

Federal Court



Cour fédérale

**Date: 20231108**

**Docket: T-1662-21**

**Citation: 2023 FC 1493**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, November 8, 2023**

**PRESENT: Associate Chief Justice Gagné**

**BETWEEN:**

**ARI BEN MENASHE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**and**

**ROYAL BANK OF CANADA**

**Third Party**

**JUDGMENT AND REASONS**

I. Overview

[1] For more than ten years, Ari Ben Menashe has been denied access to basic banking services by the majority of Canadian chartered banks, the latest being the third party, Royal Bank of Canada [**RBC**].

[2] After unsuccessfully applying to Quebec's ordinary courts of law for redress, Mr. Ben Menashe is now asking this Court to order the Financial Consumer Agency of Canada [**Agency**] to investigate RBC's actions and apply the appropriate sanctions and orders, in application of sections 627.17(1), 627.18, 627.19, 980 and 989(3) of the *Bank Act*, SC 1991, c 46, as well as subsections 3(2), 5(1) and 19(1) of the *Financial Consumer Agency of Canada Act*, SC 2001, c 9 [**Agency Act**]. He is seeking the issuance of a writ of *mandamus* against the Agency, pursuant to sections 18 and 44 of the *Federal Courts Act*, RSC 1985, c. F-7, and is asking the Court to rule on his right to have access to basic banking services, and to order RBC to provide him with such services.

[3] Given that the applicant has not met the criteria for the issuance of a *mandamus* order against the Agency, and that this Court does not have the jurisdiction to grant him the other remedies sought, his application will be dismissed.

II. Facts

[4] In September 2011, the Canadian Imperial Bank of Commerce [CIBC] terminated the banking services to which the applicant had access, giving him 60 days' notice; the reason given for the termination was the risk he posed to CIBC's reputation.

[5] In his order dismissing the application of the Attorney General of Canada [AGC] to strike the Notice of Application, my colleague Justice Peter Pamel summarized the litigation between Mr. Ben Menashe and the various banks over the ensuing years as follows (*Menashe c Canada (Procureur général)*, 2022 CF 178, at para 3):

[TRANSLATION]

- On November 7, 2011, Mr. Ben Menashe filed applications with the Quebec Superior Court for a safeguard order, an interlocutory injunction and a permanent injunction against the Canadian Imperial Bank of Commerce [CIBC] to force it to continue doing business with him. The safeguard order was denied and Mr. Ben Menashe subsequently discontinued his claim (file 500-17-068752-115).
- On August 10, 2018, Mr. Ben Menashe filed a claim for damages before the Court of Quebec against Amex Bank of Canada for having cancelled his payment card without reason and without prior notice (file 500-22-249233-183). Judge Martin Bergeron dismissed that application on April 21, 2021 (*Ben Menashe v Amex Bank of Canada*, 2021 QCCQ 3586).
- On January 30, 2019, Mr. Ben Menashe filed an originating application with the Quebec Superior Court against the Department seeking an order that would compel the Agency to investigate the financial institutions involved (Bank of Montreal, RBC and CIBC) and to apply the appropriate sanctions and orders, as well as implement a review system for financial institutions' decisions. Mr. Ben Menashe discontinued that claim in April 2019 (file 500-17-106460-192).

[6] Mr. Ben Menashe alleges that he contacted every major financial institution in Quebec during this period and was denied access to a bank account, bank card, credit card or any other banking service.

[7] With regard to the RBC, the applicant availed himself of a number of internal steps prior to approaching the Agency:

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- In October 2020, he went to the RBC branch at 1 Place Ville-Marie in Montreal to open a regular bank account, but was refused;
- A few days later, he sent a letter to RBC customer service, requesting an explanation for the refusal;
- In March 2021, RBC replied to the letter and simply stated that it was unable to grant Mr. Ben Menashe's request;
- Also in March 2021, the applicant sent a letter to the RBC Office of the Ombudsman, again requesting an explanation for the refusal to open a bank account for him;
- In April 2021, the RBC Ombudsman replied that matters relating to the bank's policies were outside the Ombudsman's mandate and that the Ombudsman could not compel the bank to maintain a relationship with a client.

[8] The applicant then turned to the external complaints body for financial institutions, ADR Chambers Banking Ombuds Office [ADR]:

[TRANSLATION]

- In June 2021, he sent a letter requesting ADR's assistance in his dispute with RBC;
- In July 2021, ADR replied that its mandate did not allow it to investigate matters relating to financial institutions' risk management policies or business decisions. It clarified that

the decision not to open a bank account was a matter under the bank's discretion, and that it was unable to compel a bank to do business with a client.

[9] Following this new refusal, the applicant turned to the Agency (letter dated August 16, 2021) and the Department of Finance (letter dated October 12, 2021), asking them to intervene and assist him in resolving his dispute with RBC.

[10] On October 18, 2021, the Agency replied to the applicant. It explained that it did not have a mandate to involve itself in the resolution of individual disputes between banks and consumers, nor did it have the authority to grant the remedies sought. It added that all banks are required to have an internal customer complaint management process, and referred the applicant to the one established by RBC.

