Federal Court of Appeal  Cour d'appel fédérale

Date: 20220921

Docket: A-370-19

Citation: 2022 FCA 158

CORAM: **GLEASON J.A.**
WOODS J.A.
DAWSON D.J.C.A.

BETWEEN:

GWENDOLYN LOUISE DEEGAN and
KAZIA HIGHTON

Appellants

and

THE ATTORNEY GENERAL OF CANADA and
THE MINISTER OF NATIONAL REVENUE

Respondents

Heard at Vancouver, British Columbia, on March 30, 2022.

Judgment delivered at Ottawa, Ontario, on September 21, 2022.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: GLEASON J.A.
DAWSON D.J.C.A.

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REASONS FOR JUDGMENT

WOODS J.A.

I. Overview

[1] The appellants, Gwendolyn Louise Deegan and Kazia Highton, are residents and citizens of Canada. They are also citizens of the United States as a result of being born there. Neither appellant has any real ongoing connection with the United States.

[2] As citizens of the United States, the appellants are subject to income tax in that country on their worldwide income, and are subject to annual reporting obligations to the U.S. Internal Revenue Service (IRS).

[3] In 2014, Canada enacted legislation (Impugned Provisions) that assists the United States in its compliance efforts relating to accounts held outside the United States by persons subject to worldwide U.S. taxation. The Impugned Provisions require Canadian financial institutions to file with the Minister of National Revenue (Minister) account information concerning their customers that may be subject to worldwide U.S. taxation. Canada is required to disclose this information to the United States.

[4] The appellants brought an action in the Federal Court which claims, among other things, that the Impugned Provisions are *ultra vires* Parliament and are unconstitutional. The hearing of the action was divided into two parts. The *ultra vires* claims were heard first and were dismissed by Martineau J. (*Hillis v. Canada (Attorney General*), 2015 FC 1082, [2016] 2 F.C.R. 235). The constitutional claims were subsequently dismissed by Mactavish J., as she then was (*Deegan v. Canada (Attorney General)*, 2019 FC 960, [2020] 1 F.C.R. 411). This is an appeal from the latter decision. Although there was an appeal from the earlier decision, it has been withdrawn.

[5] This appeal involves a single issue: Did the Federal Court err when it concluded that the Impugned Provisions do not contemplate an unreasonable search or seizure for purposes of s. 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter)? The Federal Court also

determined that the Impugned Provisions do not violate s. 15 of the Charter, and this determination has not been appealed.

[6] With respect to s. 8 of the Charter, the Federal Court determined that the Impugned Provisions contemplate a seizure, but not an unreasonable one. The basis for the Court's reasonableness finding was that: (1) persons affected by the Impugned Provisions have very little privacy interest in the seized information, and (2) Canada had an important objective in enacting the Impugned Provisions.

[7] In this appeal, the appellants are represented by different counsel from those who appeared in the Federal Court, and some of their submissions were not discussed in the reasons of the Court below. Broadly, the appellants submit that the seizure is unreasonable because: (1) the purpose of the Impugned Provisions was not driven by Canada's interests; it simply was to facilitate the interests of the IRS; (2) the seized information may belong to persons with no real connections to the United States, or to persons who are not themselves subject to worldwide U.S. taxation; and (3) the IRS may use the information for the enforcement of its tax laws, including for prosecution of tax evasion.

[8] As I will explain, I conclude that the Federal Court did not err in finding that the Impugned Provisions do not violate s. 8 of the Charter. Accordingly, I would dismiss the appeal.

II. Factual background

A. *The FATCA context*

[9] In 2010, the United States enacted amendments to the Internal Revenue Code, which are commonly referred to as the *Foreign Account Tax Compliance Act* (FATCA). The Federal Court's reasons, at paras. 20-30, provide a detailed description of FATCA as it applies to individuals. A brief summary is provided below.

[10] The Court wrote that "[i]n an effort to thwart tax evasion through the use of off-shore bank accounts, *FATCA* imposed new reporting requirements on certain persons, including U.S. citizens, with respect to financial assets held outside the U.S." (para. 22). The reporting obligation applies to U.S. persons, and is intended to "capture individuals who are subject to U.S. tax laws." (para. 23). By way of background, I note that FATCA also applies to corporations and other persons who are not individuals. However, most of the evidence regarding FATCA before the Federal Court related to affected persons who were individuals. No one made any submissions on this and I assume that it does not affect the outcome in this appeal.

