IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General), 2008 NSSC 111

Date: 20080423
Docket: SN 266560
Registry: Halifax

Between:

Cape Breton Regional Municipality

[Plaintiff]

- and -

Attorney General of Nova Scotia

[Defendant]

Judge: The Honourable Justice John D. Murphy

Heard: November 28, 2007, in Halifax, Nova Scotia
{Interlocutory Application}

Final Written Submissions: March 11, 2008

Counsel: Neil Finkelstein, Catherine Beagan-Flood, for plaintiff
Alex Cameron, for defendant

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Paragraph

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By the Court:

INTRODUCTION

[1] The Cape Breton Regional Municipality ("CBRM" or "the Municipality"), an incorporated body comprising the inhabitants of Cape Breton County, commenced this proceeding to obtain a declaration that the Legislature and Government of Nova Scotia (sometimes referred to as "the Province") have breached commitments under s.36 of the *Constitution Act*, 1982.

[2] The Province has brought an Interlocutory Motion, which is the subject of this decision, seeking an order:

(1) to strike out the proceeding brought by CBRM; or in the alternative,

(2) converting the proceeding from an application to an action.

CBRM's CLAIM

[3] CBRM maintains that the Province has failed to comply with s.36 of the *Constitution Act*, which provides as follows:

EQUALIZATION AND REGIONAL DISPARITIES

> **36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
>
> (a) promoting equal opportunities for the well-being of Canadians;
>
> (b) furthering economic development to reduce disparity in opportunities; and
>
> (c) providing essential public services of reasonable quality to all Canadians.
>
> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

[4] It is the Municipality's position that the Province has a legal obligation under s.36 to fulfill a duty or constitutional commitment to ensure that CBRM's residents, in relation to other Nova Scotians, have reasonably comparable levels of public service in exchange for reasonably comparable levels of taxation. CBRM claims to stand "almost apart in Canada" as an urban region experiencing severe localized disparities, over an extended period of time, without receiving effective government intervention to rectify underlying structural economic problems and significantly ameliorate the resulting economic disparity. The Municipality says that equalization payments which Canada makes to Nova Scotia under s.36(2) are not used by the Province in the manner required by s.36(1).

[5] CBRM's complaints, as enumerated in its Notice of Application and amplified in detailed responses to intensive demands for particulars made by the Province, allege that Nova Scotia has breached each of the commitments set out in s.36(1)(a), (b) and (c) of the *Constitution Act*. The complaints can be grouped into two categories:

(a) Taxes and Services: The Municipal Equalization Complaint

CBRM claims that it experiences lower fiscal capacity, lower levels of public service, and higher municipal taxes than other Nova Scotian

municipalities. It maintains that the Province's chosen method of distributing federal equalization monies to municipalities, in particular under the *Municipal Grants Act*, (R.S.N.S. 1989, c. 302) does not promote equal opportunities for residents of CBRM, and does not give the Municipality sufficient fiscal capacity to provide a comparable level of public service for a comparable tax burden.

(b) The Economic Development Complaint

The Municipality says that the Province has failed to fulfill its commitment to further economic development to reduce disparity in opportunities between CBRM's citizens and members of other Nova Scotian communities.

[6] The only relief which CBRM seeks is a declaration that the Government of Nova Scotia has not complied with its commitments under s.36 of the *Constitution Act*. It does not ask the court to determine the full scope of Nova Scotia's constitutional commitment, nor does it request the court to direct what the Province must do to fulfill its obligations. The Municipality does not challenge the constitutionality or validity of the *Municipal Grants Act* or other Nova Scotia legislation.

MOTION TO STRIKE THE PROCEEDING

[7] The Province submits that:

(a) CBRM's Application for a Declaration ought to be struck out because s.36 of the *Constitution Act*, which the Municipality alleges Nova Scotia has breached, is not justiciable, or does not establish a commitment which can give rise to a justiciable claim; and

(b) The Economic Development Complaint should also be struck out because CBRM does not have standing to bring the application with respect to the Province's economic development obligations.

[8] The Province's motion to strike is brought under *Civil Procedure Rule 14.25* and pursuant to the inherent jurisdiction of the court, which was confirmed in **Haughn v. Halifax**, [1998] N.S.J. No. 196.

[9] *Civil Procedure Rule 14.25* states as follows:

> **14.25.**
> (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
>
> (d) it is otherwise an abuse of the process of the court; and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a). [E. 18/19]

[10] CBRM does not challenge the court's authority to strike this proceeding, if the Province establishes the grounds set out in the Rule.

[11] The Province advised, in response to questions during its oral presentation, that the motion to strike was advanced primarily on the basis that no reasonable cause of action is disclosed, the ground set out in subparagraph (a) of *Rule 14.25(1)*. However, counsel also commented that "one might equally argue that the proceeding is frivolous."

[12] I will first address the suggestion that the proceeding falls in the "frivolous" category referenced in *subparagraph (b)* of *Rule 14.25(1)*. In its submissions, the Province invoked very strong language, which ought to be reserved (if it would ever be helpful in a legal brief) to impugn only the most abusive, frivolous, or vexatious allegations. For example, in its written representations, Nova Scotia used terms such as "absurd", "entirely bizarre", "completely incoherent" and "nonsensical" to describe a pleading or position being advanced by CBRM. The Province described one of the Municipality's arguments as "meager", referred to one claim as "merely a generalized rant", and on one occasion portrayed CBRM's analysis as "a recipe for chaos consequent upon a pleading that is absurd, frivolous and vexatious." In my view, neither the proceeding nor any submissions made on the Municipality's behalf can

properly be described in any of those or similar terms. CBRM's Application represents a genuine effort to bring a matter before this Court; the proceeding is neither frivolous nor vexatious, and does not require further examination under *subparagraph (b), (c) or (d) of Rule 14.25(1)*.

