as well. What I say or my friend says is
22 irrelevant. We have pleaded it's not available; it
23 is not presented to Parliament every year. That
24 has to be taken as a fact for the purposes of this
25 motion.

1 If that is not so, that will come
2 out in the wash and this part of claim will be
3 dismissed. But the pleading is it's not made
4 available to the MPs.

5 Now I move on to my friend's
6 factum and page 12 of my memo, which is the —

7 JUSTICE AALTO: Charter?

8 MR. GALATI: — section 30.1. No,
9 not yet. Again, I am not going to bog this down.
10 We have sought a declaration that this privative
11 clause pursuant to Dunsmuir can't apply to
12 unconstitutional acts, and that is all I will say
13 about it. The law is clear on that.

14 JUSTICE AALTO: Yeah.

15 MR. GALATI: Now the Charter. I
16 am not going to suggest to you that this is, with
17 respect to the — not just the section 7 in the
18 equality provisions both as a structural
19 underpinning to the Constitution and section 15 of
20 the Charter. I am going to use the words of the
21 Supreme Court about substantive equality.

22 This issue is more complicated
23 than meets the eye with respect to section 15, but
24 I am first going to give you a summary of what the
25 Charter arguments amount to.

1 At tab 39 of my authorities there
2 is a case that is often neglected when equality
3 rights are argued. It is the Winner case from the
4 Supreme Court of Canada, 1951. I will give you the
5 references, pages 22 and 23 and page 32. Very
6 briefly, what Winner was was somebody who wanted an
7 extra-provincial bussing licence from New Brunswick
8 to go to the other provinces and it was denied.
9 And it was denied because the operator was a
10 foreign citizen, a American through a corporation,
11 Israel Winner.

12 What the Supreme Court of Canada
13 decided in Winner pre-Charter was that what
14 underlined our constitutional framework was an
15 equality of citizenship, unless the rights deprived
16 went to the issue of whether or not you were a
17 citizen.

18 So if you were a permanent
19 resident or an alien, then you didn't have equality
20 rights. But if you were a citizen, including a
21 corporate citizen – this corporation was
22 incorporated in New Brunswick – then you have a
23 right to equality of treatment.

24 That is not difficult to
25 understand if we look at the articulation of the

1 history of our Constitution in the Supreme Court of
2 Canada's decision in Quebec secession reference.
3 It's impossible to fathom, your honour, that in a
4 constitutional democracy that is based on the rule
5 of law, constitutionalism, federalism, respect for
6 minorities, that underlying all of that in a one-
7 vote, one-person democracy, that you wouldn't have
8 equality as an underlying principle. And Winner
9 says this. It doesn't articulate it that way, but
10 basically Winner says this pre-Charter.

11 In a constitutional democracy
12 based on a system of one person, one vote, equality
13 has always been an underlying constitutional
14 imperative, quite apart from section 15 and the
15 invocation of an individual's rights to equality on
16 the analogous or enumerated heads.

17 This equality provision as it
18 speaks to human capital and services and
19 expenditures has been further codified in our
20 patriated Constitution in 1982 in section 36. If I
21 can turn to that for a second at tab 2 of the book
22 of authorities, and over to section 36. Part III
23 of the Constitution Act, 1982 is called
24 "Equalization and Regional Disparities: Commitment
25 to Promote Equal Opportunities." Thirty-six says:

1 "Without altering the
2 legislative authority of
3 Parliament or the provincial
4 legislatures or the rights of
5 any of them with respect to
6 the exercise of their
7 legislative authority,
8 Parliament and the
9 legislatures together with
10 the government of Canada and
11 the provincial governments
12 are committed to, A,
13 promoting equal opportunities
14 for the well-being of
15 Canadians; B, furthering
16 economic development to
17 reduce disparity in
18 opportunities; and C,
19 providing essential public
20 services of reasonable
21 quality to all Canadians.
22 "Two, Parliament and the
23 Government of Canada are
24 committed to the principles
25 of making equalization

1 payments to make sure that
2 provincial governments have
3 sufficient revenues to
4 provide reasonably comparable
5 levels of public services at
6 reasonably comparable levels
7 of taxation."