[11] FATCA also imposed a reporting obligation on foreign financial institutions, which requires these institutions to "disclose the identity of U.S. persons who are beneficial owners of foreign financial accounts." (para. 27). FATCA gives "foreign banks the choice of opting in or out of the *FATCA* regime," but if they opt out they will be subject a 30 percent withholding tax on U.S. source payments. (para. 29).

[12] The obligations imposed on foreign financial institutions by FATCA are extensive (at paras. 20-30). For example, the foreign financial institution is required to determine whether a customer may be subject to FATCA by having regard to several indicia or connections to the United States, such as an address or telephone number, or an “in-care-of” or “hold mail” address as the sole address on file. If any such indicia are satisfied, the financial institution is required to contact the customer to determine whether they are subject to FATCA. If the customer refuses to provide this information, the financial institution must impose the 30% withholding tax on U.S. source payments to that customer.

[13] The Government of Canada was concerned with risks that FATCA “posed for the Canadian financial sector, its customers and investors, and the Canadian economy as a whole.” (para. 31). According to Kevin Shoom of the Department of Finance, whose affidavit was before the Federal Court, the Department was concerned that a “broad application of *FATCA* would have serious negative consequences for the Canadian financial system and for the Canadians who rely upon it.” (paras. 32-33). This concern was confirmed by Matthias Oschinski, an expert in economic impact analysis, whose affidavit was likewise before the Federal Court (para. 32 at footnote 3).

B. *The Impugned Provisions*

[14] The Department of Finance sought to address Canada’s concerns with FATCA through negotiations with its United States counterparts. The Federal Court describes the negotiations and their results in its reasons at paras. 40-107.

[15] Through these negotiations, which were extensive, Canada obtained a number of concessions that mitigated Canada's concerns. The result was an agreement between Canada and the United States (Intergovernmental Agreement or IGA). Canada implemented its obligations under the IGA by enacting the Impugned Provisions: *Canada-United States Enhanced Tax Information Exchange Implementation Act*, S.C. 2014, c. 20, s. 99; and *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA), at ss. 263-269.

[16] One significant difference between the Impugned Provisions and FATCA is that the Impugned Provisions do not require Canadian financial institutions to report directly to the United States. Instead, this obligation is imposed on the Minister who in effect acts as an intermediary. Accordingly, Canadian financial institutions are required to provide the Minister with specified information and the Minister is required to provide this information to the United States. The disclosure to the United States is effected through the exchange of information provisions in Article XXVII of the *Convention Between Canada and the United States of America with Respect to Taxes on Income and Capital* (Tax Treaty).

III. Preliminary issues

[17] As mentioned earlier, this is an appeal from the 2019 decision of Mactavish J. The decision dealt with three preliminary issues. Although the parties did not raise any of the preliminary issues in this Court, I will discuss two of them briefly.

[18] One of the preliminary issues is whether the appellants have standing to bring the constitutional challenge. This is a concern because there was no evidence before the Federal Court that the appellants had yet been directly affected by the Impugned Provisions. The Court concluded that the appellants did not have a sufficient stake in the litigation to have standing as of right (para. 192). However, the Court granted public interest standing to Ms. Deegan (para. 208).

[19] Ms. Deegan and Ms. Highton have both appealed. Ms. Deegan clearly has standing, but the Federal Court did not find that Ms. Highton has standing. It is difficult to see how Ms. Highton has standing on this appeal. However, no one has raised this as an issue, and therefore it would not be appropriate for this Court to remove her as a party.

[20] A second preliminary issue is whether the Federal Court has jurisdiction to grant the constitutional relief sought. This issue was not raised by the parties in the Court below, but the Federal Court properly concluded that it had to be satisfied that it had the appropriate jurisdiction.

[21] The Federal Court discussed this issue extensively (paras. 212-240) and concluded that the Court did have jurisdiction. I agree with this conclusion substantially for the reasons it gave.

IV. Analysis

A. *Introduction*

[22] This appeal concerns s. 8 of the Charter, which reads:

8 Everyone has the right to be secure against unreasonable search or seizure.	**8** Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

[23] There are two aspects of s. 8 to consider. Is there a search or seizure? If so, is the search or seizure unreasonable?