[11] The applicant argues that he is going around in circles and has exhausted the remedies available to him, hence his application for a *mandamus* order.

[12] In June 2022, some of the legislative and regulatory provisions on which the applicant's application was initially based were amended. The *Access to Basic Banking Services Regulations*, SOR/2003-184 were repealed, and some of its provisions were incorporated by amendment into the *Bank Act*.

[13] The parties agree, however, that the amendments in question merely recast previous law and have no impact on this dispute. The parties have filed amended memoranda of fact and law,

and the application will be decided on the basis of the applicant's amended notice of application and the parties' most recent submissions.

### III. Issues

[14] The sole issue in this case is whether the applicant's application meets the cumulative criteria for the issuance of a *mandamus* order, namely:

- (1) there must be a public legal duty to act;
- (2) the duty must be owed to the applicant;
- (3) there must be a clear legal right to performance of that duty;
- (4) where the duty sought to be enforced is discretionary, certain additional principles apply:
  - (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
  - (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
  - (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
  - (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way and;
  - (e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
- (5) no adequate remedy is available to the applicant;
- (6) the order sought will have some practical value or effect;
- (7) the Court finds no equitable bar to the relief sought; and

(8) on a balance of convenience an order of *mandamus* should be issued.

*(Canada (Health) v The Winning Combination Inc*, 2017 FCA 101, leave to appeal to SCC refused, 37697 (April 12, 2018); *Lukács v Canada (Transportation Agency)*, 2016 FCA 202, para 29; *Apotex Inc v Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742, aff'd by 1994 CanLII 47 (SCC), [1994] 3 SCR 1100).

#### IV. Analysis

[15] The Agency is an agency of the Government of Canada established under subsection 3(1) of the *Agency Act* over which the Minister of Finance shall preside and for which the Minister shall be responsible. Subsection 3(2) of the Act states that the Agency's objects are to:

- (a) supervise financial institutions and the external complaints body to determine whether they are in compliance with
  - (i) the consumer provisions applicable to them, and
  - (ii) the terms and conditions or undertakings with respect to the protection of customers of financial institutions that the Minister imposes or requires, as the case may be, under an Act listed in Schedule 1 and the directions that the Minister imposes under this Act;
- (b) strive to protect the rights and interests of consumers of financial products and services and the public, taking into account the need of financial institutions to efficiently manage their business operations;
- (c) promote the adoption by financial institutions of policies and procedures designed to implement provisions, terms and conditions, undertakings or directions referred to in paragraph (a) — as well as voluntary codes of conduct that are adopted by financial institutions, and any public commitments made by them, that are designed to protect the rights and interests of their customers — and monitor the implementation of those voluntary codes and public commitments;

(c.1) promote the adoption by the external complaints body of policies and procedures designed to implement the provisions, terms and conditions, undertakings or directions referred to in paragraph (a);

(c.2) monitor and evaluate trends and emerging issues that may have an impact on consumers of financial products and services, and make information on those trends and issues public;

(d) strengthen the financial literacy of Canadians and promote consumer awareness about the obligations of financial institutions and the external complaints body under the consumer provisions applicable to them and about all matters connected with the protection of consumers of financial products and services; and

(e) foster, in co-operation with any department, agency or agent corporation of the Government of Canada or of a province, financial institutions and consumer and other organizations, an understanding of financial services and issues relating to financial services.

[16] The Agency is an agency that regulates and monitors the activities of financial institutions. Its role is to foster federally regulated financial institutions' compliance with their market conduct obligations, including their obligations to handle consumer complaints. So, while it may receive complaints from consumers about non-compliance with financial institutions' obligations under the *Bank Act*, this is only one of several sources of information it uses to fulfill its monitoring duties. And such complaints are only capable of resulting in the imposition of penalties, not the resolution of civil disputes between banks and individuals (for this distinction, see, for example, *Bank of Montreal v Marcotte*, 2014 SCC 55 at para 82).

[17] The *Agency Act* confers a number of powers on the Agency and imposes a number of obligations on it.



[18] The Agency has the duty to levy an annual assessment against each financial institution and the external complaints body to cover the expenses incurred for or in connection with the administration of the Act. This assessment constitutes a debt due to the Crown that may be recovered in any court of competent jurisdiction (subsection 18(6) of the *Agency Act*).

[19] Under sections 19 et seq. of the *Agency Act*, the Agency may impose penalties (up to a maximum of \$1,000,000 in the case of a violation that is committed by a natural person, and \$10,000,000 in the case of a violation that is committed by a financial institution) to foster compliance with the consumer provisions of the *Bank Act* and other legislation listed in the schedule to the *Agency Act* (sections 2 and 21.1 of the *Agency Act*). The decision to impose a penalty may be appealed to the Federal Court (subsection 24(1) of the *Agency Act*).

[20] It should be noted that the *Agency Act* does not define the term “court of competent jurisdiction”, but given that Parliament clarifies this when jurisdiction is granted to this Court, it seems clear that, in the absence of such mention, the jurisdiction is that of the provincial ordinary courts of law.