TEST TO STRIKE A PROCEEDING AS DISCLOSING NO REASONABLE CAUSE OF ACTION

[13] CBRM's position that a defendant must satisfy a very high onus in an application to strike a claim under *Rule 14.25(1)(a)* was not contested by the Province, and is correct. In **Operation Dismantle v. The Queen**, [1985] 1 S.C.R. 441, the Supreme Court noted that proceedings challenged on the basis of a failure to disclose a reasonable cause of action should be dismissed only in "plain and obvious cases." (para.73)

[14] The threshold that a moving party must meet on an application to strike is very high. Such a motion can only succeed in the clearest of cases, where it is plain and obvious or beyond reasonable doubt that there is no reasonable cause of action. As Justice Wilson explained for a unanimous Supreme Court in **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959 at p. 980:

> ...if there is a chance that the plaintiff might succeed, then that plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect...should the relevant portions of a plaintiff's statement of claim be struck out...

[15] A unanimous Nova Scotia Court of Appeal recently explained in **Sable Offshore Energy Inc. v. Ameron International Corp.**, 2007 N.S.C.A. 70 at para.13, that:

> The burden is not on the plaintiff to show that the pleaded cause of action exists or will be accepted in the future; the burden is on the defendant to convince the court that the claim is "certain to fail."
>
> (Application for leave to appeal to S.C.C. denied, 2008 CarswellNS 13 (January 17, 2008))

[16] Similarly, in **CGU Insurance Co. of Canada v. Noble**, 2003 N.S.C.A. 102 at para.13, the Nova Scotia Court of Appeal stated: "deciding a claim without trial is a serious matter which should occur only if the claim, on its face, is absolutely unsustainable."

[17] Novelty can be a critical factor in the analysis. As Justice Wilson explained for the Supreme Court in **Hunt v. Carey** (*supra*) at pp.990-91: "where a Statement of Claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed."

[18] Pleadings should not be struck unless, it is "perfectly clear" that they do not disclose a reasonable cause of action. (**Carley Estate v. Allied Signal Inc.**, [1997] B.C.J. No. 1097 at para.3)

[19] In an application to strike, all the facts pleaded by the plaintiff must be deemed to be proven. (**Hunt v. Carey** (*supra*) at p. 979; **Lamey v. Wentworth Valley Developments Ltd.** (1999), 173 D.L.R. (4th) 641 (N.S.C.A.))

JUSTICIABILITY OF SECTION 36 OF THE *CONSTITUTION ACT*

A. Definition and Test

[20] Nova Scotia submits that the proceeding does not have the requisite legal component to be justiciable. The Province maintains that adjudicating CBRM's complaint would not involve the court in an interpretation of law, but rather in a review of economic policy, and accordingly it discloses no "cause of action." The Municipality claims that when the commitments expressed in s.36 were included in the text of the *Constitution Act*, under s.52(1) of that Act they became part of the "supreme law of Canada", so that the question whether a province has breached a constitutional commitment under s.36 is a question of constitutional law that can only be authoritatively resolved by courts, and is therefore justiciable.

[21] The term "justiciability" has been defined as follows by Professor L. M. Sossin in *Boundaries of Judicial Review: the Law of Justiciability in Canada* (Scarborough, Ont: Carswell, 1999) at page 2:

> ...justiciability may be defined as a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life.

> In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable. The criteria used to make this determination pertain to three factors: (1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court.

[22] The Supreme Court of Canada has considered in several recent cases whether litigation raised a justiciable constitutional issue. CBRM and the Province cite the same cases to identify the test; the parties differ concerning how the criteria for justiciability apply in this case.

[23] In **Finlay v. Canada (Minister of Finance)**, [1986] 2 S.C.R. 607, at 632-33 ("**Finlay**") the Supreme Court held that "questions of law" are "clearly justiciable", even when they have a "policy context or implications":

> The concern about the proper role of the courts and their constitutional relationship to the other branches of government is addressed by the requirement of justiciability,... The requirement of justiciability was considered by this Court in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, where reference was made to both the institutional and constitutional aspects of justiciability. The question of justiciability in that case was considered in the context of a challenge, based on the *Canadian Charter of Rights and Freedoms*, to the constitutionality of a decision of the executive government of Canada in the realms of foreign policy and national defence. As I read the reasons of Wilson J., with whom Dickson J. (now C.J.) concurred on the question of justiciability, they affirm that where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government. That was, of course, said in the context of the judicial duty to rule on issues of constitutionality under the *Charter*, but I take it to be equally applicable to a non-constitutional issue of the limits of statutory authority. There will no doubt be cases in which the question of provincial compliance with the conditions of federal cost-sharing will raise issues that are not appropriate for judicial determination, but the particular issues of provincial non-compliance raised by the respondent's statement of claim are questions of law and as such clearly justiciable. The same is, of course, true of the issue of statutory authority under s.7 of the Plan. I am, therefore, of the opinion that the recognition of public interest standing in this case should not be refused on the ground of justiciability.

In **Canada (Auditor General) v. Canada**, [1989] 2 S.C.R. 49, Chief Justice Dickson wrote for the court as follows at para 49:

> ... As I noted in *Operation Dismantle Inc. v. the Queen*, [1985] 1 S.C.R. 441, at p. 459, justiciability is a "doctrine...founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes", endorsing for the majority the discussion of Wilson J. beginning at p. 460. Wilson J. took the view that an issue is non-justiciable if it involves "moral and political considerations which it is not within the province of the courts to assess" (p. 465). An inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity.