8 Earlier my friend said that the
9 human capital expenditures of which my clients
10 complain which are not being effected through
11 interest-free loans under section 18 of the Bank of
12 Canada Act have nothing to do with the feds because
13 health, education, all that is provincial
14 jurisdiction. We live in a complicated
15 constitutional framework. Yes and no.

16 We have a constitutional
17 requirement of equalization which binds the federal
18 government. The federal government has the
19 spending power under the Constitution, and so it's
20 too quick and easy to say that matters under
21 provincial jurisdiction do not involve the federal
22 government.

23 Perfect example? The Finlay case.
24 It is in the book of authorities. The Finlay case
25 dealt with Mr. Finlay taking objection with how the

1 province of Manitoba spent monies sent to it by the
2 federal government in this court. And this court
3 had jurisdiction to deal with it because it is part
4 of the equalization structure of our Constitution.

5 Prior to this — prior to this, pre-Charter, let's
6 call it pre-Constitution Act, 1982, apart from —

7 JUSTICE AALTO: I can stop you for
8 one section, Mr. Galati? I want to make a note of
9 Finlay, tab 63.

10 MR. GALATI: Finlay was dealt with
11 on a non-constitutional basis, but the principle
12 still applies. He was complaining about provincial
13 action with respect to federal funds.

14 Prior to this enactment of section
15 36, and even prior to the equalization payments
16 coming into effect, this was effected through the
17 Bank of Canada. Even when the equalization
18 payments came into effect under Prime Minister
19 Trudeau, the Bank of Canada provisions augmented
20 the equalization.

21 When we are talking about — when
22 I get to it, when we are talking about equality,
23 it's not restricted here and it is pleaded and you
24 may not see all of that in my pleadings, but it's
25 not restricted to the individual section 15 rights.

1 Really, in the context of this
2 claim, Mr. Krehm's and Ms. Emmett's personal
3 section 15 rights with respect to all of this
4 really stem from the structural imperatives of our
5 constitutional framework under section 36. And
6 prior to that, the spending power of the federal
7 government which it partially effected through
8 section 18 (i) and (j) of the Bank of Canada Act,
9 when it set up during the Depression. For what?
10 For this very purpose, to float interest-free...

11 JUSTICE AALTO: Loans to the —

12 MR. GALATI: Loans, and that is
13 how we paid for World War II. That is how we paid
14 for the St. Lawrence Seaway. That is how we paid
15 for the Trans-Canada. It's in the pleadings.

16 The idea that this is unconnected
17 human capital expenditure because it may when it
18 gets off the ground fall under provincial
19 jurisdiction doesn't mean that the feds have
20 nothing to do with it. It stems from the Bank of
21 Canada Act and then later section 36 of the
22 Constitution Act, and in between as well the
23 spending power, which has been recognized the
24 courts, of the federal government.

25 Now I am going to move down to how

1 this affects the section 7 and 15 Charter rights of
2 individuals. You have that at paragraphs 16, 17,
3 18, 19, and through, of my factum.

4 I will take it in two parts.
5 First I will do section 7.

6 JUSTICE AALTO: Okay.

7 MR. GALATI: Paragraph 16 says,
8 with respect to paragraphs 16 to 23 of the
9 defendant's submissions, the plaintiffs state that
10 their section 7 rights are engaged with respect to
11 seeking declaratory relief and damages as follows:
12 A, by reduction, elimination and/or fatal delay in
13 health care services; B, reduction, elimination,"
14 et cetera. And that is in the statement of claim
15 in paragraphs 27E and 47A.

16 Then at paragraph 17 it is further
17 submitted that the available and/or restriction of
18 medical services has been determined by Supreme
19 Court of Canada to constitute a section 7 Charter
20 interest. And we know that from Chaoulli.

21 JUSTICE AALTO: Mm-hmm.

22 MR. GALATI: And it is further
23 submitted that all reduction and elimination in
24 human capital expenditures, such as health,
25 education, libraries, the arts, et cetera, directly

1 diminishes the quality of life of the plaintiffs,
2 and in certain instances, actually endangers it
3 physically and psychologically, which are section 7
4 protected.

5 Over the page, paragraph 18 it
6 says it's further submitted that the defendants
7 have also pleaded a specific increased gulf between
8 the rich and poor, the disappearance of the middle
9 class, which has led and continues to lead to
10 deteriorating socio-economic conditions resulting
11 in threats to their physical and psychological
12 well-being through increased crime and other socio-
13 economic evils with resulting threat, degeneration,
14 and devolution of society.