[21] The Agency is further mandated to inquire into, and report to the Minister from time to time on, all matters connected with the administration of consumer provisions (subsection 5(1) of the *Agency Act*).

[22] Lastly, the Minister tables before each House of Parliament an annual report showing the Agency’s operations and describing, in aggregate form, its conclusions on the compliance by

financial institutions and the external complaints body with the consumer provisions applicable to them.

[23] In other words, when the Agency collects information from consumer complaints, it does not collect or use it to respond to individual complaints or to handle or resolve individual consumer complaints against financial institutions.

[24] Rather, it uses this information to take all measures at its disposal to ensure that the activities of federally regulated financial institutions comply with the market conduct obligations to which they are subject under legislative and regulatory provisions, codes of conduct and public commitments.

[25] Under the *Bank Act*, financial institutions are responsible for handling and resolving individual consumer complaints. They must have an internal complaints process, and in the event they are unable to resolve complaints to the consumer's satisfaction, they must provide access to an external complaints process that complies with the requirements of the *Bank Act*.

[26] That said, the *Bank Act* does provide that, on the request, made in person at a bank branch, of a natural person who is able to provide evidence of his or her identity, the bank will open a retail deposit account (section 627.17 of the *Bank Act*). However, this right to basic banking services is not without limits. The bank retains the discretion to refuse to open an account in the cases listed in section 627.18 of the *Bank Act*, or if it is of the opinion that this would pose a commercial or reputational risk to the bank. The bank must then notify the person

in writing of its refusal (section 627.19) and of the internal and external complaints processes (sections 627.19 and 627.25). The bank is not obliged to provide the reason for its refusal (*Jeyanandan v BMO Wealth Management*, 2023 ONSC 4352).

[27] Unlike the *Agency Act*, the *Bank Act* provides a definition of the term “court” (“*tribunal*” in French). In the province of Quebec, this is the Superior Court of Quebec. With a few specific exceptions (mainly appeals from decisions of the Superintendent of Financial Institutions or the Minister of Finance, which have no relevance to the case at hand), the Superior Court has jurisdiction over disputes between banks and their clients. This is particularly true of the recourse provided for in subsection 989(3) of the *Bank Act*, on which the applicant is basing the present application in part, and which reads as follows:

**Compliance or restraining order — consumer provisions**

(3) If a bank or an authorized foreign bank or any director, officer, employee or agent of one does not comply with any applicable consumer provision, the Commissioner or any complainant may, in addition to any other right that that person has, apply to a court for an order directing the bank, authorized foreign bank, director, officer, employee or agent to comply with — or restraining the bank, authorized foreign bank, director, officer, employee or agent from acting in breach of — the consumer provision and, on the application, the court may

**Dispositions visant les consommateurs**

(3) Le commissaire ou un plaignant peut, en plus de tous ses autres droits, demander au tribunal une ordonnance enjoignant à la banque ou à la banque étrangère autorisée ou à ceux de ses administrateurs, dirigeants, employés ou mandataires qui ne respectent pas les dispositions visant les consommateurs applicables de s’y conformer, ou leur interdisant d’y contrevenir; le tribunal peut acquiescer à la demande et rendre toute autre ordonnance qu’il juge indiquée.

so order and make any further order it thinks fit.

[28] Now, if we combine the first two criteria applicable to the issuance of an order of *mandamus*, the question is whether the Agency, in light of the provisions of the *Agency Act* and the *Bank Act*, has a public legal duty to act on the applicant's behalf corresponding to the remedies sought.

[29] The answer to this question is obviously negative.

[30] Not only does the Agency have no legal duty towards the applicant (other than to receive his complaint, process it and consider it in the preparation of its annual report), but the remedies sought by the applicant, insofar as section 627.17 of the *Bank Act*, has been violated, fall within the jurisdiction of the Superior Court of Quebec.

[31] As the first two criteria have not been met, it is not necessary to pursue the analysis any further.

## V. Conclusion

[32] Given that the applicant has not demonstrated that the Agency has a legal duty to act on his behalf, and given that this Court has no jurisdiction to grant the remedies he is seeking, his application for judicial review is dismissed.

[33] By email dated September 20, 2023, the parties notified the Court that they had agreed that the defaulting party should be ordered to pay costs assessed at \$5,700; it will be so ordered.

**JUDGMENT in T-1662-21**

**THIS COURT'S JUDGMENT is as follows:**

1. The application for judicial review is dismissed;
2. Costs in the amount of \$5,700 are awarded to the respondent.

“Jocelyne Gagné”  
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Associate Chief Justice

Certified true translation  
Sebastian Desbarats

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1662-21

**STYLE OF CAUSE:** ARI BEN MENASHE v ATTORNEY GENERAL OF CANADA and ROYAL BANK OF CANADA

**PLACE OF HEARING:** MONTREAL, QUEBEC

**DATE OF HEARING:** SEPTEMBER 6, 2023

**JUDGMENT AND REASONS:** GAGNÉ A.C.J.

**DATED:** NOVEMBER 8. 2023

**APPEARANCES:**

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