Subsequently, in **Reference re Canada Assistance Plan** [1991] 2 S.C.R. 525, ("**CAP**") the Court stated the test for justiciability to be whether a question had "a sufficient legal component to warrant the intervention of the judicial branch":

> 26 While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. See *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 90-91, and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 362. In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch. In *Reference re Resolution to amend the Constitution*, supra, at p. 884, the majority in Part II of the judgment said:
>
> > We agree with what Freedman C.J.M. wrote on this subject in the Manitoba Reference [*Reference Re Amendment of the Constitution of Canada* (1981), 117 D.L.R. (3d) 1 (Man. C.A.)] at p. 13:
> >
> > > In my view, this submission goes too far. Its characterization of Question 2 as "purely political" overstates the case. That there is a political element embodied in the question, arising from the contents of the joint address, may well be the case. But that does not end the matter. If Question 2, even if in part political, possesses a constitutional feature, it would legitimately call for our reply.

> In my view, the request for a decision by this Court on whether there is a constitutional convention, in the circumstances described, that the Dominion will not act without the agreement of the Provinces poses a question that it [sic], at least in part, constitutional in character. It therefore calls for an answer, and I propose to answer it.

27 This was reiterated in *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at p. 805. The Court reaffirmed the validity of the above passage from the judgment of Freedman C.J.M. While the passage speaks to a "constitutional feature", it is equally applicable to a question which possesses a sufficient legal component to warrant a decision by a court. Since only a court can authoritatively resolve a legal question, its decision will serve to resolve a controversy or it will have some other practical significance.

The Court returned to the issue in the context of whether it should answer a constitutional reference question in **Reference re Secession of Quebec**, [1998] 2 S.C.R. 217, ("**Quebec Secession**") where is said:

> 26 ...Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately addressed by a court of law.
>
> ...
>
> Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:
>
> (I) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
>
> (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.
>
> 27 As to the "proper role" of the Court, it is important to underline, contrary to the submission of the amicus curiae, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be

> called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. "political questions" doctrine therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec.
>
> 28 As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

B. Determination Respecting Justiciability

[24] CBRM submits that its claim raises the following three questions of mixed law and fact that engage the court in a judicial role of interpreting s.36 of the *Constitution Act* and determining whether Nova Scotia has met a legal standard set out in that constitutional provision:

(a) Does s.36 of the *Constitution Act*, 1982 obligate provinces that receive federal equalization payments to provide “reasonably comparable levels of public services at reasonably comparable levels of taxation”?

(b) Has Nova Scotia done so?

(c) Is CBRM a community that has not received reasonably comparable levels of public services at reasonably comparable levels of taxation as compared to other Nova Scotian communities?

[25] For the reasons which follow, I have concluded that CBRM’s proceeding does not raise a justiciable issue - the questions the Municipality seeks to have determined in the context of complaints advanced respecting Municipal Equalization and Economic Development do not have a sufficient legal component to warrant court intervention. If the court were to adjudicate the dispute, it would exceed its proper role within Canada’s constitutional framework as defined in **CAP** and

Quebec Secession and engage in political and economic considerations which are not appropriate for judicial determination.

C. Analysis

(I) *Constitution Act*, Section 36: Previous Assessment of Justiciability by Courts

[26] The justiciability of s.36 of the *Constitution Act* has not been addressed by the Supreme Court of Canada, and has been considered in only two reported cases, both at the Court of Appeal level.

[27] In **Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board** (1992), 91 D.L.R. (4th) 554, ("**Keewatinowi**") the Manitoba Court of Appeal commented in *obiter dicta* that s.36 may be amenable to judicial consideration. The appellant relied in part on s.36(1)(c) to challenge a Hydro general rate increase that had been approved by Manitoba's Hydro-Electric Board (the "Board"), and argued that until reduced electrical capacity in remote communities could be ameliorated, there should be a substantial reduction in the rates paid by the inhabitants of these communities. The appellant was unsuccessful in its submissions to the Board, which made the following statement (quoted by the Court of Appeal at p.556) with regard to s.36(1)(c)):

> Section 36(1)(c) of the Constitution Act, 1982 evidences the objective of Canadian governments of ensuring that all Canadians are provided with essential public services of reasonable quality and while the enhancement by Hydro of its delivery of power is consistent with this objective, it is the opinion of the Board that this provision in the Constitution Act does not mandate any specific level of service by Hydro nor necessitate any specific Board action at this time.

The Manitoba Court of Appeal ruled on the basis that there was no nexus between s.36(1)(c) and the powers of the Board, which lacked jurisdiction to order Manitoba Hydro to improve the level or quality of service in any region. In *obiter*, that Court commented on the meaning of s.36(1)(c) as follows at pp.557-558:

> There have been no cases dealing with the interpretation of s. 36(1)(c) of the Constitution Act, 1982. There is considerable academic debate as to whether the section in fact creates enforceable rights and, if so, whether they are not in any event - by virtue of the preamble to the section - subordinate to the ordinary acts of

> Parliament and the provincial legislatures. Suffice it to say I am satisfied that in the general sense a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights. However, it is not necessary to decide this point in light of the disposition I am about to make.