15 I pause again to say am I going to
16 be able on behalf of my clients to prove this?
17 Maybe not.

18 JUSTICE AALTO: That was certainly
19 going through my mind.

20 MR. GALATI: Okay, but does that
21 mean it is not a fact?

22 JUSTICE AALTO: Pretty wide,
23 embracing statement.

24 MR. GALATI: But that doesn't go
25 to the sufficiency of the fact. It's a fact that

1 is provable. It's not like — let's address
2 Operation Dismantle head-on. Operation Dismantle,
3 the Supreme Court of Canada said it is not a
4 provable fact, it is not a provable fact that
5 deterrence increases the risk to the safety of
6 Canadians by stockpiling nuclear weapons and that
7 the non-proliferation of nuclear weapons in fact
8 increases security. The Supreme Court says it's
9 not something you can prove one way or the other.
10 It is speculation.

11 Well, on socio-economic issues,
12 half the case law and constitutional law has to do
13 with heads of power which relate to this action.
14 We can prove what banking policies do. We can
15 prove what increased crime does. We can prove what
16 a reduction in social services does. That is not a
17 non-provable fact. In Chaoulli they proved that
18 what they were doing with the health care system
19 was endangering people's lives.

20 Now, you can't expect me to prove
21 that in a statement of claim, because if I did you
22 would strike it for pleading evidence.

23 These are not non-provable facts.
24 Are they complicated? One may see, at first
25 blush, without actually knowing what evidence we

1 intend to lead that they may be difficult to prove;
2 that is no reason for striking. The jurisprudence
3 says you can't strike for that reason.

4 On section 7, I will briefly take
5 you through a few brief passages, the Singh
6 decision at tab 36. Physical and psychological
7 integrity are section 7 protected.

8 My clients say that because of the
9 actions and because of the ceasing to provide these
10 loans and because the true revenues are not
11 presented to Parliament and a proper debate cannot
12 be had on what to do with the money that we are
13 taking in, that over the — as my friend says, over
14 the last 40 years since they stopped giving these
15 loans, Canadian society and services have devolved.

16 It's not rocket science to say
17 that it's provable that that has an effect, in the
18 same way we have had royal commission enquiries on
19 the effect of racism in the criminal justice
20 system, of lack of funds for this and that. These
21 are provable facts.

22 You recall, and it's in my
23 authorities, the courts have dealt with such things
24 as the anti-inflation reference, with wage and
25 price controls. I am sure you are old enough —

1 JUSTICE AALTO: Mm-hmm.

2 MR. GALATI: — like me to
3 remember that. That is a complex financial socio-
4 economic issue that the Supreme Court of Canada had
5 no problem adjudicating. This is no more, no less
6 complex.

7 With respect to the section 7
8 Charter interest and rights, tab 36, page 19 of
9 same, paragraph 47, they are into the discussion of
10 whether or not section 7 protects from just
11 physical harm. And the court rejects that, and
12 says it protects also from psychological harm.
13 Then paragraph 48, they see support from that from
14 a lower court decision in Collins. And they quote
15 from Collins.

16 The Supreme Court ends paragraph
17 48 to say:

18 "It is noteworthy that the
19 applicant had not
20 demonstrated that his health
21 had been impaired; he merely
22 showed that it was likely
23 that his health would be
24 impaired. This was held to
25 be sufficient to constitute a

1 deprivation of the right to
2 security of the person under
3 the circumstances."

4 I have plead for my clients why
5 and how the ceasing of these loans has led to a
6 reduction and/or elimination of health, education,
7 et cetera, and the negative effect it has had on
8 society and the psychological anxiety that it
9 causes them and all Canadians, in certain respects,
10 through increased crime and all that.

11 I can prove, I can prove for my
12 clients that lack of programs will lead to
13 increased crime. I have pleaded it. That is a
14 provable fact. That endangers their psychological
15 security in having to walk the streets where they
16 live.

17 In Morgentaler, at tab 37, the
18 Supreme Court also — I'm sorry that my photocopier
19 has wiped out the typed page numbers, but at page 6
20 of that extract, Morgentaler, the last paragraph on
21 page 6, again with respect to the abortion laws,
22 cited psychological impact as a section 7 Charter-
23 protected interest. The court says:

24 "A woman's decision to
25 terminate her pregnancy falls

1 within the class of protected
2 decisions. It is one that
3 will have profound
4 psychological..."

