

## Headlines - FATCA regime goes on trial in Canada

MLex US Tax Watch

January 14, 2019

**MLEX US Tax Watch > January 14, 2019**

Copyright © 2019 MLex, Inc.

**Cite:** 20 MLex US Tax Watch 14

**Byline:** Paul Merrion

### **Body**

---

A Vancouver courtroom will soon hear a constitutional challenge to Canada's cooperation with US tax reporting requirements for Americans living north of the border, a case with potentially broad implications for data the Internal Revenue Service gets on foreign bank accounts around the world.

A trial starting Jan. 28 in the Federal Court of Canada will consider a lawsuit by two Canadian individuals born in the US who are suing the Canadian government over its agreement with the US government to collect their bank account information and send it to the IRS to comply with the Foreign Account Tax Compliance Act.

If found to violate Canadian sovereignty and privacy laws, the decision would disrupt that country's financial system and potentially upend similar agreements with more than 100 countries around the world. FATCA's big-stick, no-carrot approach requires US banks to withhold 30 percent of financial transfers to foreign banks that don't comply with the law.

"If this gets struck down in Canada, it will have a domino effect," said John Richardson, co-chair and general counsel for the Alliance for the Defence of Canadian Sovereignty, a nonprofit group that raised money to finance the suit.

The impending trial highlights long-simmering controversies over the far-reaching FATCA regime and US taxation of its citizens no matter where they live or earn income, but the ultimate outcome will not be known until the case makes its way to Canada's Supreme Court.

"My expectation is it's going to the Supreme Court of Canada, no matter how this trial goes," Richardson added. "This is just one more checkpoint in a long journey."

Late last year, the issue of expatriate taxation bubbled up in Congress where Representative George Holding introduced the Fair Taxation for Americans Abroad Act, which would amend the Internal Revenue Code to tax foreign income in the country where it is earned, rather than taxing US citizens abroad to the extent their US tax exceeds the foreign income tax they pay.

The 2017 tax overhaul law exacerbated the situation for expatriates who now face a new repatriation tax and other changes in international tax laws that could target retirement savings and other assets. Even if taxes aren't owed to the US, the new law creates additional accounting and compliance costs.

"FATCA has a pretty big compliance burden," said Demian Brady, research director for National Taxpayers Union, a conservative tax reform group. "We get a ton of responses from citizens abroad who are fed up with the hassles of dealing with FATCA."

Paul Merrion

## Headlines - FATCA regime goes on trial in Canada

The plaintiffs in the Canadian suit going to trial later this month are suing to invalidate an intergovernmental agreement between the US and Canada. It requires Canadian banks to report foreign account information to the Canada Revenue Agency, which then transmits the information to the IRS.

- Standing emerges as threshold issue -

One plaintiff, Gwendolyn Louise Deegan, is a Canadian citizen and graphic designer in Toronto who was born in the US in 1962 to an American citizen and a Canadian citizen. At the age of five, she and her parents emigrated to Canada and she has lived there ever since.

The other, Kazia Highton, is a Canadian citizen and elementary school teacher who lives in Victoria, British Columbia. She was born in Michigan in 1982 and her parents are Canadian citizens. Neither one has ever filed a US tax return or paid US taxes, according to their pre-trial brief.

One threshold issue raised by the defendants - the Attorney General of Canada and the Minister of Revenue - is that Deegan and Highton lack standing because no information on their accounts has been transmitted to the IRS since the intergovernmental FATCA agreement went into effect five years ago.

Lawyers for the plaintiffs - Joseph J. Arvay and Arden Beddoes of Arvay Finlay LLP in Vancouver - countered that the government had not raised the standing issue before in the case, which originated in 2014. Further, they argued, as US citizens by virtue of their birthplace, the intergovernmental agreement treats them differently in their relationships with financial institutions, even if their accounts are not large enough to be reported under FATCA.

But the meat of the case is the contention that Canada's agreement to collect FATCA information from its banks violates several provisions in the Canadian Charter of Rights and Freedoms, which is equivalent to the US Constitution's Bill of Rights.

Probably the most significant constitutional issue raised by the case is whether privacy rights are at stake in the FATCA reporting agreement, a legal question that boils down to a test of reasonableness under Canadian case law. The reporting requirements in question "must strike a reasonable balance between an important state objective and the invasion of privacy they occasion," the plaintiffs' brief said.

The purpose of the agreement is to help the IRS find "US tax evaders and cheats," the plaintiffs argued. "This is not an important Canadian objective."

That is an "oversimplification," the government argued in its brief.

The agreement's primary purpose "was to avoid the potentially catastrophic impacts of FATCA on Canadian financial institutions, their customers, and the Canadian economy," the government's brief said. "Secondary purposes included lessening the burden of the direct application of FATCA on Canadian financial institutions and their customers and obtaining additional automatic exchange of information from the US to Canada for Canadian taxation purposes in exchange for assisting with the application of FATCA in Canada."

In the long run, a change in US tax laws may be the only real solution. Even if the plaintiffs ultimately win and the intergovernmental agreement is found to be unconstitutional, Canadian financial institutions and hundreds of thousands of Americans who live in Canada would still have to comply with FATCA.

"It's a gigantic problem," said the Alliance's Richardson. Holding's bill, even though it was floated on the last day Congress was in session for discussion purposes, "is extremely significant because it puts the legislative seal of good housekeeping on the idea that Americans should not be taxed on foreign income."

## References

---

Headlines - FATCA regime goes on trial in Canada

<http://www.adcs-adsc.ca/>

[http://apps.fct-cf.gc.ca/pq/IndexingQueries/info\\_RE\\_info\\_e.php?court\\_no=T-1736-14&select\\_court=T](http://apps.fct-cf.gc.ca/pq/IndexingQueries/info_RE_info_e.php?court_no=T-1736-14&select_court=T)

<http://www.adcs-adsc.ca/CourtSubmissions.html>

[https://www.americansabroad.org/aca-explains-tfaa-rbt-bill/?utm\\_source=cision&utm\\_medium=pr&utm\\_campaign=pr190107](https://www.americansabroad.org/aca-explains-tfaa-rbt-bill/?utm_source=cision&utm_medium=pr&utm_campaign=pr190107)

<https://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?TABID=2&LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=1118296&GK=0&GRP=0&PID=105396&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=95&VID=0&VNAMEE=&VNAMEF=&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0>

<https://www.congress.gov/bill/115th-congress/house-bill/7358>

---

End of Document