[28] In **Canadian Bar Association v. British Columbia** ("**CBA**") the plaintiff brought a systemic challenge respecting the provisions of the legal aid scheme in British Columbia and sought, among other remedies, a declaration that "the Federal Crown and the Provincial Crown are in breach of s.36(1)(c) of the *Constitution Act*, 1982, due to inadequacies in BC Civil Legal Aid by failing to establish and maintain a civil legal aid regime that ensures meaningful and effective access to justice..." In September 2006 the British Columbia Supreme Court ruled that the plaintiff did not have standing and dismissed the action [2006] B.C.J. No. 1342. The Court also addressed an alternative submission by the defendant that the claim should be struck out under *B.C. Rule 19(24)*, which is substantially the same as *Nova Scotia Rule 14.25(1)*. With respect to the plaintiff's allegation that the crown defendants had breached s.36(1) of the *Constitution Act*, the Supreme Court stated at para.118:

> In my view this constitutional provision [s.36] cannot form the basis of a claim since it only contains a statement of "commitment".

and concluded at para.126:

> The claims of the CBA for alleged violations of written and unwritten constitutional norms are also dismissed under R. 19(24).

[29] Nova Scotia argued that the Court dismissed the claim on two grounds: (1) that the CBA had no standing; (2) that there was no "reasonable claim" under *Rule 19.24*. CBRM strongly suggested that the decision was based only on the standing issue, vigorously maintained that the conclusion that there was no reasonable cause of action was *obiter*, and submitted that this Court should not be persuaded by the British Columbia Supreme Court's comments concerning s.36.

[30] With respect, I disagree with the Municipality's view that the Court's statements concerning s.36 and the absence of a reasonable claim were *obiter*. Immediately after addressing representations based on the *Canadian Charter of Rights and Freedoms* and the plaintiff's constitutional arguments, including the submission based on s.36, the Court said at para.119:

> Hence I conclude that the statement of claim fails to disclose a reasonable claim pursuant to any of the **Charter** or constitutional provisions pleaded.

[31] The B.C. Supreme Court's expression (quoted in para.28 of these reasons) that s.36 cannot form the basis of a claim because it only contains a statement of commitment was tantamount to a finding that the section is "not justiciable", and was one of the grounds upon which that Court concluded the plaintiff's proceeding did not disclose a reasonable claim. Although the Court also noted at paras.102-103 that previous decisions had determined there was no general constitutional right to legal aid, that does not diminish the significance of the Court's conclusion concerning the justiciability of s.36.

[32] After submissions were presented on this motion, the British Columbia Court of Appeal dismissed an appeal from the Supreme Court's decision in the **CBA** case (2008 B.C.C.A. 92). The Court of Appeal ruled that the CBA's statement of claim did not disclose a reasonable cause of action, and that the pleadings were too general to permit the inquiry sought or the relief contended for. (paras.13, 15) Because the Court of Appeal concluded that the CBA had failed to plead a reasonable claim, it declined to express an opinion on a matter of standing, a disposition which supports the Province's position that the B.C. Supreme Court's conclusion concerning the justiciability of s.36 was a foundation for its dismissal of the plaintiff's claim, and not *obiter dicta* as CBRM contended.

[33] Upon release of the Court of Appeal decision in the **CBA** case, counsel for CBRM and the Province were provided an opportunity to make additional submissions in this case.

[34] In the context of upholding the Supreme Court's decision that no reasonable claim had been disclosed in the "too general" pleading by the CBA, the Court of Appeal, after quoting s.36 of the *Constitution Act,* stated as follows at para.53:

> I accept that "a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights" (**Manitoba Keewatinowi Okimakanak** at para.10), but more than that is required of a statement of claim. Material facts must be pleaded to create an informed environment for consideration of that question. The statement of claim in this case does not accomplish that end. On these pleadings, this claim is not justiciable – there is no reasonable claim to try.

[35] CBRM emphasizes that the first sentence in the quotation indicates that the only two Court of Appeal decisions that have considered s.36, the B.C. ruling in **CBA** and the Manitoba decision in **Keewatinowi**, are consistent in finding that the provision may be amenable to judicial consideration. The Province highlights the remainder of the quotation, indicating that material facts must be pleaded, and pleadings which are too general do not raise a reasonable claim.

[36] Although the Courts of Appeal in Manitoba and British Columbia did not foreclose the possibility that s.36 of the *Constitution Act* could be justiciable, in my view they did not attribute much likelihood to the proposition, using the terms:

> A reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights. [emphasis added]

Neither Court concluded that an alleged breach of s.36 raised a justiciable issue in the circumstances presented. The British Columbia Court of Appeal declined to proceed on a pleading which did not attack the constitutionality of any statute or regulation, or otherwise plead facts to create an informed environment to consider whether enforceable rights were created by the section.

[37] In my view the pleadings in this case do not allege material facts which create an informed environment to have the court determine whether s.36 could possibly have been intended to give CBRM enforceable rights. In determining that the claim is not justiciable, I have considered not only the test outlined by the British Columbia Court of Appeal in **CBA**, but also the other issues raised, submissions made, and authorities referenced by the parties, which are addressed in the following sections of these reasons.

(II) Section 36 - Academic Commentary

[38] Constitutional experts hold differing views concerning the justiciability of s.36. Professor Peter Hogg in Constitutional Law of Canada (5th ed., Carswell Looseleaf) Vol. 1 at p.6-10) suggests that the constitutional obligation to make equalization payments to provinces is probably too vague, too political to be justiciable. At p.33-2, Professor Hogg opines:

> The provision [s.36(1)] seems to be a statement of aspiration rather than an enforceable obligation.

