File No. T-1736-14

FEDERAL COURT

BETWEEN:

GWENDOLYN LOUISE DEEGAN and KAZIA HIGHTON

PLAINTIFFS

and

THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF NATIONAL REVENUE

DEFENDANTS

MEMORANDUM OF FACT AND LAW OF THE PLAINTIFFS, GWENDOLYN LOUISE DEEGAN and KAZIA HIGHTON

Motion for Summary Trial
Hearing: January 28-February 1, 2019 in Vancouver BC

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MEMORANDUM OF FACT AND LAW OF THE PLAINTIFFS

PART I: STATEMENT OF FACTS

A. Introduction

1. This summary trial is about the constitutionality of the *Canada-United States Enhanced Tax Information Exchange Agreement Implementation Act*,[1] and ss. 263 to 269 of the *Income Tax Act*[2] (collectively, the "**Impugned Provisions**").

2. The Impugned Provisions implement an Intergovernmental Agreement[3] (the "**IGA**") between Canada and the United States, which resulted from United States legislation entitled the *Foreign Account Tax Compliance Act* ("**FATCA**").

3. FATCA requires financial institutions around the world to search their records for accounts belonging to individuals whom it defines as "United States Persons" ("**US Persons**"). After the United States enacted FATCA, and as a consequence of it, Canada entered into the IGA and subsequently enacted the Impugned Provisions.

4. Broadly speaking, the Impugned Provisions cause Canada to act as an intermediary between Canadian financial institutions ("**Canadian FIs**")[4] and the United States Internal Revenue Service ("**IRS**"). Canadian FIs are required to provide Canada with certain information ("**Accountholder Information**") concerning financial accounts belonging to US Persons, and Canada then provides that information to the IRS.

5. This Memorandum of Fact and Law explains the plaintiffs' contention that the Impugned Provisions are unconstitutional because they are inapplicable to provincially regulated financial institutions on the basis of s. 92(13) of the *Constitution*

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[1] *Canada-United States Enhanced Tax Information Exchange Agreement Implementation Act*, being s. 99 and Schedule 3 of the *Economic Action Plan 2014 Act, No. 1*, S.C. 2014, c. 20 [***Implementation Act***], Motion Record ("**MR**") Vol. 8, Tab 40

[2] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [***ITA***], MR Vol. 8, Tab 45

[3] *Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital*, February 5, 2014, Can. T.S. 2014, No. 16, Appendix B, MR Vol. 9, Tab 86

[4] As defined in the IGA, Article 1(l)(1), MR Vol. 10, Tab 86

Act, 1867 and the doctrine of interjurisdictional immunity; unjustifiably infringe s. 8 of the *Charter of Rights and Freedoms* (the "***Charter***"); unjustifiably infringe s. 15 of the *Charter*; and unjustifiably infringe s. 7 of the *Charter*.

6. To the extent the Impugned Provisions unjustifiably infringe any section of the *Charter*, the plaintiffs seek declarations that they are of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*.

B. United States Tax Law

7. The United States deems all US citizens as permanent tax residents in the United States for federal income tax purposes. It taxes the worldwide income of US Persons regardless of whether they live, work, or earn income in the United States. Therefore, US Persons are subject to US federal taxation on all of their income from all sources, wherever derived. This practice is often referred to as "citizenship-based taxation" ("**CBT**"). Accordingly, every Canadian resident who is a US citizen, even if he or she is also a Canadian citizen, is subject to US federal taxation on all of their income from all sources, wherever derived. The United States is apparently the only country in the world, and certainly the only country with a robust tax system such as Canada's, that comprehensively treats individuals as residents for tax purposes by virtue of their status as citizens or legal permanent residents.[5]

8. While US Persons resident in Canada can credit limited and specific taxes paid to Canada and to Canadian provinces against some taxes they would otherwise owe the United States, they are subject to United States taxation for some events that are not taxable in Canada, but are taxable in the United States even if they take place in Canada. For example, when US Persons resident in Canada realize capital gains on a personal residence (which is not a taxable event in Canada, but generally is in the United States), they can be exposed to significant tax liability to the United States. The extent to which Canadian residents who have US Person status are subject to United

[5] Affidavit of Allison Christians sworn April 28, 2015 ("**Christians Affidavit**"), Ex. C, ¶9, *fn* 29, MR Vol. 1, Tab 5, p. 95; Affidavit of Kevyn Nightingale sworn November 1, 2016 ("**Nightingale Affidavit #1**"), Ex. A, p. 4, MR Vol. 2, Tab 16, p. 934

States tax is not known because taxpayer data is confidential and neither country tracks the tax paid to the United States by Canadian residents on Canadian-sourced income.[6]

9. The United States estimates that fewer than 10% of all individuals who do file US tax returns from a "tax home" located outside the United States ultimately owe any tax to the United States. Regardless of whether any tax is due, however, the United States requires extensive financial and asset reporting, for which noncompliance attracts extensive penalties.[7]

10. US Persons resident in Canada must also fulfill annual tax form filing and financial asset reporting obligations to the United States, in most cases unrelated to any tax due. Failure-to-file, failure-to-pay, accuracy-related, and information return penalties are generally assessed in cases in which United States citizens fail to make required form submissions. These penalties can be significant.[8]

11. For example, if a person considered by the United States to be a citizen or resident is established to have willfully failed to file a return, to provide required information, or to pay tax, she or he can be subject to criminal sanction, including imprisonment. For example, US Persons who own or have signing authority over Canadian bank accounts with an aggregate value over $10,000 must file FinCEN (Financial Crimes Enforcement Network) Form 114, common known as a Foreign Bank Account Report, or "FBAR". The penalty for *non*-willful failure to file an FBAR is $10,000 *per year per account*. The penalty for willful failure to file an FBAR is the greater of 50% of the value of the account or $100,000, and up to five years in prison.[9]

C. U.S. Immigration Law

12. The United States automatically considers anyone born in the United States to be a citizen and therefore a US Person. Other circumstances – such as parentage – can

[6] Christians Affidavit, Ex. C, ¶¶9-12, MR Vol. 1, Tab 5, pp. 95-99; Nightingale Affidavit #1, Ex. A, p. 6, MR Vol. 2, Tab 16, p. 936
[7] Christians Affidavit, Ex. C, ¶¶10-11, MR Vol. 1, Tab 5, pp. 95-96
[8] Christians Affidavit, Ex. C, ¶13, MR Vol. 1, Tab 5, pp. 99-101; Affidavit of Robert W. Wood, sworn April 29, 2015 ("**Wood Affidavit**"), Ex. C, pp. 8-9, MR Vol. 2, Tab 7, pp. 771-72; Affidavit of Roy Berg sworn December 15, 2016 ("**Berg Affidavit**"), Ex. A, pp. 19-25, MR Vol. 3, Tab 22, pp. 1073-79
[9] Berg Affidavit, Ex. A, pp. 21-22, MR Vol. 3, Tab 22, pp. 1075-76

also lead to a person being deemed to be a citizen by the United States, even if they were born outside the United States. Some individuals are considered by the United States to be US citizens despite never having had any substantive connection to the United States. For example, individuals born in the United States decades ago out of pure happenstance, who left the United States as infants (sometimes referred to as "**accidental Americans**"), can nonetheless be considered US citizens under US law.[10]