5 And I underline:

6 "...economic and social
7 consequences for her."

8 I do that because there is an
9 assumption that somehow in constitutional
10 litigation, in Charter litigation socio-economic
11 interests are never to be discussed. That is not
12 true. Chaoulli is a prime example. Anti-inflation
13 reference. Finlay. A lot of these cases deal with
14 socio-economic issues. We do not shy away from
15 them just because they are socio-economic. Nor do
16 they become, as my friend would suggest, pure
17 political issues because they are socio-economic,
18 and I took you through Chaoulli where the Supreme
19 Court says that.

20 JUSTICE AALTO: Mm-hmm.

21 MR. GALATI: Tab 38, Rodriguez, to
22 the same effect, that psychological impairment is
23 protected.

24 I plead these facts at paragraph
25 27, 47(a), 48 and 49 of the statement of claim.

1 Then, of course, at paragraph 19 I
2 have extracted a different portion of the Vriend
3 decision that goes to the psychological integrity
4 because of the minister's inaction, and I will
5 leave that with you. It's extracted there. I will
6 leave that with you.

7 With that, I will move to the
8 section 15 or the equality provision.

9 JUSTICE AALTO: So the issue is
10 what is the comparator — where is the inequality
11 if, as Mr. Hajecek said, all taxpayers are treated
12 equally?

13 MR. GALATI: I will get to that
14 right now. I want to take you through the layers
15 of inequality.

16 JUSTICE AALTO: All right.

17 MR. GALATI: First I have taken
18 you through the structural requirement of equality
19 under the Constitution under Winner, and under
20 section 36 of the Constitution Act, 1982.

21 Keeping in mind that this is a
22 proposed class action — it might not go that way,
23 but at this stage it is a proposed class action,
24 clearly there are two — the first level of unequal
25 agreement includes all the citizens of Canada.

1 equalization payments, who are disadvantaged vis-à-
2 vis those members of Canadian society who are
3 wealthy enough not to need it.

4 So if you can fly to the States
5 and get your health care, even though you are —
6 you know, you are in a better position than a
7 person who relies on the human capital
8 infrastructure that was embedded in the creation of
9 the Bank of Canada and section 36 of the
10 Constitution Act, 1982. So there will be all sorts
11 of groups — the elderly, the traditional
12 disadvantaged socio-economic classes — that need
13 these programs for their very physical and
14 psychological survival.

15 My friend is going to say in reply
16 that economic status is not an enumerated ground.
17 He is wrong. Everybody is born into and dies with
18 a socio-economic tag. You are middle class. You
19 are a yuppie. You are a yippie. You are an
20 aristocrat. You are well-to-do. You are
21 independently wealthy. There is no member of
22 society on whom a socio-economic tag does not
23 attach.

24 Does that mean that that member of
25 society is always attached to that socio-economic

1 tag? No. But does that mean that that is not an
2 enumerated ground? No. A Christian can convert to
3 Judaism can convert to Hinduism can convert to
4 Islam. But what never changes is every individual
5 has a religious belief, even if it's atheism.

6 So your socio-economic status is
7 with you as an inalienable characteristic of a
8 human being in any human society, from the cradle
9 to the grave. The fact that it changes – you can
10 be born poor and be rich; you can be born rich and
11 be poor – does not change the fact that everyone
12 has a socio-economic tag attached to them.

13 And so the comparator group is
14 those who are socio-economically disadvantaged by
15 the minister of finance's obstinate refusal to
16 abide by his constitutional duties, both under the
17 Bank of Canada Act and under the budgetary process.

18 Will I win? I don't know. But is
19 this a frivolous argument? With all due respect,
20 no. It is not frivolous or vexatious or argument
21 without merit.

22 Where are the terms of
23 justiciability? I have set those out. I have set
24 those out.

25 If members of Canadian citizenry

1 who rely on these programs are disadvantaged
2 because of either race, religion, or it is just
3 mere socio-economic status, section 15 is engaged.