[39] Professor Kent Roach in Constitutional Remedies in Canada (Canada Law Book) 2006 expresses a similar opinion at p.2-32:

> Section 36 of the *Constitution Act*, 1982, did provide commitments to equalization payments from the Federal Government to the provinces to promote "equal opportunities for the well being of Canadians" and to provide "essential public services of reasonable quality for all Canadians", but it is non-justiciable and has no monitoring mechanism. (Footnote 197)

[40] Contrary views are held by Professor Lorne Sossin and by Aymen Nader. In *Boundaries of Judicial Review: the Law of Justiciability in Canada, (supra*) Professor Sossin writes at p.191:

> The argument that s.36 was intended to create justiciable obligations on the federal and provincial governments is reinforced by the inclusion of the term "commitment" to describe the protections contained therein. A commitment suggests the creation of an enforceable obligation, at least to employ one's best efforts in securing that to which one is committed. However, it falls short of creating any mandatory obligation to provide a particular level of funding or type of benefit.
>
> There is further support for this position if one views the treatment of constitutional conventions, discussed above, as analogous to how the Supreme Court would approach s.36. The *Patriation Reference* [in which the Supreme Court of Canada decided that it was appropriate to answer a reference question regarding an [sic] constitutional convention, even though such conventions are not enforceable by the courts] is authority for the proposition that a political disputes [sic] may nonetheless be justiciable if they possess a "constitutional feature." It simply does not make sense that unwritten, judge-made constitutional doctrines such as conventions possess this "constitutional feature", while written provisions of the *Constitution Act*, 1982 do not.

In a law review article, Professor Sossin opined that while s.36:

> may not be enforceable in terms of requiring the government to penalize provinces whose welfare policies failed to meet certain standards, it could appropriately be the subject of a declaration by the Court regarding the proper action by the government in the circumstances. ("Salvaging the Welfare State?: The Prospects of Judicial Review for the Canada Health & Social Transfer" (1998) 21 Dalhousie L.J.14)

[41] Aymen Nader wrote in an earlier edition of the same law journal:

> Sufficient jurisprudence exists to suggest that if the issue put to a court has a constitutional feature or a sufficient legal component then, in spite of its more open texture of political dimensions, the court will take cognizance of it... Although a coercive remedy may or may not be available in an action based on this section [s.36], considerable authority exists to suggest that the courts have the power to make "binding declarations of right, whether or not any consequential relief is or could be claimed." A statement by the courts that a government is acting in violation of the Constitution without further judicial requirement that its actions be rectified remains a viable remedy. (A. Nader, "Providing Essential Services: Canada's Constitutional Commitment under S.36" (1997) 19 Dalhousie L.J. 306)

(III) Justiciability - Other Authorities

[42] CBRM suggests that Supreme Court of Canada decisions which have addressed justiciability in constitutional cases, without consideration of s.36 of the *Constitution Act*, demonstrate that courts can appropriately make legal determinations regarding federal/provincial fiscal arrangements. The Municipality refers to **Finlay** (*supra*) and to **CAP** (*supra*), but I am not persuaded that those cases assist CBRM. Both dealt with federal legislation, the issues were more defined than in this case, and s.36 of the *Constitution Act* was not relevant to the determination. Mr. Finlay contended that federal cost sharing payments to Manitoba were illegal as being contrary to federal statutory authority; in the **CAP** reference the court was required to interpret a federal statute and a federal/provincial agreement and also to address the applicability of the legal doctrine of legitimate expectations to the process involved in enacting a money bill. In my view, unlike in **Finlay** and **CAP**, CBRM's claim does not have sufficient legal component to attract court intervention.

[43] Other decisions upon which the Municipality relies to support the justiciability of its claim are distinguishable because they considered the validity of legislation or addressed a party's specific statutory right. For example, in **Chaoulli v. Quebec (Attorney General)**,[2005] 1 S.C.R. 791 ("**Chaoulli**") and **Doucet-Boudreau v. Nova Scotia (Minister of Education)**, [2003] 3 S.C.R. 3, the Supreme Court considered whether rights under a specific section of the *Canadian Charter of Rights and Freedoms* were violated; in **Chaoulli** offending legislation was struck down.

(IV) Intent That Section 36 Be Justiciable: "Supreme Law of Canada and Fundamental Constitutional Principles"

[44] The *Constitution Act*, s.52(1) provides as follows:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

CBRM submits that under s.52(1), the commitment in s.36 is the "supreme *law* of Canada", and therefore must be justiciable in a court, which has the duty, as judicial guardian of the Constitution, to interpret and apply the law. The Municipality's position is that s.36 sets out *legal* commitments respecting the Federal Government's payment and the Provinces' use of equalization and regional disparity payments, and the issue of whether Nova Scotia has complied with that commitment is a question of *law*, and as such justiciable.

[45] The Municipality also suggests that extrinsic evidence concerning the intention of the drafters implies that constitutional commitments are justiciable unless expressly stated otherwise.

[46] I do not agree that the "commitment" expressed in s.36 is, by virtue of s.52(1), judicially enforceable constitutional law. In my view, s.52(1) must be construed with reference to both unwritten constitutional principles and the limiting words used in s.36.

[47] Canada's Constitution incorporates unwritten principles, such as democracy, the rule of law and judicial independence (**Reference re Secession of Quebec**, [1998] 2 S.C.R. 217, **Reference re Remuneration of Judges**, [1997] 3 S.C.R. 3. The doctrine of parliamentary supremacy and the rule that government expenditures require legislative authorization are unwritten constitutional principles relevant to this case.