13. Until 2004, U.S. citizenship for tax purposes was determined by reference to U.S. immigration law, and an individual ceased to be classified as a U.S. citizen for tax purposes at the same time their citizenship terminated for immigration purposes. However, in 2004, the *American Jobs Creation Act* introduced the concept of U.S. citizenship for tax purposes as distinct from U.S. citizenship for immigration purposes. It became possible for a person who ceased to be a U.S. citizen for immigration purposes to nonetheless remain a citizen for tax purposes.[11]

14. In 2008, the *Heroes Earnings Assistance and Relief Tax Act of 2008* [***HEART***] enacted numerous changes to the date on which U.S. citizenship is lost for tax purposes. Under *Heart*, tax citizenship is not terminated unless a Certificate of Loss of Nationality ("**CLN**") has been issued. Read literally, *HEART* directs that this requirement applies retroactively, not just prospectively. The result is that a person who lost their citizenship for immigration purposes long ago – and would have lost their tax citizenship as well under previous law – nonetheless may retain their tax citizenship today if they did not obtain a CLN when they lost their citizenship for immigration purposes, although there is uncertainty with respect to whether this is how the IRS itself interprets the legislation. It is also possible for a person to lose their U.S. citizenship but then subsequently regain it – likely without their knowledge – as a result of legislation which previously removed their citizenship being later ruled unconstitutional.[12]

15. Given the complexities associated with U.S. immigration law, as a practical

[10] Berg Affidavit, Ex. A, pp. 6, 26, MR Vol. 3, Tab 22, pp. 1060, 1080
[11] Berg Affidavit, Ex. A, pp. 6, 8, 10, MR Vol. 3, Tab 22, pp. 1060, 1062, 1064
[12] Berg Affidavit, Ex. A, pp. 11-15, MR Vol. 3, Tab 22, pp. 1065-69

matter it can be difficult for a person to determine whether they are a U.S. citizen for tax purposes, which can involve assessments of the legal consequences of events that took place many decades in the past. Individuals can expend considerable resources simply attempting to determine whether they are required to comply with U.S. tax filing and compliance requirements.[13]

16. A US Person who seeks to relinquish United States citizenship for tax purposes must apply for a CLN. In order to obtain a CLN, individuals must certify that they have brought themselves into compliance with United States tax laws for the previous five taxation years, which generally requires the filing of overdue tax returns and FBARs. Individuals seeking to obtain a CLN may be required to renounce their US citizenship before a consular official.[14]

17. Individuals who determine that they are US Persons, but desire not to be US Persons, must therefore obtain a CLN and ensure they are compliant with United States tax laws for the previous five taxation years. Putting aside the direct financial impact of so complying with US tax law, it can be expensive and onerous for a person to determine their overall US tax liability, and the United States generally charges fees for renouncing before a consular official and issuing a CLN.[15]

18. Under certain circumstances, a US Person applying to relinquish United States citizenship may also be subject to additional penalties and taxes due before or upon expatriation, commonly referred to as the "Exit Tax". The Exit Tax applies to individuals whose average US tax liability for the preceding five years, or alternatively their net worth, is above a certain threshold. Exposure to the Exit Tax results in

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[13] Affidavit of John Riendl, affirmed January 31, 2017 ("**Riendl Affidavit**"), ¶¶12-13, Ex. I and J, MR Vol. 3, Tab 24, pp. 1109-10, 1134-39; Affidavit of Danielle De Banné, affirmed February 28, 2017 ("**De Banné Affidavit**"), ¶¶8-13, MR Vol. 4, Tab 26, pp. 1210-11; Berg Affidavit, Ex. A, MR Vol. 3, Tab 22, pp. 1053-93

[14] Berg Affidavit, Ex. A, p. 18, MR Vol. 3, Tab 22 p. 1072; Cross-examination on Affidavit of Roy Andrew Berg held July 24, 2018, p. 28, ll. 22-27, MR Vol. 4, Tab 37, p. 2890

[15] De Banné Affidavit, ¶12, MR Vol. 4, Tab 26, p. 1211; Affidavit of Mona Nicholls, affirmed February 23, 2017 ("**Nicholls Affidavit**"), ¶¶8-14, MR Vol. 4, Tab 25, pp. 1156-58; Riendl Affidavit, ¶13, MR Vol. 3, Tab 24, pp. 1109-10; Affidavit of Marilyn Ginsburg, affirmed October 12, 2016 ("G**insburg Affidavit**"), ¶¶9-17, MR Vol. 2, Tab 15, pp. 905-08; Affidavit of Travis Miller, sworn November 17, 2016, ¶9, MR Vol. 2, Tab 18, p. 961; Affidavit of Carol Tapanila, sworn November 18, 2016 ("**Tapanila Affidavit**"), ¶¶14-21, MR Vol. 2, Tab 19, pp. 969-71

additional adverse tax consequences, and it may result in double taxation because tax paid as a result of the Exit Tax will usually not be available to use as a foreign tax credit in Canada.[16]

19. Accordingly, it can be expensive and onerous for an individual to determine if they are a US citizen for tax purposes and, if they are a US citizen for tax purposes, to relinquish their status as such.

20. In practice, individuals may be effectively denied access to certain banking services because they are unable to produce a CLN to their financial institutions. This can occur even where the individual is not a US citizen, because some individuals who are not US citizens will not be able to produce a CLN to their financial institutions.[17]

D. FATCA

21. FATCA was introduced in the US House of Representatives in June of 2009 in an atmosphere of increased scrutiny concerning offshore income and asset tax compliance. Comments made by legislators indicate that the purpose of the legislation was to catch tax evaders and stop tax cheats.[18]

22. FATCA imposes reporting requirements on US Persons, including US Persons who are resident in and citizens of Canada. This reporting is required for all US Persons with assets outside of the United States whose value is in excess of certain thresholds based on their residency and filing status. For US Persons living abroad, including in Canada, reporting is required if they file as "single" or "married filing separately," and have specified foreign financial assets in excess of $200,000 (USD) on the last day of the tax year, or $300,000 at any point during the year. For US Persons living abroad who file a joint tax return (a return that reports the income of both spouses and carries joint and several liability for both spouses), the thresholds are $400,000 (USD) on the last day of the year, or $600,000 (USD) at any point during

[16] Affidavit of Kevyn Nightingale, sworn May 8, 2017 ("**Nightingale Affidavit #2**), Ex. A, pp. 2-4, MR Vol. 4, Tab 29, pp. 1291-93
[17] Berg Affidavit, Ex. A, pp. 25-27, MR Vol. 3, Tab 22, pp. 1079-81
[18] Wood Affidavit, Ex. C, *fn* 9, MR Vol. 2, Tab 7, p. 768

the year.[19]

23. Importantly, FATCA also imposes reporting requirements on non-US "financial institutions", which includes, *inter alia*, any entity that: accepts deposits in the ordinary course of a banking or similar business; holds financial assets for the account of others as a substantial portion of its business; or is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting or trading in securities, partnership interests, commodities or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities. FATCA requires foreign financial institutions to disclose the US Persons who are beneficial owners of foreign financial accounts. Such institutions are required to withhold 30% of all transactions sourced in the United States, payable to the US Treasury (the "**Withholding Tax**"). The Withholding Tax is waived if the foreign financial institution agrees to disclose its US Person accountholders.[20]

24. The immediate purpose of FATCA was to force foreign financial institutions to disclose to the United States foreign financial assets owned by US Persons. This was part of a broader effort on the United States' part to prevent tax evasion and force compliance with US tax reporting requirements.[21]

25. One of the effects of FATCA is that financial damage may be inflicted upon financial institutions that do not agree or cannot agree to disclose their US accountholders to the United States.