4 Did I fail to sufficiently plead it? Maybe, but I
5 think that might go to an amendment of particulars.

6 I think I did sufficiently plead it. Maybe my
7 friend didn't understand it, and maybe I didn't
8 make myself understood, and I apologize, but it's
9 there.

10 As you know, I am not going to
11 take you to the test, pleadings have to be
12 generously read.

13 But to say there is no section 15
14 interest there is simply not so.

15 JUSTICE AALTO: A question flowing
16 from that is does one of these disadvantaged groups
17 of which you are making the comparison, are they a
18 necessary party to a proceeding such as this or are
19 they subsumed within the group that would be the
20 class the plaintiffs intend to represent?

21 MR. GALATI: They don't have to —

22 JUSTICE AALTO: Can they be
23 separately —

24 MR. GALATI: They may — for
25 instance, my two biological plaintiffs are,

1 respectively, 97 and 80 years old, so for instance
2 they might invoke senior citizenship as a group,
3 but they don't have to. They don't have to because
4 they are walking around and their society is
5 devolving, is becoming crime-ridden, has all sorts
6 of evils because of the lack of this statutory
7 requirement that is being ignored. So their
8 psychological integrity is affected, as is the
9 quality of other members of society.

10 In an action for declaratory
11 relief, the plaintiffs do not have to be directly
12 affected in every aspect of claim. I didn't bring
13 the cases, but there is clear case law from the
14 Supreme Court on that.

15 Dr. Henry Morgentaler was never
16 going to give birth; Mr. Borowski was never going
17 to have an abortion, but they were the plaintiffs
18 in those cases. So it's the law that is the
19 subject of the analysis, under the Constitution.

20 And so with that, I guess you are
21 pushing me to the standing issue.

22 JUSTICE AALTO: It's an
23 interesting issue.

24 MR. GALATI: I am ready to go
25 there.

1 JUSTICE AALTO: Whichever way you
2 want to go. You have given me headlines, and my
3 notes make sense.

4 MR. GALATI: I have extracted the
5 section 7 and 15 argument and it finishes at page
6 17. What the new trend in Withler with respect to
7 section 15 talks about, it talks about substantive
8 equality, and I think I have made enough arguments,
9 for the purposes of this motion — let me put it at
10 that — on that issue.

11 You don't really want to hear me
12 on whether or not this court has jurisdiction, writ
13 large, do you?

14 JUSTICE AALTO: Not really.

15 MR. GALATI: Thank you, so I will
16 skip that.

17 JUSTICE AALTO: I think I have a
18 pretty good handle on what this court can and
19 cannot do.

20 MR. GALATI: Thank you. Let me go
21 to naming the particular ministers. What you said
22 earlier in these proceedings is generally true,
23 your honour, but with respect, not in this case.

24 JUSTICE AALTO: Okay.

25 MR. GALATI: Because they are not

1 being named in their nominal capacity.

2 JUSTICE AALTO: They are being
3 named in their representative capacity?

4 MR. GALATI: They are not being
5 named. They are the guys who are making these
6 decisions. The minister of finance under section
7 14 of the Bank of Canada Act runs the Bank of
8 Canada, ultimately. His decisions are — he can
9 issue directives. Under section 17 the minister of
10 finance holds all the shares. So it's not that he
11 is — what we are challenging is — we are
12 challenging is what his underlings are doing, but
13 it is under his direction.

14 He is there right in the middle of
15 this litigation, and as is this minister of
16 national revenue, that may be the minister, if this
17 goes forward, compelled to provide what my clients
18 say is the constitutional requirement to the
19 minister of finance so he can present it to the
20 Parliament, the actual revenues.

21 Because it's not the minister of
22 finance who administers the tax credits before the
23 fallacious revenue is set out, it is the minister
24 of national revenue. So they are both there for
25 that reason.

1 Let me take you to a decision of
2 Madam Justice Reid in Liebmann – you have seen this
3 before at another point – at tab 45. Liebmann,
4 paragraphs 51 and 52.

5 In this court, she makes the
6 obvious observation that although this is the law
7 in most cases when you are dealing with
8 constitutional issues, the minister can properly be
9 named and sometimes should be named.

10 We have seen this before,
11 obviously, in the Air Canada v. AG of B.C. case
12 with the attorney general. I am not going to take
13 you to that case again. We see this again in Khadr
14 where the minister of foreign affairs is personally
15 named. He is one who is supposed to ask them, to
16 get him out of Guantanamo.

