

**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**

**\* \* \* \* \***

**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**

**\* \* \* \* \***

**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 mandamused. 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                                   privative clause, which  
2                                   provides a strong indication  
3                                   of legislative intent, cannot  
4                                   be determinative in this  
5                                   respect... The inherent  
6                                   power of superior courts to  
7                                   review administrative action  
8                                   and ensure that it does not  
9                                   exceed its jurisdiction stems  
10                                  from judicature provisions in  
11                                  sections 96 to 101 of the  
12                                  Constitution Act, 1867."

13   And they cite Mr. Justice Beetz in the Bibeault  
14   case.

15                                  "'The role of the superior  
16                                  courts in maintaining the  
17                                  rule of law is so important  
18                                  that it is given  
19                                  constitutional protection.'  
20                                  In short, judicial review is  
21                                  constitutionally guaranteed  
22                                  in Canada, particularly with  
23                                  regard to the definition and  
24                                  enforcement of jurisdictional  
25                                  limits."

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 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 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                                    Now, my friend says there are  
2 people better suited. He hasn't told you who,  
3 apart from the MPs, which I submit is a nonsensical  
4 proposition. Again, citizens, according to the  
5 Supreme Court of Canada, have the vested interest  
6 in the Constitution, not parliamentarians or the  
7 legislatures or the governments. It's the people's  
8 constitution, under the AG of Nova Scotia v. AG of  
9 Canada decision and all the other decisions that  
10 follow.

11                                    Is there anybody, is there another  
12 proposed suit or reasonable way to bring this to  
13 the court? Who is going to bring it to the court,  
14 under the act? The minister, if he requests the  
15 bank to give him the loan, but the bank refuses?  
16 The minister is refusing to request, and that is  
17 pleaded. Consistently since 1974, the minister  
18 refuses to request these loans. So the minister is  
19 not in a position to bring this action against  
20 himself. Only members of the public, citizens are  
21 suited to bring this constitutional proceeding.

22                                    There is nobody else in sight than  
23 my clients because of their genuine interest and  
24 their knowledge and expertise as a think tank, and  
25 two individuals who have been writing on this for



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.

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