E. The IGA, the *Implementation Act*, and the *Income Tax Act*

26. FATCA raised a number of issues for Canada, including that Canadian FIs could not comply with certain aspects of FATCA due to Canadian domestic legal impediments, such as privacy legislation. As a result, Canada engaged with the United States in an attempt to find a means of implementing FATCA that would be acceptable to Canada and compliant with Canadian law. These efforts ultimately resulted in the

[19] Wood Affidavit, Ex. C, p. 8, MR Vol. 2, Tab 7, p. 771
[20] Wood Affidavit, Ex. C, p. 7, MR Vol. 2, Tab 7, p. 770
[21] Wood Affidavit, Ex. C, p. 2, MR Vol. 2, Tab 7, p. 765

IGA, which Canada and the United States executed on February 5, 2014. Canada approved the IGA and gave it force of law in Canada by enacting the *Implementation Act*.[22]

27. Generally speaking, the IGA requires Canada to collect information about certain accounts maintained by certain Canadian FIs that are held by one or more US Persons, or accounts that are held by a legal arrangement or legal person (such as a corporation or a trust) that is controlled by one or more US Person ("**US Reportable Accounts**").[23]

28. With respect to each US Reportable Account, the information that Canada must collect from Canadian FIs includes:

a. the name and address of each US Person or person associated with a US Person Indicia that is an accountholder;

b. the taxpayer identifying number ("**TIN**") of each US Person or person associated with a US Person Indicia that is an accountholder, or if TIN is not in the records of the Canadian financial institution, the accountholder's birth date;

c. the name and identifying number of the Canadian financial institution;

d. the account number and balance and/or value of the account; and

e. the gross amount of interest, dividends and other income generated by the account or the assets held in the account, including the gross proceeds from the sale or redemption of any property held in the accounts,

(collectively, the "**Accountholder Information**").[24]

29. The IGA requires Canada to collect Accountholder Information with respect to

[22] Affidavit of Kevin Shoom sworn April 13, 2018 ("**Shoom Affidavit**"), MR Vol. 7, Tab 32, pp. 2777-2818; IGA, Preamble, MR Vol. 10, Tab 86
[23] IGA, Articles 1(1)(cc) and 2(2), MR Vol. 10, Tab 86
[24] IGA, Article 2(2)(a), MR Vol. 10, Tab 86

each US Reportable Account held at each Canadian financial institution, and then provide that information to the United States on an automatic basis.[25]

30. The Canadian FIs to which the IGA applies include any financial institution that is resident in Canada or any non-resident financial institution with a branch in Canada. Generally speaking, so long as Canadian FIs disclose to Canada Accountholder Information associated with US Reportable Accounts, and Canada then discloses that Accountholder Information to the United States, those Canadian FIs will be deemed complaint with FATCA and not subject to the Withholding Tax.[26]

31. Whether or not an account is a US Reportable Account is determined by Canadian FIs by following the due diligence procedures set out in Annex I to the IGA and in the Impugned Provisions (the "**Due Diligence Procedures**"). Certain kinds of accounts (such as RRSPs, TFSAs and RESPs) are excluded from the operation of the IGA and the Impugned Provisions and are not US Reportable Accounts. Different Due Diligence Procedures apply to accounts opened before and after June 30, 2014, and to **Low Value Accounts** (an account with a balance or value of less than $50,000, or a cash value insurance contract or annuity contract with a value of less than $250,000), **Lower Value Account**s (an account with a value of between $50,000 and $1,000,000, or a cash value insurance contract or annuity contract with a value between $250,000 and $1,000,000), and **High Value Accounts** (an account with a value of more than $1,000,000).[27]

32. The due diligence procedures followed by Canadian FIs generally require them to search their account records for indications that the accountholder is a US Person ("**US Person Indicia**"). US Person Indicia include any of the following information when it appears in a record relating to an account held by an individual at a Canadian financial institution: identification of the accountholder as a United States citizen or resident; unambiguous identification of a place of birth in the United States; current United States mailing or residence address; standing instructions to transfer funds to

[25] IGA, Articles 2, 3, MR Vol. 10, Tab 86
[26] IGA, Articles 1(1)(g) and 1(1) (q) and 4, MR Vol. 10, Tab 86
[27] IGA, Article 1(1) (s) and Annex II, MR Vol. 10, Tab 86

an account maintained in the United States; currently effective power of attorney or signatory authority granted to a person with a United States address; or an "in-care-of" or "hold mail" address that is the sole address relating to the account.[28]

33. If a financial institution does not detect any US Person Indicia associated with an account, it need not take any other steps with respect to that account unless and until there is a change of circumstances that results in one or more US Person Indicia being associated with the account.[29]

34. The Due Diligence Procedures vary depending on the value of the financial account and whether the account is a Low Value Account, Lower Value Accounts, or High Value Account. Financial institutions *may* designate Low Value Accounts as non-reportable accounts, in which case they need not review these account records or report these accounts. But financial institutions have discretion: they are not *required* to make that designation and may instead elect to treat these accounts as US Reportable Accounts.[30]

35. If a financial institution discovers US Person Indicia associated with a Lower Value Account or a High Value Account, it must attempt to obtain or review information and documents that would clarify whether or not the accountholder is a US Person (the "**Proof of Loss of US Citizenship**"). For example, where the US Person Indicia detected is an unambiguous US place of birth, the Canadian financial institution must seek or obtain all of the following documents and information: a self-certification that the accountholder is neither a US citizen nor a US resident for tax purposes; a non-US passport or other government-issued identification evidencing the accountholder's citizenship or nationality in a country other than the United States; and a copy of the accountholder's Certificate of Loss of Nationality or a reasonable explanation of either the reason the accountholder does not have a Certificate of Loss of Nationality despite relinquishing US citizenship or the reason the accountholder did not obtain US citizenship at birth. If the Canadian financial institution cannot obtain

[28] IGA, Annex I, s. II(B), MR Vol. 10, Tab 86
[29] IGA, Annex I, cl. II(B)(2) and II(D)(5), MR Vol. 10, Tab 86
[30] IGA, Annex I, ss. II and III, MR Vol. 10, Tab 86; *ITA*, ss. 264, 265(5), MR Vol. 8, Tab 45

or review a Proof of Loss of US Citizenship for an account associated with a US Person Indicia, the Canadian financial institution must treat the account as a US Reportable Account.[31]

36. Some financial institutions have apparently elected to treat Low Value Accounts as US Reportable Accounts. Individuals with Low Value Accounts have had their accounts frozen, and have been told that their accounts will not be reopened unless and until they present a CLN. As well, at least one individual with a Lower Value Account has been informed that her financial institution's policy is not to accept any "reasonable explanations" for an individual's lack of a CLN, but rather that it will only accept a CLN as Proof of Loss of US Citizenship.[32]