17 In these cases where the minister
18 is not simply the representative defendant or
19 respondent where the minister himself or herself
20 are the ones making the decisions as is pleaded in
21 the statement of claim, then the minister is a
22 proper party. Because this is, what is at issue
23 here is constitutional challenge.

24 I'd ask my friend if he is saying
25 that the attorney general is one of ministers who

1 shouldn't be named, because I will get to that as
2 well. Or is he just referring to the minister of
3 finance and minister of national revenue; Peter?

4 MR. HAJECEK: I don't think there
5 are any allegations against the attorney general.

6 MR. GALATI: Because I was going
7 to take you through the clear case law from this
8 court that if a declaratory proceeding is brought,
9 the attorney general has to be named. There is no
10 choice. If you want me to take you through that
11 case law, I will.

12 JUSTICE AALTO: That's all right.
13 Got it.

14 MR. GALATI: Standing. I want to
15 be clear in my submissions so I am not
16 misunderstood. Mr. Krehm and Ms. Emmett, as
17 Canadian citizens and taxpayers, do not rely on
18 public interest standing for their constitutional
19 challenge. They have a right to no taxation
20 without representation, which does not depend on
21 public interest standing.

22 I want to briefly draw a
23 distinction for your honour between the Thorson
24 line of cases and the McNeil line of cases, which
25 are so-called — they are referred to as so-called

1 ratepayer cases.

2 JUSTICE AALTO: Mm-hmm.

3 MR. GALATI: That expression is
4 taken from the American jurisprudence. When we are
5 dealing with public interest standing on ratepayer
6 cases, it is a scenario goes as follows: I am a
7 taxpayer; I am a ratepayer. I don't like that road
8 they built down the road, or I don't like the
9 libraries or I don't like this or that. And it's
10 one removed. It's based on the fact that because
11 they are general taxpayers they can complain about
12 everything.

13 The Supreme Court of Canada in the
14 Prior (ph) case, you'll recall the Quakers saying
15 they wanted a refund on their portion of taxes on
16 the military budget. They said you can't pick and
17 choose as a taxpayer.

18 That is where the public interest
19 ratepayer cases go. Where every citizen has a
20 right with respect to being taxed, a constitutional
21 right such as the right not to be taxed without
22 representation, that is not a ratepayer case.
23 Every citizen is taxed. Any citizen of this
24 country can bring this constitutional challenge
25 against the minister of finance on the budgetary

1 process.

2 Any taxpayer can bring the
3 challenge to the Bank of Canada Act. Why? As the
4 pleadings set out, we are running deficits that my
5 clients are objecting to. It's tied to the
6 constitutional right of no taxation without
7 representation, because of the lack of interest-
8 free loans with respect to the annual deficit.

9 So with respect to their
10 constitutional rights, they are not public interest
11 — this is not public interest standing. They have
12 a right to bring this application — sorry, this
13 action for declaratory relief.

14 On the assumption that I don't
15 sway you on that, let's briefly look at public
16 interest standing. How is it they don't meet the
17 three tests set out in Thorson, McNeil, Finlay, and
18 the latest one in the Vancouver Downtown Sex
19 Workers case? The three criteria are, one, serious
20 and justiciable issues. I submit that they have
21 been presented. They are in the statement of
22 claim.

23 Whether the plaintiff has a real
24 or genuine interest; those are disjunctive. COMER,
25 as well as Mr. Krehm and Ms. Emmett, who are

1 members of COMER, it has been their existence to
2 write and analyze these issues that are before the
3 court. They have a genuine interest in this
4 litigation, apart from their constitutional right
5 to bring this under *Dunsmuir*, as citizens who are
6 subject to taxation.

7 Then the last criteria, really,
8 that my friend hopes to hang his hat on: He says
9 it is the MPs who should be bringing this action to
10 the court. With all due respect – I don't want to
11 take you back to my general discussion – the MPs
12 don't hold the Constitution in their back pocket.
13 The justiciability and standing on a particular
14 issue on constitutional issues of public importance
15 doesn't reside with the lawmakers in Parliament. I
16 doubt that an MP would have standing to bring this
17 challenge. He is a member of the House of Commons.
18 He can deal with it in the House of Commons.