[48] Parliamentary sovereignty, also referred to as parliamentary supremacy, is the rule that Parliament has the power "to make or unmake any law whatever" (Hogg Constitutional Law of Canada (*supra*) Vol. 1 at p. 12-1 citing Dicey The Law of the Constitution (10th ed., 1965). Laskin C.J. said in **Reference re: Anti-Inflation Act (Canada)**, [1976] 2 S.C.R. 373 that legislative policy "under a doctrine of parliamentary sovereignty within the limits of legislative power, is a matter solely for Parliament or the Legislatures of the Provinces." (p.405) In **Singh v. Canada**, [2003] 3 F.C. 185 (F.CA.), Strayer J.A. noted that "both before and after 1982 our system was and is one of parliamentary sovereignty exercisable within the limits of a written

constitution." (para.16, *see* paras. 12-24) In **Babcock v. Canada**, [2002] 3 S.C.R. 3, McLachlin C.J. (for the majority) described Strayer J.A.'s judgment in **Singh** as "a thorough and compelling review of the principle of parliamentary sovereignty in the context of unwritten constitutional principles." (para.56)

[49] The principle that government expenditures require legislative authorization is succinctly stated as follows in **Auckland Harbour Board v. The King**, [1924] A.C. 318 (P.C.):

> For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated fund into which the revenues of the State had been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced. (p. 326-327)

The expenditure of money, and the raising of taxes to pay for those expenditures, are matters which are confined to Parliament or a legislature, as a matter of unwritten constitutional law.

[50] The introductory words of s.36(1) of the *Constitution Act*, which preface the commitments upon which CBRM relies in this case, are as follows:

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

[51] That language specifies that the commitments upon which the Municipality's claim is based do not diminish the legislative authority of Parliament or the legislatures, or their rights with respect to exercise of that authority.

[52] The "legislative authority...of the provincial legislatures" is broad language, which encompasses the unwritten doctrines of constitutional law, including the authority of the legislature (as described in para.48 of these reasons) to "make or

unmake any law whatever" (subject to the s.91/92 division of legislative authority), to authorize government expenditure, and to raise taxes. The "rights" of legislatures "with respect to the exercise of their legislative authority" is also broad language. It encompasses the legislatures' power to make law, to approve or not approve expenditures, to tax or not to tax, and to craft statutes and regulations including those granting or delegating discretions. This is unaltered by the "commitment" described in s.36(1)(a), (b), and (c); thus the authority and rights of the legislature before the inception of s.36(1) are unchanged.

[53] CBRM maintains that because s.52(1) of the *Constitution Act* provides that the Constitution is the "supreme law of Canada", then section 36, which is part of the Constitution, must be law and accordingly justiciable. In my view this submission overlooks the express wording in the preamble to s.36, which specifies that the commitments upon which the Municipality relies do not alter provincial law making authority. The Nova Scotia Legislature's power to make and implement law is not restricted by the commitments set out in s.36. Although s.52 provides that the Constitution is the "supreme law of Canada", it does not convert provincial legislative authority and rights in the areas referenced by the s.36 commitments to justiciable constitutional law. Section 36 references commitments without altering or affecting Nova Scotia law; the fact that the section forms part of the Constitution does not, by virtue of s.52, make the commitments "supreme law" justiciable as to constitutionality.

(V) Failure to Challenge Legislation

[54] The Province claims that CBRM's proceeding should be struck because it does not challenge any provincial legislation. Nova Scotia maintains that the whole of CBRM's complaint respecting municipal equalization is an expression of dissatisfaction concerning the operation of the Nova Scotia *Municipal Grants Act*, and that CBRM's complaints involving economic development all relate to policies and spending controlled and directed by provincial statutes. Relying upon **N.S. Board of Censors v. McNeil**, [1978] 2 S.C.R. 662 and Hogg, Constitutional Law of Canada (*supra*), vol. I p.15-23 and vol. II p.38-9), the Province submits that absent any challenge to the laws pursuant to which it undertakes municipal equalization and economic development activity, those laws are presumed to be constitutional. Nova Scotia says that its unchallenged statutes are valid and presumptively constitutional laws under which it carries out the activities which CBRM complains about, that it is bound to follow the law set out in those statutes, and that no justiciable

constitutional issue can arise from application of valid provincial law. The Province maintains that once CBRM accepts the legality of the legislation which dictates the relevant policy and pursuant to which activities are performed, the Municipality cannot raise a justiciable issue by alleging government acts unlawfully when it pays out legislatively-authorized municipal equalization grants and applies economic development policy authorized by the statutes.

[55] CBRM acknowledges that the proceeding does not challenge any Nova Scotia Statutes, and does not dispute that Nova Scotia has enacted legislation and implemented programs to deal with municipal equalization and economic development. However, the Municipality maintains that the regime and government spending scheme in Nova Scotia are not constitutionally sufficient, as they do not meet the Province's commitments and obligations under s.36 of the *Constitution Act*. CBRM says that a challenge to legislation is not a prerequisite for constitutional review, and that the Constitution guarantees citizens the right to constitutional behaviour not only by Parliament or a legislature, but also by "government." The Municipality suggests that Nova Scotia Government action can be challenged without impugning an underlying provincial statute. CBRM's submission is that the reference to any "law" in s.52(1) of the *Constitution Act* should not be construed as restricted to statutes, regulations and the common law, but extended to any government action "taken or not taken, pursuant to power granted by law, such as the Province's decision to under-fund...using its discretion under...the *Municipal Grants Act*."