37. Article 2 of the IGA requires Canada to collect Accountholder Information about US Reportable Accounts from Canadian FIs and then provide that information to the United States. According to Article 2 of the IGA, Canada's disclosure of the Accountholder Information occurs annually and on an automatic basis pursuant to the provisions of Article XXVII of the *Tax Treaty Act*.[33]

F. The Plaintiffs

38. Gwendolyn Louise Deegan ("**Gwen**") is a Canadian citizen, business person, and graphic designer living in Toronto, Ontario. Gwen was born in Washington State in 1962 to an American citizen and a Canadian citizen. Gwen and her parents resided in the United States from the time of her birth until approximately 1967, when Gwen and her parents returned to Canada. Gwen has not resided in the United States since she was five years old.[34]

39. Kazia Highton ("**Kazia**") is a Canadian citizen and elementary school teacher living in Victoria, British Columbia. Kazia was born in Michigan in 1982 to Canadian

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[31] IGA, Annex I, ss. II(B)(4) and II (D)(5)(b), MR Vol. 10, Tab 86
[32] Affidavit of Kathleen Sullivan, affirmed March 3, 2017 ("**Sullivan Affidavit**"), ¶15, Ex. F and H, MR Vol. 4, Tab 27, pp. 1251-52
[33] IGA, Article 2(1), MR Vol. 10, Tab 86; *Canada-United States Tax Convention Act, 1984*, S.C. 1984, c. 20, Article XXVII [***Tax Treaty Act***], MR Vol. 8, Tab 41
[34] Affidavit of Gwendolyn Louise Deegan, sworn April 27, 2015 ("**Deegan Affidavit**"), ¶¶2-7, 20, MR Vol. 1, Tab 4, pp. 58-59, 61

citizen parents. Kazia has a United States Social Security Number.[35]

40. Both plaintiffs have accounts at Canadian FIs. The Accountholder Information relating to some of these accounts or other accounts that may be opened by the plaintiffs may be disclosed to the United States pursuant to the Impugned Provisions, because both plaintiffs were born in the United States and their account records may therefore contain US Person Indicia.[36]

41. Neither plaintiff has ever filed a United States tax return or paid any United States taxes. Nevertheless, both may be subject to significant penalties for failure to file tax returns and/or information forms.[37]

PART II: STATEMENT OF POINTS IN ISSUE

42. In addition to the question of whether issues in this motion are suitable for determination by summary trial, the plaintiffs say there are four other issues to be decided on this motion:

a. whether the Impugned Provisions apply to provincially regulated financial institutions;

b. whether the Impugned Provisions unjustifiably infringe s. 7 of the *Charter* and are of no force and effect;

c. whether the Impugned Provisions unjustifiably infringe s. 8 of the *Charter* and are of no force and effect; and

d. whether the Impugned Provisions unjustifiably infringe s. 15 of the *Charter* and are of no force and effect.

[35] Affidavit of Documents of Kazia Marie Highton, affirmed July 27, 2017, MR Vol. 5-7, Tab 31, pp. 1854-2776
[36] Deegan Affidavit, ¶26, Ex. F-G, MR Vol. 1, Tab 4, pp. 63, 69-72; Affidavit of Documents of Kazia Marie Highton, affirmed July 27, 2017, MR Vol. 5-7, Tab 31, pp. 1854-2776
[37] Deegan Affidavit, ¶¶19-20, MR Vol. 1, Tab 4, p. 61; Berg Affidavit, Ex. A, pp. 20-25, MR Vol. 3, Tab 22, pp. 1074-79

PART III: STATEMENT OF SUBMISSIONS

A. The Issues in this Motion are Suitable for Determination by Summary Trial

43. The issues canvassed in this motion are suitable for summary trial under Rule 216 of the Federal Court Rules. In determining whether a matter is suitable for summary trial, the court may consider, *inter alia*: "the complexity of the matter; the cost of a conventional trial in relation to the amount involved; the course of the proceedings; whether the litigation is extensive; whether credibility is a crucial factor; whether the summary trial will involve a substantial risk of wasted time and effort; and whether the summary trial will result in litigating in slices."[38]

44. The considerations noted above militate in favour of a finding that the issues in this motion are appropriately dealt with by summary trial: deciding the issues in this motion will not require any determinations of credibility; a conventional trial would be very expensive compared to a summary trial; and this summary trial will not involve wasted time and effort because it will determine all of the remaining outstanding issues in this proceeding – this is not litigation in slices.

B. The Impugned Provisions are Inapplicable to Provincially Regulated Financial Institutions

45. The doctrine of interjurisdictional immunity directs that the Impugned Provisions are inapplicable to provincially regulated financial institutions.

46. A federal statute, even if *intra vires*, may be inapplicable in certain circumstances pursuant to the doctrine of interjurisdictional immunity if its application would trench upon the core of a provincial power, and the statute's effect on the exercise of the provincial power is sufficiently serious to invoke the doctrine.[39]

47. The Impugned Provisions trench upon the core of the provincial power over property and civil rights because they constitute the regulation of a particular industry – the financial industry – and the regulation of this particular industry is an exercise of

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[38] Federal Court Rules 213 and 216, MR Vol. 8, Tab 44; *Collins v. Canada*, 2014 FC 307, ¶40, MR Vol. 8, Tab 54

[39] *Quebec v. Canadian Owners and Pilots Association*, 2010 SCC 39, ¶¶25-27, MR Vol. 9, Tab 63

the provinces' core powers over property and civil rights.[40]

48. "Near banks" such as trust companies, credit unions, and caisses populaires, are provincially regulated. The Supreme Court of Canada has held that this is so irrespective of the federal power over banking in s. 91(15) of the *Constitution Act, 1867*. The Canadian Parliament has never before attempted to regulate the activities of these institutions.[41]

49. The impairment of the provincial power over property and civil rights is sufficiently serious to invoke the doctrine because it interferes with the relationship of confidence between provincially regulated financial institutions and their clients. As discussed below in the context of s. 8 of the *Charter*, financial records *prima facie* attract a reasonable expectation of privacy. Those records are formed in a confidential relationship between the individual and the financial institution.[42]

50. By undermining the relationship of confidence between provincially regulated financial institutions and their clients, the Impugned Provisions seriously interfere with the core of the provincial power over property and civil rights. Simply, Canada does not have jurisdiction to direct a provincially regulated financial institution to transfer private information about property it holds in trust for its customers – the Accountholder Information – to Canada for further distribution to a foreign state.

C. The Impugned Provisions Violate Section 8 of the *Charter*

51. Section 8 of the *Charter* states: Everyone has the right to be secure against unreasonable search or seizure. To claim s. 8 protection, a person must establish that they have a reasonable expectation of privacy in the subject matter of the search and/or seizure.[43] Determining whether the Impugned Provisions violate s. 8 requires assessing whether they cause a search and/or seizure and, if so, whether the search

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[40] *Reference Re Securities Act*, 2011 SCC 66, MR Vol. 10, Tab 81
[41] *Canadian Pioneer Management Ltd. et al. v. Labour Relations Board of Saskatchewan et al.*, [1980] 1 SCR 433, MR Vol. 8, Tab 51; Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough: Thomson Carswell, 2007), 24-3 to 24-7
[42] *R. v. Chusid*, 2001 CanLII 28074 (ON SC) [***Chusid***], ⁋⁋44-46, MR Vol. 9, Tab 66
[43] *R. v. Marakah*, 2017 SCC 59, ¶10, MR Vol. 10, Tab 72

and/or seizure is reasonable.