19 JUSTICE AALTO: Only in his
20 capacity as a citizen and a taxpayer.

21 MR. GALATI: Right; that's right.

22 JUSTICE AALTO: On the basis of
23 your argument.

24 MR. GALATI: If that distinction
25 were made; that's right, that's right. Yes.

1 40 years are well-suited.

2 So even though I say they have a
3 right of standing, even if you were going to apply
4 the public interest standing, they more than meet
5 it.

6 JUSTICE AALTO: I see your point.

7 MR. GALATI: Lastly, the Federal
8 Court of Appeal in the Apotex case at tab 67 at
9 paragraph 13 says that a motion to strike is not
10 always the best juncture to determine standing. I
11 would submit this is the type of proceeding or case
12 where the standing issue is not best decided on a
13 motion to strike. Why? Because it presupposes
14 conclusions based on the facts that are pled, based
15 on the evidence which has not yet been presented,
16 and it assumes things in a weighty and at some
17 junctures complicated action. And so the issue of
18 standing should not necessarily be decided now. The
19 Court of Appeal in Apotex said at paragraph 13:

20 "It is not always appropriate
21 for motions to strike to be
22 the context to make a binding
23 decision on a question of
24 standing. Rather a judge
25 should exercise her

1 discretion as to whether it
2 would be appropriate in the
3 circumstances to render a
4 decision on standing or
5 whether a final disposition
6 of the question should be
7 heard with the merits of the
8 case."

9 That is what the Court of Appeal
10 said in Apotex.

11 JUSTICE AALTO: There is still a
12 gatekeeper function to this particular motion.

13 MR. GALATI: Sure.

14 JUSTICE AALTO: In keeping actions
15 that really have no ultimate possibility of success
16 from cluttering the courts.

17 MR. GALATI: I agree, and I would
18 submit that this is not one of them. The facts
19 pleaded and the nature of the examination and
20 analysis proposed has already been done in Anti-
21 Inflation, in Finlay, in Chaoulli, and half of the
22 entire constitutional case law in my walls in the
23 Supreme Court Reports: What is margarine? What
24 are the constituent elements of margarine? Who
25 gets to put these goods in these trucks and put

1 them across the border? Half our constitutional
2 law is on socio-economic, health, and education
3 issues.

4 JUSTICE AALTO: Mm-hmm.

5 MR. GALATI: This is not new
6 territory that we are pounding a path on.

7 Again, with respect, my friend and
8 the court would have to presume the outcome of
9 evidence they haven't seen, notwithstanding that
10 the facts are properly pled and the area of
11 adjudication has already been analyzed and ruled
12 upon by the various courts of this country.

13 I would say one other thing, that
14 the proper interpretation of a public act,
15 particularly on monies and expenditure and
16 taxation, is always, always justiciable by the
17 courts, particularly when there are constitutional
18 dimensions to that justiciability. Otherwise we
19 don't need the courts. Otherwise the courts would
20 not be the lever that balances the rule of law and
21 constitutionalism under the Quebec secession
22 reference.

23 The last two points, your honour.
24 If you do strike, I will leave it to you, I would
25 want leave to amend, certainly one of two of the

1 concerns — notwithstanding the fact that I think I
2 have properly pleaded for my clients, in terms of
3 particulars I could amend.

4 And lastly, on the issue of costs,
5 I am wondering, rather than burdening you today,
6 maybe we can make submissions after you issue your
7 ruling.

8 JUSTICE AALTO: That was going to
9 be my suggestion. We will deal with costs after
10 the fact.

11 MR. GALATI: Sure.

12 JUSTICE AALTO: On the leave to
13 amend I am quite familiar with the case law on
14 leave to amend. As I was reading this stuff and
15 preparing, it's possible to strike part and not
16 others, and I have to get my mind around how all
17 the pieces of the puzzle that both of you have been
18 describing for me all day fit together.

19 MR. GALATI: I take a last
20 submission from Russell Peters and ask my friend to
21 be a man and jump into the bull ring.

22 JUSTICE AALTO: Thank you, Mr.
23 Galati.

24 MR. GALATI: Thank you.

25 — Whereupon the excerpt concluded at 1:35 p.m.

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability,
accurately recorded and transcribed
the foregoing proceeding.

Catherine Keenan, BA (Hons), MA
Computer Aided Transcription