[56] In my view, CBRM has not raised a justiciable issue by claiming that while acting pursuant to unchallenged legislation that must be presumed to be constitutionally valid, the Nova Scotia Government breached commitments under s.36 of the *Constitution Act*, which specifically preserves the provincial legislature's ability to implement and exercise legislative authority. The Courts of Appeal which considered s.36 in **CBA** (*supra*) and **Manitoba Keewatinowi** (*supra*) both approached the potential for a justiciable claim under s.36 of the *Constitution Act* with caution, indicating that "a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights." (**CBA** (B.C.C.A.) (*supra*), para.53) (**Manitoba Keewatinowi** (*supra*), pp.557-558) [emphasis added] In **CBA**, the plaintiff complained of the inadequacy of the civil legal aid regime, including a claim under s.36(1) of the *Constitution Act*, without challenging the validity of legislation. The Court of Appeal, after noting in para.9 that the CBA "contends that an attack on government action is not required to be against legislation, but rather can be, as here against a scheme", specified that "material facts must be

pleaded" to create an informed environment for consideration of the question, found that the statement of claim fell short, and ruled that it was "simply too general." (para.15)

[57] The Municipality's claim against "government" in this proceeding, absent any challenge to provincial legislation, regulation or crown prerogative , is no less general than the CBA's claim. As in that case, material facts have not been pleaded to create an informed environment in which a reasonable argument "might" be advanced as to whether s.36 of the *Constitution Act* "could possibly have been intended" to create enforceable rights.

[58] In this case, without a challenge to legislation, CBRM's pleading does not raise a reasonable cause of action. The Municipality does not create a justiciable issue by referring in the claim to s.36 of the *Constitution Act*, when the commitments set out in that section do not alter the Nova Scotia Legislature's right to exercise legislative authority. A general attack on "government" action, alleging that the Nova Scotia regime is constitutionally deficient, is too vague a basis for a court to determine under s.52 of the *Constitution Act* that a law "is inconsistent with the provisions of the Constitution."...and "of no force or effect."

[59] This Court's conclusion that CBRM's general challenge to government action does not give rise to a justiciable issue or reasonable cause of action does not suggest that impugning legislation must always be a prerequisite to a constitutional challenge, if material facts are pleaded to create an informed environment for consideration of the issue. For example, exercise of delegated statutory authority can be challenged as infringing the *Charter of Rights and Freedoms*. (**Eldridge v. British Columbia**, [1997] 3 S.C.R. 624) However, neither the exercise of particular statutory discretion nor a *Charter* right are in issue in this case. The introductory words of s.36, reserving the authority and rights of provincial legislatures, suggests a more limited scope to attack government for a breach of commitment than is available when a *Charter* right is infringed.

(VI) Declaration as an Appropriate Remedy

[60] The only remedy sought by CBRM is a declaration that Nova Scotia breached its constitutional commitment in s.36. The Municipality says that the court should declare that constitutional commitments have not been fulfilled, but need not address how government should meet its obligations. CBRM does not ask the court to do

more than declare that there has been a breach - the Municipality maintains that determining the remedy and manner of compliance can be left to the government to decide.

[61] In view of my finding that the proceeding does not raise a justiciable issue, it is unnecessary to address the suitability of the remedy sought. Justiciability is a prerequisite to determining what relief may be available - the question of justiciability is not tempered by the nature of the remedy sought. In Brown and Evans, Judicial Review of Administrative Action in Canada (Vol. 8 p.1-75), the authors say this:

> **1:7310** The Requirement of Justiciability
>
> Because the scope of declaratory relief lacks clear definition, courts have been concerned to ensure that declarations are sought only in respect of matters that are properly the subject of judicial determination. Thus, as a general principle, the subject matter of the dispute must be justiciable both in the sense that it must be within the competence of the judiciary to determine, and that the issue be one that is appropriate for a court to decide.

[62] This proceeding is being struck out because it does not raise a justiciable issue and fails to disclose a reasonable cause of action. The problems inherent in asking a court to make a determination are not resolved because the remedy sought is declaration of breach, instead of a solution. Declaratory judgment should only be available, as is the case with other remedies, after material facts have been pleaded to create an informed environment for consideration of the issue.

[63] Even if the justiciability threshold were met, it is unlikely that a declaration of breach would be an available remedy in this case. Specific legislation was in issue in all of the constitutional cases referred to by CBRM in support of the suitability of declaratory relief, and those cases considered rights pursuant to the *Charter*, which provides recourse to wider remedial authority than s.36. The sole remedial provision in respect of s.36 is s.52 of the *Constitutional Act* which, even if it could be invoked in this case, provides only for determination that a law is of no force and effect, which is not what the Municipality seeks.

(VII) The Role of the Court - Practical Considerations

[64] Nova Scotia suggests that adjudicating the commitment in s.36(1) of the *Constitution Act* would engage this Court in a non-judicial role, interpreting vague

terms such as "promoting", "opportunities", "well-being", "furthering", "reduce" and other language much less precise than terms such as "entitlement" and "guarantee" found in the *Charter*. I agree with the Province's submission that the language of s.36(1) lacks the firm, precise tenor of constitutional rights, and its wording does not suggest that the provision was intended to be justiciable.

[65] A declaration from this Court that the Province breached a s.36 commitment, without addressing the validity of underlying legislation, would be more akin to stating public policy than adjudicating a dispute. Declaring a breach, without addressing remedy, could be inconclusive, and might result in continuing court involvement in allocation of funds for municipal equalization and economic development. The court's role is to provide final determination of legal issues, without intervening in public policy. If a "declaration of breach" were issued in this proceeding, nothing would prevent the Municipality from returning indefinitely to court for a similar declaration each time it considered government corrective action to be inadequate. The business of government could not proceed efficiently if its municipal equalization and economic development activities, areas of traditional legislative expertise, were subject to judicial veto, without remedial direction.