52. The Impugned Provisions authorize both a search and a seizure. In order to constitute a seizure, the taking at issue need not be carried out by the state directly against the person affected. A seizure can occur when a person's information is taken by the state from a third party, such as a financial institution.[44]

53. In the present case, the subject matter of the search and seizure is Accountholder Information belonging to the plaintiffs and other individuals in reasonable hypothetical situations, which may be transmitted to both Canada and the United States. The court may consider reasonable hypothetical situations to determine whether a law complies with the *Charter*.[45]

54. The plaintiffs and other reasonable hypothetical individuals have a reasonable expectation of privacy in their Accountholder Information. Canadian courts have observed that personal financial information *prima facie* attracts a reasonable expectation of privacy, and that individuals can reasonably expect their financial institutions to keep their information confidential. The fact that the Accountholder Information is already in the hands of Canadian FIs does not affect the plaintiffs' and hypothetical others' reasonable expectations of privacy in that information.[46]

55. Canada pleads that because the plaintiffs and other US Persons have pre-existing obligations to report certain information to the IRS under US law, their privacy interest in that information is minimal. This overlooks at least two important facts.[47]

56. First, although some US Persons in Canada have obligations under US law to report their Accountholder Information to the IRS, they generally *do not* have an

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[44] *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 SCR 406, at 439-42, MR Vol. 8, Tab 55; *R. v. Colarusso*, [1994] 1 SCR 20, at 56, MR Vol. 9, Tab 67

[45] *R. v. Appulonappa*, 2015 SCC 59, ¶28, MR Vol. 9, Tab 64; *R. v. Nur*, 2015 SCC 15 [***Nur***], ⁋⁋51-58, MR Vol. 10, Tab 76

[46] *R. v. McKinlay Transport Ltd.*, [1990] 1 SCR 627 [***McKinlay Transport***], pp. 641-42, MR Vol. 10, Tab 73; *Schreiber v. Canada (Attorney General)*, [1998] 1 SCR 841, p. 856, MR Vol. 10, Tab 83; *Chusid*, ⁋46, MR Vol. 9, Tab 66; *R. v. Wong*, [1990] 3 SCR 36, MR Vol. 10, Tab 80; *Alberta Treasury Branches v. Leahy*, 2000 ABQB 575, ⁋331, MR Vol. 8, Tab 46

[47] Amended Statement of Defence filed July 22, 2016, ⁋52, MR Vol. 7, Tab 38, p. 2907

obligation to report this information to Canada. Canada has admitted that the Accountholder Information it receives as a result of the Impugned Provisions can be used for *domestic* tax compliance purposes.[48] As a result, Canada has enhanced information with respect to individuals whose Accountholder Information is reported to it pursuant to the Impugned Provisions, whether those individuals are US Persons or not, as compared to individuals whose Accountholder Information is not reported. Accordingly, the search and seizure of the Accountholder Information that takes place pursuant to the Impugned Provisions results in that information being in the possession of, and potentially actionable by, both Canada and the United States.

57. Second, it is not disputed that many individuals whose Accountholder Information is shared with the IRS pursuant to the Impugned Provisions do not, in fact, have any reporting obligations under US law. Canada admits that it does not know how many account records have been shared with the IRS which are associated with individuals who are not US Persons.[49] Simply, the Impugned Provisions cause Accountholder Information belonging to non-US Persons to be shared with the United States, and the extent to which this occurs is unknown because Canada does not keep track. It is therefore reasonable to hypothesize that non US-Person Canadian citizens have had, and will have, their Accountholder Information shared with both Canada and the United States pursuant to the Impugned Provisions.

i. The Search and Seizure Pursuant to the Impugned Provisions is Unreasonable

58. In order to establish that the searches authorized by the Impugned Provisions are reasonable, Canada must demonstrate that the Impugned Provisions are themselves reasonable, and that the manner in which the search and seizure they authorize takes place is reasonable.[50] This requires Canada to demonstrate an important state objective, that the privacy intrusion goes no further than necessary to reasonably

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[48] Cross-Examination on Affidavit of Sue Murray held on July 22, 2015 ("**Murray Cross**"), QQ. 60-62, MR Vol. 7, Tab 34, pp. 2877-78

[49] Affidavit of Sue Murray, sworn July 22, 2016 ("**Murray Affidavit**"), Ex. A, QQ. 24-26, MR Vol. 2, Tab 12, p. 870

[50] *Hunter v. Southam*, [1984] 2 SCR 145 [***Hunter***], at 161, MR Vol. 8, Tab 58; *R. v. Mann*, 2004 SCC 52, ¶36, MR Vol. 9, Tab 71

achieve that objective, and that the intrusion is subject to judicial supervision to guard against abuse.[51]

59. Canada cannot demonstrate that the searches and seizures authorized by Impugned Provisions are reasonable because (a) they are warrantless and lack any judicial supervision of any kind, (b) it is impossible to test their reliability in achieving their objective, and (c) they almost certainly capture an inordinate number of individuals who have no US tax and reporting obligations.

ii. The Impugned Provisions Authorize Warrantless Searches

60. Warrantless searches are presumptively unreasonable and Canada bears the onus of establishing otherwise.[52] Notably, but for the Impugned Provisions, Canada would require a warrant in order to require Canadian FIs to disclose to it the Accountholder Information of unnamed US Persons.[53]

61. That the Impugned Provisions authorize warrantless searches without any notice or means of judicial review of any kind is undisputed and fatal to their reasonableness. The reason prior authorization is presumptively required for a search to comply with s. 8 is to prevent unreasonable searches.[54] Canada does not employ any meaningful safeguards to ensure transparency and accountability in terms of how searches pursuant to the Impugned Provisions are conducted; rather, it leaves their conduct to the discretion of Canadian FIs. Even when conducted by the state, discretionary and unreviewable powers of search and seizure are unreasonable and contrary to s. 8.[55]

iii. It is Impossible to Test the Reliability of the Impugned Provisions

62. For the Impugned Provisions to be reasonable they must strike a reasonable balance between an important state objective and the invasion of privacy they occasion. This involves an assessment of the reliability of the means employed by the

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[51] *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 [***Goodwin***], ¶96, MR Vol. 8, Tab 57
[52] *Goodwin*, ¶56, Vol. 8, Tab 57
[53] *ITA*, s. 231.2(2), MR Vol. 8, Tab 45
[54] *R. v. Tse*, 2012 SCC 16, ¶¶82-84, MR Vol. 10, Tab 79; *Hunter*, p. 161, MR Vol. 8, Tab 58
[55] *Goodwin*, ¶¶69-71, 75, Vol. 8, Tab 57; *Hunter*, p. 166, MR Vol. 8, Tab 58

Impugned Provisions in achieving their objective, as well as the availability (or not) of judicial supervision.[56]

63. The state objective underlying the Impugned Provisions is to assist the United States in implementing FATCA and finding US tax evaders and cheats.[57] This is not an important Canadian objective. However, because Canada does not track even basic data concerning whose privacy is affected by the Impugned Provisions, it is impossible to review their reliability in achieving this objective. As a result, Canada cannot discharge its onus of demonstrating that the warrantless searches authorized by the Impugned Provisions are reasonable.

64. The determination as to whether a particular individual's Accountholder Information will be reported to both Canada and the United States is made solely by Canadian FIs, who have discretion in determining, *inter alia*, whether to report certain accounts – such as Lower Value Accounts – and what to accept as Proof of Loss of US Citizenship.[58] But Canada has admitted that it does not oversee – meaningfully or at all – the conduct of Canadian FIs in determining whose Accountholder Information will be reported to both Canada and the United States. It has admitted that it effectively has no data on the makeup of the accounts being reported pursuant to the Impugned Provisions, including the proportion of those accounts that are actually owned (or not) by US Persons, Canadian citizens, or persons having any tax-related obligations at all under US law.[59]

iv. The Impugned Provisions Capture an Inordinate Number of Innocent Individuals

65. While the reliability of the Impugned Provisions cannot be accurately tested, they almost certainly capture an inordinate number of individuals with no US tax obligations of any kind. The Supreme Court of Canada has stated that laws which

[56] *McKinlay Transport*, at 643, MR Vol. 10, Tab 73; *Goodwin*, ¶57, Vol. 8, Tab 57
[57] IGA, preamble, MR Vol. 10, Tab 86; Wood Affidavit, Ex. C, *fn* 9, MR Vol. 2, Tab 7, p. 768
[58] Cross-Examination of Cindy Negus, held July 20, 2018 ("**Negus Cross**"), p. 5, ll. 14-17, MR Vol. 7, Tab 36, p. 2885
[59] Murray Affidavit, Ex. A, QQ. 14-19, 22, 24-26, 33, MR Vol. 2, Tab 12, pp. 867-70, 874; Negus Cross, pp. 11-18, MR Vol. 6, Tab 36, pp. 2886-87F

capture an inordinate number of innocent individuals are not reasonable.[60]

66. Canada's evidence is that hundreds of thousands of accounts have been shared and will continue to be shared,[61] but that the IRS is likely to only prosecute a very small number of individuals as a result of information it obtains pursuant to the Impugned Provisions.[62] Accordingly, the Impugned Provisions capture orders of magnitude more individuals than necessary to achieve their objective.

67. Finally, it is impossible for Canada to establish that its own use for domestic tax compliance purposes of Accountholder Information obtained pursuant to the Impugned Provisions (to which it admits[63]) is reasonable because Canada's use of that information is unrelated to the objective underlying the Impugned Provisions. Canada only possesses this information as an incident to the Impugned Provisions, which are directed at providing this information to the United States, not Canada.

D. The Impugned Provisions Violate Section 15 of the *Charter*

68. Section 15(1) of the *Charter* provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

69. A law will violate s. 15(1) if it creates a distinction based on an enumerated or analogous ground, and that distinction is discriminatory in either purpose or effect. A distinction may be founded on the imposition of a burden that is imposed on a group of individuals based on an enumerated or analogous ground.[64]

70. The Impugned Provisions create a distinction between citizens and residents of Canada who are US Persons (the "**Group**") and those who are not. The distinction is based on national origin and citizenship. A key indicia of US personhood is a United

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[60] *Goodwin*, ¶67, Vol. 8, Tab 57; *R. v. Chehil*, 2013 SCC 49, ¶51, MR Vol. 9, Tab 65
[61] Negus Cross, pp. 11-12, MR Vol. 7, Tab 36, p. 2886-87
[62] Affidavit of Brian Skarlatos, sworn April 13, 2018, MR Vol. 7, Tab 33, pp. 2819-75
[63] Murray Cross, QQ. 60, 62, MR Vol. 7, Tab 34, pp. 2877-78
[64] *R. v. Kapp*, 2008 SCC 41 [***Kapp***], ¶17, MR Vol. 9, Tab 69

States place of birth.[65] This is because individuals born in the United States are automatically granted US citizenship. It is undisputed that the United States employs CBT and that the Impugned Provisions are directed at obtaining the Accountholder Information of individuals who may owe US tax. Accordingly, the Impugned Provisions are clearly directed at a group of individuals determined by national origin and citizenship, which are enumerated and analogous grounds, respectively.[66]

71. The distinction created by the Impugned Provisions is discriminatory because the provisions impose arbitrary disadvantages upon the Group. The Supreme Court of Canada has set out contextual factors to aid in the assessment of whether a law is discriminatory: (1) pre-existing disadvantage, if any, of the identified group; (2) the degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect in terms of combatting discrimination; and (4) the nature of the interest affected.[67] Not all factors are relevant in every case and they should not be rigidly applied; rather, the "objective is to determine the actual situation of the group and assess the potential of the impugned law to worsen their situation."[68]

72. As to the first factor, while individuals having US citizenship or a US place of birth arguably have faced some degree of historical stereotyping in Canada, such historical disadvantage is not a necessary element to establish a breach of s. 15(1).[69] In any event, even if the Impugned Provisions do not *perpetuate* any historical disadvantage, they nonetheless impose and initiate disadvantage.

73. The third factor listed above is not engaged because the Impugned Provisions are not directed at remedying any pre-existing disadvantage of any particular group.

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[65] IGA, Annex I, ss. II(B)(1)(b), MR Vol. 10, Tab 86
[66] *Lavoie v. Canada*, 2002 SCC 23 [***Lavoie***], MR Vol. 9, Tab 59
[67] *Québec (Attorney General) v. A*, 2013 SCC 5 [***Québec v. A***], ¶¶155-59, 331, MR Vol. 9, Tab 61; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 [***Canadian Foundation***], ¶55, MR Vol. 8, Tab 50; *Lavoie*¸ ¶46, MR Vol. 9, Tab 59
[68] *Québec (Attorney General) v. Alliance du personnel professional et technique de la santé et des sevices sociaux*, 2018 SCC 17, ¶98, MR Vol. 9, Tab 62
[69] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [***Law***], ¶65, MR Vol. 9, Tab 60; see also *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, in which a law was found to discriminate against men, MR Vol. 10, Tab 85

Accordingly, Canada is not entitled to the deference that would apply if the Impugned Provisions had such an ameliorative purpose.[70]

74. Analysis of the second and fourth factors directs that the Impugned Provisions are discriminatory.

75. As to the fourth factor – the nature of interests affected – the Impugned Provisions cause the Group three distinct but related disadvantages: (1) their privacy interests are undermined, (2) they create significant practical disadvantages, for example by restricting access to financial services, and (3) they undermine a fundamental aspect of membership in Canadian society because they expose the identified group to the extraterritorial enforcement of the United States' tax compliance and reporting regime.

76. The Impugned Provisions' affect on the privacy interests of the Group is discussed above under s. 8.

77. The Impugned Provisions impose on the Group significant practical disadvantages in that its members: may be asked to provide additional proof regarding their place of birth, residence, and citizenship when opening or continuing to hold an account; may be unable to obtain bank accounts or otherwise access banking services as effectively as other individuals; may be inhibited from progressing in their careers or participating in financial opportunities that would otherwise be available to them; and may be required to expend significant sums on accounting and tax professionals.