[24] The Federal Court discussed the first requirement very briefly, noting the parties' agreement that the Impugned Provisions contemplate a seizure. The Federal Court accepted this, citing *R. v. Dyment*, [1988] 2 S.C.R. 417 at 431, 55 D.L.R. (4th) 503 (para. 274).

[25] For purposes of this appeal, I assume that adherence to the Impugned Provisions constitutes a seizure. This does not affect the outcome of the appeal. However, I make no finding on whether the Impugned Provisions contemplate a seizure, and would leave that issue for another day.

[26] As for whether the seizure is unreasonable, the general principle is to consider all the circumstances and assess whether the privacy interests of affected persons are outweighed by the

public interest in requiring a seizure (*Canada (Combines Investigation Branch, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159-160, 11 D.L.R. (4th) 641).

[27] The Federal Court determined that the public interest outweighs the privacy interests in this case and therefore the contemplated seizure is reasonable (paras. 353-354). As I will explain, I conclude that there is no error in this finding.

B. *Standard of review*

[28] The applicable standard of review is well established: "Questions of law on an appeal attract a standard of correctness. … Questions of fact attract a palpable and overriding error standard. … The application of the law to a given factual matrix, that is, whether a legal standard is met, amounts to a question of law and attracts a correctness standard. …" (*R. v. Le*, 2019 SCC 34 at para. 23, [2019] 2 S.C.R. 692).

[29] The Supreme Court has also instructed on the standard of review where the question involves a determination on reasonableness: "While a trial judge is owed deference in relation to her factual findings, whether those factual findings support reasonable suspicion is a question of law, and as such is reviewable on the correctness standard." (*R. v. Chehil*, 2013 SCC 49 at para. 60, [2013] 3 S.C.R. 220).

C. *Appellants' submissions*

[30] The Federal Court concluded at paras. 353-354 that the state's interest in enacting the Impugned Provisions outweighs its intrusion into the privacy interests of affected persons. The Court reached this conclusion by weighing the following findings:

- The principal purpose underlying the Impugned Provisions is to avoid the consequences of the direct application of FATCA in Canada. The Court described this as important.

- Individuals have a limited privacy interest in their banking records, and the method used to collect the information is minimally intrusive.

- The information that is provided to the United States is afforded protection under the Tax Treaty.

[31] The appellants submit that the Federal Court erred in law in reaching this conclusion. In these reasons, the appellants' submissions have been grouped into four general categories:

- What is Canada's purpose in enacting the Impugned Provisions?

- Is the purpose of avoiding FATCA relevant to s. 8?

- Is there a risk that the seized information will be used to advance a criminal prosecution into tax evasion? If so, is this a significant intrusion of privacy interests?

- Are the Impugned Provisions harsh and burdensome?

[32] As I will explain, the appellants' submissions, considered together or separately, do not affect the Federal Court's conclusion that the contemplated seizure is reasonable for purposes of s. 8 of the Charter.

D. *What is Canada's purpose in enacting the Impugned Provisions?*

[33] The appellants submit that the purpose of the Impugned Provisions is to facilitate the interests of the United States. They describe it this way:

> The Impugned Provisions were not enacted in order to address a harm, gap or concern within Canada, which required a legislative response. Instead, the Impugned Provisions were prompted by and a response to what the United States perceived as a deficiency in the enforcement of its income tax laws.

[34] This submission is diametrically opposed to the Federal Court's finding on this issue. As mentioned, the Court found that the Impugned Provisions were enacted principally to address a concern within Canada (at para. 353). As the Court wrote: "[A] major purpose for the enactment of the Impugned Provisions was to avoid the potentially catastrophic impact of *FATCA* on

Canadian financial institutions, their customers and the Canadian economy as a whole." (para. 88).

[35] Although the appellants suggest that this raises a question of law, it is either a question of fact or mixed fact and law to which deference should be given. The Federal Court's finding does not give rise to a reviewable error, and indeed the Court's finding is amply supported by the record.

E. *Is the purpose of avoiding FATCA relevant to s. 8?*

[36] The appellants submit that the state interest in avoiding the consequences of FATCA is not relevant to the reasonableness test in s. 8 of the Charter. They submit that this factor should instead be taken into account in considering the saving provision in s. 1 of the Charter. Section 1 provides that the rights set out in the Charter are subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." (emphasis added). This issue was not discussed in the Court below.