CONCLUSION - JUSTICIABILITY; REASONABLE CAUSE OF ACTION

[66] For the foregoing reasons I conclude that CBRM's claim should be struck out. In reaching this result, I acknowledge that Canadian Courts should interpret the Constitution in a large, liberal and generous rather than legalistic manner, and that courts must be prepared to hear and rule upon novel claims. However, a novel claim which does not raise a justiciable issue and a pleading which does not disclose a reasonable cause of action should be struck out. As Wilson J. stated in **Operation Dismantle v. The Queen**, [1985] 1 S.C.R. 441 at p.477, quoting from **McKay v. Essex Area Health Authority**, [1982] 2 All E.R. 771 at p.778:

> Here the court is considering not "ancient law" but a novel cause of action, for or against which there is no authority in any reported case in the courts of the United Kingdom or the Commonwealth. It is tempting to say that the question whether it exists is so difficult and so important that it should be argued out at a trial and on appeal up to the House of Lords. But it may become just as plain and obvious, after argument on the defendants' application to strike it out, that the novel cause of action is unarguable or unsustainable or has no chance of succeeding.

[67] The Province has met the "high onus" it bears to strike this proceeding as disclosing no reasonable cause of action. Assuming all facts pleaded by the Municipality to be proven, and applying the tests summarized in paras.13 to 18 of these reasons, I conclude that this proceeding should be struck out. This is a clear case where Nova Scotia has satisfied its burden and established that it is plain and obvious the claim is absolutely unsustainable. No justiciable constitutional issue is raised, and CBRM's pleadings do not disclose a reasonable cause of action.

STANDING

[68] Nova Scotia maintains that CBRM lacks standing to advance the Economic Development Complaint because it does not have a direct interest, authorized by statute, enabling it to pursue a proceeding with respect to the Province's constitutional commitment to further economic development and reduce disparity in opportunities. CBRM claims standing as of right to challenge the Province's compliance with constitutional obligations regarding economic development, and in the alternative maintains that it satisfies the test for public interest standing, a position which Nova Scotia also challenges. The Province raises the standing issue only with respect to the Economic Development Complaint, and not in the context of the Municipal Equalization Complaint.

[69] Because of my conclusion that the proceeding does not raise a justiciable constitutional issue and that CBRM's pleadings do not disclose a reasonable cause of action, it is unnecessary to determine whether the Municipality has standing to pursue the Economic Development Complaint. However, as the parties addressed the issue in oral and written submissions, I will indicate what my finding concerning standing would be if the action were not being struck out for other reasons.

[70] In my view, had the pleadings raised a justiciable constitutional issue regarding economic development, then CBRM would have standing as of right to bring and maintain the proceeding, and would also satisfy the test for public interest standing.

A. Standing as of Right

[71] CBRM is a creature of the *Municipal Government Act*, S.N.S. 1998, c. 18. Section 31(2)(e) of that statute and s.15(a) of the *Interpretation Act*, R.S.N.S. 1989, c. 235, contemplate that municipalities may bring legal proceedings.

[72] The *Municipal Government Act* gives CBRM statutory authority to promote economic development (s.57(1)) and to expend money for that purpose. (s. 65(m)) I agree with CBRM's submission that it has a direct interest, provided by statute, in economic development within the Municipality, so that it would have standing to pursue a proceeding which raised a justiciable issue to enforce an economic development obligation. I would also conclude that the Municipality would have standing to pursue such a proceeding as the local authority for its population, as in **Charlottetown (City) v. Prince Edward Island**, [1998] P.E.I.J. No. 88 (C.A.) in which the court found that a city could invoke s.3 of the *Charter* to ensure effective representation for its citizens.

B. Public Interest Standing

[73] The test for public interest standing requires that:

> (1) the action raise a serious legal question;
> (2) the claimant have a genuine interest in the resolution of the question; and
> (3) there be no other reasonable and effective manner in which the question may be brought to court. (**Chaoulli** (*supra*))

[74] I have concluded that this proceeding does not satisfy the first element of the test; however, if my conclusion on that issue had been different, I would grant public interest standing. CBRM has statutory authority with respect to economic development, and if the issue it sought to have determined were justiciable, the Municipality would have a genuine interest in resolution. The exercise of discretion to grant public interest standing involves a purposive consideration of what should be done where those primarily affected do not have the resources to mount an effective challenge. Courts should be reluctant to force individual plaintiffs to mount a systemic constitutional challenge; allowing the Municipality standing would be the most reasonable and effective manner of bringing the issue before the court, if the claim were justiciable. (*See* **The Canadian Council of Churches v. Canada (Minister of Employment and Immigration)**, [1992] 1 S.C.R. 236 at pp. 251-253 and **Vriend v. Alberta**, [1998] 1 S.C.R. 493 at paras. 47-48)

CONVERSION OF THE PROCEEDING FROM AN APPLICATION TO AN ACTION

[75] The Province's motion included, in the alternative if the application to strike were unsuccessful, a request for an order that CBRM's proceeding be converted to an action. The parties presented written and oral argument with respect to the alternative motion at the same time as they addressed the motion to strike the proceeding. Because the Municipality's claim is being struck out pursuant to *Civil Procedure Rule 14.25* as disclosing no reasonable cause of action, the Province's alternative request for conversion is now moot, and need not be decided.

[76] This Court recognizes that if CBRM successfully appeals the decision to strike out its claim, the conversion application could require determination. Accordingly, the Order granting the Province's motion to strike the proceeding will provide that, if an appeal from that decision is allowed, this Court will retain jurisdiction to decide whether the claim should be converted to an action. The submissions already made by the parties on the conversion issue can be considered by this Court in the context of any directive from the Court of Appeal.

COSTS

[77] If the parties are unable to agree concerning costs, they may make written representations within 30 days of receiving these reasons.

J.