78. All of these practical disadvantages have been experienced by at least some individuals,[71] and given the volume of individuals who are affected by the Impugned Provisions, Canada cannot dispute that these disadvantages will be experienced by

[70] *Kapp*, ¶49, MR Vol. 9, Tab 69

[71] Affidavit of David Ash, affirmed August 15, 2016, MR Vol. 4, Tab 13, pp. 878-80; Ginsburg Affidavit, MR Vol. 2, Tab 15, pp. 904-29; Tapanila Affidavit, MR Vol. 2, Tab 19, pp. 967-1021; Affidavit of Nathaniel Highton affirmed December 30, 2016, MR Vol. 3, Tab 23, pp. 1098-1106; Nicholls Affidavit, MR Vol. 4, Tab 25, pp. 1155-1208; De Banné Affidavit, MR Vol. 4, Tab 26, pp. 1209-48; Sullivan Affidavit, MR Vol. 4, Tab 27, pp. 1249-73; Affidavit of Erika Kristensen, affirmed March 14, 2017, MR Vol. 4, Tab 28, pp. 1274-87

other hypothetical individuals.[72] Further, individuals who seek to avoid these disadvantages by relinquishing US citizenship face a high cost of doing so, both in terms of professional fees, and because of the Exit Tax.

79. Most importantly, the Impugned Provisions undermine the Group's access to a basic aspect of full membership in Canadian society by denying them the protection of Canadian sovereignty by exposing them to the extraterritorial enforcement of another state's taxation and tax compliance regime. Distinctions which deny access to fundamental social institutions associated with membership in Canadian society are more likely to be discriminatory.[73]

80. But for the Impugned Provisions, Canadian citizens residing in Canada who are also US Persons would have no obligation under Canadian law to comply with FBAR requirements or any other element of the United States' tax law. Pursuant to a basic tenet of international law – the principle of non-intervention – the United States would have no ability to enforce tax compliance and reporting obligations directly on individuals residing in Canada. The principle of non-intervention is inseparable from the concept of state sovereignty.[74]

81. Pursuant to the Impugned Provisions, Canada has chosen to permit the extra-territorial enforcement of the United States' tax compliance regime only with respect to the Group. The Impugned Provisions do not result merely in the transfer of information. Because the Impugned Provisions result in the disclosure to the United States of the Accountholder Information, they result in the disclosure to the United States of the very information that it requires be disclosed to it under US tax reporting requirements such as, for example, FBAR requirements.

82. Before the enactment of the Impugned Provisions members of the Group could choose not to comply with US tax reporting requirements, such as the requirement that

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[72] *Nur*, ¶¶51-58, MR Vol. 10, Tab 76
[73] *Law*, ¶74, MR Vol. 9, Tab 60; *Egan v. Canada*, [1995] 2 SCR 513, at 556, MR Vol. 8, Tab 56; *Québec v. A*, ¶159, MR Vol. 9, Tab 61
[74] Affidavit of Ryan Liss, sworn May 27, 2016, Ex. B, MR Vol. 2, Tab 11, pp. 837-58; *R. v. Hape*, 2007 SCC 26 [***Hape***], ¶45, MR Vol. 9, Tab 68

they report their bank accounts to the United States. This is a privilege enjoyed by all Canadians: so long as they remain in Canada, they may choose not to comply with US tax reporting requirements and Canada will not force them into compliance. The Impugned Provisions remove this privilege with respect to the Group by substantively causing those individuals to come into compliance with US tax reporting requirements, irrespective of whether they wish to do so. This is because the Impugned Provisions result in the United States receiving the information its laws demand of the Group, without any input or action from members of the Group. As a result, the Impugned Provisions remove from members of the Group the ability to decide whether or not to comply with US tax reporting requirements.

83. As a result, the Impugned Provisions effectively deny the Group access to an elemental benefit of Canadian Sovereignty: the ability to choose not to comply with another state's laws. Accordingly, the Impugned Provisions undermine the Group's access to a fundamental social institution and a basic aspect of full membership in Canadian society. This militates in favour of a finding that they breach s. 15(1).[75]

84. The disadvantages imposed by the Impugned Provisions are arbitrary because they do not correspond to the capacities, needs or circumstances of being a US Person. Members of the Group, by virtue of such membership, have no lesser claim to – nor desire to benefit from – their constitutional right to privacy, their access to financial services and the protection of Canadian sovereignty than other Canadians who are not US Persons.

E. The Impugned Provisions Violate Section 7 of the *Charter*

85. Section 7 of the *Charter* protects all individuals physically present in Canada, and provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[76]

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[75] *Canadian Foundation*, ¶74, MR Vol. 8, Tab 50; *Québec v. A*, ¶159, MR Vol. 9, Tab 61
[76] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 [***Charkaoui***], ¶¶17-18, MR Vol. 8, Tab 53

86. The Impugned Provisions expose the plaintiffs and other hypothetical individuals to a deprivation of their liberty and security of the person in a manner not in accordance with the principles of fundamental justice by: (1) violating their privacy rights, and (2) denying them the protection of Canadian sovereignty. The Impugned Provisions do not accord with the principles of fundamental justice because they are arbitrary and overbroad having regard to their objective of implementing FATCA in Canada so that the United States may catch tax evaders and cheats.[77]

87. The Supreme Court of Canada has held that ss. 7 and 8 of the *Charter* are intrinsically related, and that privacy is a protected component of liberty and security of the person. A reasonable expectation of privacy may be protected under s. 7 as well as s. 8, and an unreasonable search is inconsistent with the principles of fundamental justice.[78] Because the Impugned Provisions violate s. 8 (discussed above at paragraphs 51-67), so too do they violate s. 7.

88. The Impugned Provisions also violate s. 7 by denying the plaintiffs and other hypothetical individuals the protection of Canadian sovereignty. The manner in which the Impugned Provisions deny the plaintiffs the protection of Canadian sovereignty by exposing them to the extraterritorial enforcement of the United States' tax compliance regime is explained above at paragraphs 80-84.

89. Importantly, the s. 7 analysis is qualitative, not quantitative, and an arbitrary or overbroad impact on only one person is sufficient to establish a breach.[79]

90. The violation of the plaintiffs' and other hypothetical individuals' liberty and security of the person that is occasioned by the Impugned Provisions does not accord with the principles of fundamental justice because: (a) unreasonable searches under s. 8 do not accord with the principles of fundamental justice,[80] (b) the Impugned Provisions are overbroad having regard to their objective, and (c) alternatively the

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[77] IGA, preamble, MR Vol. 10, Tab 86; Wood Affidavit, Ex. C, *fn* 9, MR Vol. 2, Tab 7, p. 768
[78] *R. v. O'Connor*, [1995] 4 SCR 411 [***O'Connor***], ⁋⁋110-19, MR Vol. 10, Tab 77; *R. v. Mills*, [1999] 3 SCR 668, ⁋⁋ 87-88, MR Vol. 10, Tab 74
[79] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [***Bedford***], ⁋123, MR Vol. 8, Tab 47
[80] *O'Connor*, ⁋⁋110-19, MR Vol. 10, Tab 77

Court should recognize that it is a principle of fundamental justice that Canada will not deny its citizens the protection of Canadian sovereignty.