[37] Sections 8 and 1 of the Charter both contain a reasonableness test. The appellants did not refer to any judicial authority to support that the s. 8 reasonableness test does not encompass a state interest in avoiding the consequences of FATCA. The appellants submit that the purpose of avoiding FATCA "goes to the very fabric of what can be 'demonstrably justified in a free and democratic society'." Further, they submit that "[t]his is not simply the normative balance of

determining the reasonable expectation of balance [*sic*] against the objectives of a law designed to address a risk within Canada or somehow better the lives of people within Canada."

[38] It is true that the effect of the Impugned Provisions is to assist the United States with administering its tax laws. However, the principal purpose of the Impugned Provisions from Canada's perspective is to mitigate the perceived risk that FATCA presented in Canada. Contrary to the appellants' submissions, the Impugned Provisions were designed to address a risk within Canada and better the lives of people in Canada.

[39] In *Southam*, the Supreme Court instructed that the relevant state interest to be considered under s. 8 of the Charter is "its rationality in furthering some valid government objective" (at page 157). The avoidance of the direct application of FATCA is exactly the type of consideration that is relevant for purposes of s. 8.

[40] Accordingly, the Federal Court did not err by taking Canada's objective of avoiding FATCA into account when considering whether the contemplated seizure is reasonable for purposes of s. 8.

F. *Is there a risk of criminal prosecution, and is this factor significant?*

[41] The appellants submit that the United States may use the seized information "for the enforcement of its tax laws including for the prosecution of tax evasion." I understand this argument to be that the possibility of a U.S. criminal prosecution arising from the use of the

seized information significantly intrudes into the privacy interests of affected persons. It appears that this issue was not raised in the Court below.

[42] The first question is whether the appellants' statement is accurate. Is it possible that the United States may use the seized information to further a criminal prosecution?

[43] There is some support for this in the record. The evidence before the Federal Court includes an expert report by Bryan C. Skarlatos, a U.S. attorney, who was asked by the Crown to address this question: "What procedural, notice, and substantive rights does an individual accused by the United States of a tax related offence possess?" In his report, Mr. Skarlatos did not suggest that the seized information was protected from use for criminal enforcement. Although the question to Mr. Skarlatos is very broad, his answer provides some support for the appellants' position that the seized information may be used in a tax evasion prosecution.

[44] I also note that the exchange of information provisions in the Tax Treaty, which apply to the seized information, permit exchanged information to be used for domestic income tax purposes in general. This would include a criminal prosecution.

[45] Accordingly, for purposes of this appeal, I assume that the seized information may be used for a criminal prosecution for tax evasion in the United States.

[46] The next question is whether this possibility is a significant intrusion into the privacy interests of affected persons. The starting point is *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757

in which the Supreme Court made a distinction between audit and investigative materials obtained by the Canada Revenue Agency (CRA).

[47] With respect to audit materials, the Court considered s. 8 of the Charter and concluded that "taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the ITA, and that they are obliged to produce during an audit. … [T]here is nothing preventing auditors from passing to investigators their files containing validly obtained audit materials." (*Jarvis* at para. 95). Accordingly, s. 8 does not prevent audit material from being used for a criminal prosecution by the CRA.

[48] The Court in *Jarvis* took a different view of criminal investigative materials and s. 7 of the Charter. Section 7 protects against self-incrimination:

7 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.	**7** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[49] With respect to s. 7, the Court wrote that: "when the predominant purpose of a question or inquiry is the determination of penal liability, the 'full panoply' of *Charter* rights are engaged for the taxpayer's protection." (*Jarvis* at para. 96).

[50] The circumstances in this case are quite different from the facts in *Jarvis*. However, the general comments in *Jarvis*, above, concerning the use of audit materials is useful in this case.

The Federal Court recognized this when it determined that the Impugned Provisions are "essentially of an administrative nature." (para. 268). This suggests that there is very little privacy interest in the seized information even though the United States may use the information for purposes of a criminal prosecution.