91. Laws that capture conduct that bears no relation to their objective are overbroad and not in accordance with the principles of fundamental justice. Such laws are also arbitrary, at least in part.[81]

92. Determining the objective underlying the Impugned Provisions requires assessing their ends – not their means – by reference to explicit statements of their purpose, and the context and scheme of the legislation. It is important to characterize the state objective underlying the Impugned Provisions succinctly, but not in overly general terms for that will provide no meaningful check on the means employed to achieve it.[82] As the Supreme Court of Canada stated in *R. v. Moriarty*:

> [28] The appropriate level of generality for the articulation of the law's purpose is also critically important. If the purpose is articulated in too general terms, it will provide no meaningful check on the means employed to achieve it: almost any challenged provision will likely be rationally connected to a very broadly stated purpose (see, e.g., *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 77). On the other hand, if the identified purpose is articulated in too specific terms, then the distinction between ends and means may be lost and the statement of purpose will effectively foreclose any separate inquiry into the connection between them. The appropriate level of generality, therefore, resides between the statement of an "animating social value" - which is too general - and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context - which risks being too specific: *Carter*, at para. 76. An unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad, while an unduly narrow statement of purpose will almost always lead to a finding of overbreadth.[83]

93. The objective of the Impugned Provisions is to implement FATCA in Canada to enable the United States to capture tax evaders and cheats. This is revealed by the language of the Impugned Provisions themselves, the preamble, as well as the context in which FATCA and the Impugned Provisions were implemented. As described

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[81] *Bedford*, ⁋⁋112-13, MR Vol. 8, Tab 47
[82] *R. v. Moriarity*, 2015 SCC 55 [***Moriarity***], ⁋⁋26-31, MR Vol. 10, Tab 75; *Carter v. Canada (Attorney General)*, 2015 SCC 5, ⁋⁋77-78, MR Vol. 8, Tab 52
[83] *Moriarity*, MR Vol. 10, Tab 75

above, FATCA was introduced in the US House of Representatives in June of 2009 in an atmosphere of increased scrutiny concerning tax compliance, and contemporaneous comments made by legislators indicate that the purpose of FATCA was to catch tax evaders and stop tax cheats.[84] Canada understood that its objective was "to prevent US taxpayers from evading US income tax by hiding assets outside the US and not reporting income."[85]

94. For the same reason the searches and seizures are unreasonable because they capture an inordinate number of innocent individuals (discussed above at paragraphs 51-67), so too are they overbroad in their application. As noted above at paragraph 66, Canada's evidence is that (a) very few people will be prosecuted by the United States for tax-related offences as a result of the disclosures mandated by the Impugned Provisions, and (b) nonetheless, hundreds of thousands of individuals will have their Accountholder Information disclosed to the United States pursuant to the Impugned Provisions.

95. Finally, the court should recognize a novel principle of fundamental justice that Canada will not deny its citizens the protection of Canadian sovereignty. The principles of fundamental justice are those that are "vital or fundamental to our societal notions of justice."[86] The Supreme Court of Canada has set out three criteria a principle must meet in order to be recognizes as a principle of fundamental justice: (a) the principle must be a legal principle, in order to provide meaningful content for the s. 7 guarantee and avoid the adjudication of policy matters; (b) there must be sufficient consensus that the alleged principle is vital to our societal notion of justice; and (c) the principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.[87]

96. The principle that Canada will not deny its citizens the protection of Canadian

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[84] Wood Affidavit, Ex. C, *fn* 9, MR Vol. 2, Tab 7, p. 769
[85] Shoom Affidavit, ¶8, MR Vol. 7, Tab 32, p. 2779
[86] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519, pp. 590-91, MR Vol. 10, Tab 82
[87] *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, ¶113, MR Vol. 9, Tab 70; *Canadian*, ¶8, MR Vol. 7, Tab 50

sovereignty meets all three criteria: it is a legal principle – in fact, the principle of non-intervention between states is a cornerstone of the international order and intrinsically connected to state sovereignty;[88] it is undoubtedly considered by all Canadians to be fundamental to their notion of justice that Canada will not expose them to enforcement of another state's laws; and it is predictable and easily applied – simply, Canada may not allow other state to enforce their laws on individuals residing in Canada.

F. The *Charter* Infringements Cannot be Justified Under Section 1

97. To the extent the Impugned Provisions violate any *Charter* right, Canada bears the onus of demonstrating, through cogent and persuasive evidence, that the infringement is justified under s. 1.

98. Canada cannot justify the s. 8 infringement under s. 1 of the *Charter* because it cannot demonstrate that the Impugned Provisions minimally impair s. 8. The Supreme Court of Canada has observed that because the reasonableness analysis under s. 8 and the minimal impairment analysis under s. 1 overlap, laws that authorize unreasonable searches or seizures will almost necessarily fail to minimally impair s. 8. Because the searches authorized by the Impugned Provisions capture an inordinate number of individuals and their reliability cannot be tested, Canada cannot demonstrate that they minimally impair the interests protected by s. 8. It is impossible to assess proportionality between the deleterious and salutary effects of the Impugned Provisions, because Canada makes no attempt to collect the data necessary to assess those effects. Accordingly, Canada cannot justify the s. 8 infringement caused by the Impugned Provisions.[89]

99. Violations of s. 7 are particularly difficult to justify.[90]

100. The plaintiffs will leave to reply their further submissions on s. 1 and especially

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[88] *Hape*, ¶¶45-46, MR Vol. 9, Tab 68

[89] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425, at 501, MR Vol. 10, Tab 84; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, ¶¶89-91, MR Vol. 8, Tab 48; *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 SCR 401 [***Federation of Law Societies***], ¶58, MR Vol. 8, Tab 49

[90] *R. v. Oakes*, [1986] 1 SCR 103 [***Oakes***], MR Vol. 10, Tab 78; *Charkaoui*, ¶66, MR Vol. 8, Tab 53

insofar as the defendant seeks to justify the infringement of s. 15.

PART IV: STATEMENT OF ORDERS SOUGHT

101. The plaintiffs seek the relief set out in paragraphs 2, 4, 5, 6, 7, 8 and 9 of the Notice of Motion.[91]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 3, 2018

Joseph J. Arvay, O.C., Q.C.
and Arden Beddoes
Solicitors for the Plaintiffs

[91] Plaintiffs' Notice of Motion dated May 11, 2017, ¶¶1-9, MR Vol. 1, pp. 1-2

PART V. LIST OF AUTHORITIES

Cases

Alberta Treasury Branches v. Leahy, 2000 ABQB 575

Canada (Attorney General) v. Bedford, 2013 SCC 72

Canada (Attorney General) v. Chambre des notaires du Québec, 2016 SCC 20

Canada (Attorney General) v. Federation of Law Societies of Canada, [2015] 1 SCR 401 [***Federation of Law Societies***]

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4 [***Canadian Foundation***]

Canadian Pioneer Management Ltd. et al. v. Labour Relations Board of Saskatchewan et al., [1980] 1 SCR 433

Carter v. Canada (Attorney General), 2015 SCC 5

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9 [***Charkaoui***]

Collins v. Canada, 2014 FC 307

Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton, [1994] 2 SCR 406

Egan v. Canada, [1995] 2 SCR 513

Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46

Hunter v. Southam, [1984] 2 SCR 145 [***Hunter***]

Lavoie v. Canada, 2002 SCC 23 [***Lavoie***]

Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 [***Law***]

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