[51] The appellants take issue with one aspect of *Jarvis*. They acknowledge that *Jarvis* characterizes the ITA as a regulatory statute even though non-compliance with the statute may lead to criminal charges. However, the appellants suggest there is nothing regulatory about prosecutions under the ITA and that a more nuanced approach to characterizing the ITA should be taken. They suggest that it is timely and appropriate to revisit the comment in *Jarvis* that the ITA is a regulatory statute.

[52] *Jarvis* is of course binding on the Federal Court and this Court. Accordingly, Justice Mactavish did not err in relying on it.

[53] As for whether the comment from *Jarvis* should be revisited by the Supreme Court, the appellants have failed to demonstrate that this is appropriate in the context of this case.

[54] The Impugned Provisions are clearly regulatory in nature. As set out in the Federal Court's reasons, the Impugned Provisions are similar to information automatically provided to the CRA for regulatory purposes (*e.g.,* T4s by employers, T5s by financial institutions, and taxpayers' annual disclosure of foreign holdings).

[55] Further, the automatic disclosure of information embodied in the Impugned Provisions has gained widespread international support through the development of a common reporting standard. The standard is reflected in amendments to the ITA in ss. 270-281.

[56] It is difficult to see how a seizure contemplated by the Impugned Provisions significantly intrudes into privacy interests, as the appellants appear to suggest. Accordingly, I see no reason in this case to revisit the comment in *Jarvis* that the entire ITA is a regulatory statute.

[57] At the hearing, the appellants further suggest that the predominant purpose test developed in *Jarvis* in the context of s. 7 of the Charter, should be imported into the Impugned Provisions. This test provides that, with respect to s. 7, if the predominant purpose of an inquiry is the determination of penal liability, the 'full panoply' of *Charter* rights applies. (*Jarvis* at para. 96).

[58] The appellants were not able to describe with specificity how the *Jarvis* predominant purpose test could apply to the Impugned Provisions. Without a clearer explanation from the appellants as to how the predominant purpose test is relevant in this appeal, the submission will not be pursued further.

[59] In the result, I conclude that the Impugned Provisions do not intrude significantly on the privacy interests of affected persons simply on the basis that the information may possibly be used for a criminal prosecution.

G. *Are the Impugned Provisions harsh and burdensome?*

[60] The appellants suggest that the Impugned Provisions are harsh or burdensome. Some of their concerns are listed below.

- Affected persons may have very few connections to the United States and the United States may not otherwise know about their existence.

- Information will be disclosed about some persons who have no personal connection to the United States. An example was provided of a spouse of a U.S. citizen resident in Canada.

- Affected persons are compelled to provide information to Canadian financial institutions.

- U.S. citizenship is difficult and expensive to renounce or relinquish.

- The provisions are heavy-handed compared to the soft administrative approach of voluntary disclosure programs maintained by the Internal Revenue Service.

[61] In the Federal Court's detailed reasons, the Court considered many concerns of this nature. I agree with the Court's findings on this issue, substantially for the reasons it gave.

[62] Quite simply, the Impugned Provisions are an example of international cooperation in the administration of income tax laws. The record suggests that such cooperation is widely accepted and has been strengthened in recent years.

[63] Moreover, the appellants have not demonstrated that the Impugned Provisions are more intrusive than is necessary to be effective, or that Canada could have achieved a more favourable outcome for affected persons.

[64] Finally, I would comment briefly concerning the appellants' concern that financial institutions are required to obtain information from affected persons. It appears that this was not raised as a concern in the Court below, and properly so.

[65] The Impugned Provisions do in fact impose this requirement. However, as discussed in the Federal Court's reasons at para. 95, this requirement was imposed unilaterally by Canada to assist affected persons by enhancing access to exceptions that are available to them. This issue does not assist the appellants in this appeal.

V. Conclusion

[66] I conclude that the issues raised by the appellants in this appeal do not affect the conclusion reached by the Federal Court. Accordingly, the Court did not err in concluding that the Impugned Provisions do not violate s. 8 of the Charter.

[67] I would dismiss the appeal. As the Crown is not seeking costs, I would not make any order as to costs.

"Judith Woods"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
Eleanor R. Dawson D.J.C.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Gregory P. DelBigio, Q.C.	FOR THE APPELLANTS
Michael Taylor Whitney Dunn Adrienne Copithorne	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Thorsteinssons LLP Vancouver, British Columbia	FOR THE APPELLANTS
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENTS