Federal Court

Cour fédérale

RLK-3V-388

Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur

TO / DESTINATAIRE(S):

1. Name / Nom : **Mr. Joseph Arvay, Q.C., Mr. David Gruber, Mr. Arden Beddoes**
Farris, Vaughan, Wills & Murphy LLP, Vancouver, B.C.

Facsimile / Télécopieur : ~~(604) 684-9151~~ 604-661-9349
☐ As requested / tel que demandé
Telephone / Téléphone :
☐ Left voice message / suite au message vocal

2. Name / Nom : **Mr. Michael Taylor, Ms. Donnaree Nygard, Mr. Oliver Pulleyblank**
(Department of Justice, Vancouver, B.C.)

Facsimile / Télécopieur : **(604) 666-~~2414~~** 2214
☐ As requested / tel que demandé
Telephone / Téléphone :
☐ Left voice message / suite au message vocal

3. Name / Nom :

Facsimile / Télécopieur :
☐ As requested / tel que demandé
Telephone / Téléphone :
☐ Left voice message / suite au message vocal

4. Name / Nom :

Facsimile / Télécopieur :
☐ As requested / tel que demandé
Telephone / Téléphone :
☐ Left voice message / suite au message vocal

FROM / EXPÉDITEUR :

Mun Y Chan, Registry Officer

Telephone / Téléphone : **(604) 666-3232**
Facsimile / Télécopieur : (604) 666-8181

DATE: 10 AUG 2015

TIME / HEURE : 15:09

Total no. of pages (including this page) / Nombre de pages (incluant cette page) : 12

SUBJECT / OBJET :

Court File No. / N° du dossier de la Cour : **T-1736-14**

Between / entre : ***Hillis et al v AGC et al***

Enclosed is a true copy of the **3 Orders** of **Mr Justice Martineau**

Dated / date : **August 10, 2015**

COMMENTS / REMARQUES :

Please note that Rule 395 of the *Federal Courts Rules* has changed and the Registry will not be sending certified copies of decisions of the Court, unless a copy is requested by the party. If you do require a copy, please advise the Registry in writing.

Pursuant to section 20 of the Official Languages Act all final decisions, orders and judgments, including any reasons given therefore, issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.

Conformément à l'article 20 de la Loi sur les langues officielles, les décisions, ordonnances et jugements définitifs avec les motifs y afférents, sont émis dans les deux langues officielles. Au cas où ces documents ne seraient émis, en premier lieu, que dans l'une des deux langues officielles, une copie de la version dans l'autre langue officielle sera transmise, sur demande, dès qu'elle sera disponible.

Federal Court  Cour fédérale

Date: 20150810

Docket: T-1736-14

Vancouver, British Columbia, August 10, 2015

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

VIRGINIA HILLIS AND
GWENDOLYN LOUISE DEEGAN

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA
AND
THE MINISTER OF NATIONAL REVENUE

Defendants

ORDER

UPON MOTION on behalf of the plaintiffs pursuant to Rule 35(2)(b) of the *Federal Courts Rules* (the "Rules"), for:

(a) An order granting the plaintiffs leave to file the supplemental affidavit of Allison Christians, sworn July 20, 2015 (the "Supplemental Christians Affidavit", attached as Appendix A) on the plaintiffs' motion for a summary trial to be heard August 4 and 5, 2015 (the Summary Trial Motion");

(b) An order granting the plaintiffs leave to file the supplemental affidavit of Robert W. Wood, sworn July 20, 2015 (the "Supplemental Wood Affidavit", attached as Appendix B) on the Summary Trial Motion; and

(c) Costs of this motion;

AND UPON reading the materials filed on behalf of the parties and hearing submissions of counsel for the parties;

In their motion for summary trial, the plaintiffs seek:

(a) A declaration that disclosures of taxpayer information to the United States purportedly pursuant to the *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 (the "Agreement Implementation Act") are unlawful based on the *Canada-United States Tax Convention Act*, 1984, S.C. 1984, c. 20 (the "Tax Convention Act") or s. 241 of the *Income Tax Act*, R.S.C 1985, c. 1 (5th Supp.) (the "ITA"), to the extent that:

(i) the taxpayer information relates to a taxable period in which the taxpayer was a citizen of Canada;

(ii) the taxpayer information is not relevant for carrying out the provisions of the Tax Convention Act or the domestic tax laws of Canada or the United States; or

(iii) the disclosure of the taxpayer information subjects United States nationals resident in Canada to taxation and requirements connected therewith that are more burdensome than the taxation and requirements

connected therewith to which Canadian nationals resident in Canada are subjected; and

(iv) the disclosure of the taxpayer information relates to matters not explicitly covered by the *Convention Between the United States and Canada with Respect to Taxes on Income and Capital*, 26 September 1980, Can. T.S.. 1984, No. 15 as amended (the "Canada-US Tax Convention").

(b) An order in the nature of a permanent prohibitive injunction preventing the disclosure of taxpayer information to the United States by the Minister of National Revenue and her authorized representative(s) where:

i. the taxpayer information relates to a taxable period in which the taxpayer was a citizen of Canada;

ii. the taxpayer information is not shown to be relevant for carrying out the provisions of the Canada-US Tax Convention or the domestic tax laws of Canada or the United States; or

iii. the disclosure of the taxpayer information subjects United States nationals resident in Canada to taxation and requirements connected therewith that are more burdensome than the taxation and requirements connected therewith to which Canadian nationals resident in Canada are subjected;

(c) Costs including special costs, and applicable taxes on those costs;

Rule 216 provides that no further affidavits or statements may be served as evidence in a summary trial, except:

(a) In the case of the moving parties - the present plaintiffs – if their content is limited to evidence that would be admissible at trial and they are served and filed at least 5 days before the day set out in the notice of motion for the hearing of the summary trial; or

(b) With leave of the Court;

Neither the Supplemental Christians nor the Supplemental Wood Affidavits attempts to rebut any evidence led by the defendants in their affidavits. Consequently, the affidavits are not admissible under Rule 216(2)(a). In addition, I am not satisfied that it is a proper case for the exercise of my discretion to grant leave under Rule 216(2)(b).

The present motion was made returnable to the Court on August 4, 2015, that is the day that the summary trial was set to start. The Rules must be interpreted and applied as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The parties have agreed that the issues raised by the plaintiffs in their motion for summary trial were suitable for summary trial. The Supplemental Christians and Wood Affidavits are tendered as supplementary expert evidence relating to an allegedly unsubstantiated assertion touching on U.S. law first made by the plaintiffs in their Memorandum of fact and law dated July 13, 2015 at paragraph 57 and elsewhere (Christians) and in the nature of proper re-examination (Wood). Despite the oral request for adjournment made in the alternative by defendants' counsel if leave to file supplementary evidence was granted, the plaintiffs' counsel insisted that the Court proceed with the merits of the case. I rejected the defendants' oral request for an adjournment and the summary trial was conducted in this matter on August 4 and 5, 2015. Counsel have made all their legal arguments in their Memoranda of fact and law and at the hearing, subject to the

Court's eventual ruling on the present motion to file supplemental affidavits (and two other motions to strike, which are disposed of by separate orders).

This summary trial is about the extent to which the ITA (Part XVIII) and the Canada-US Tax Convention legally authorizes or permits Canada to disclose (on an automatic basis) to the United States purportedly relevant private banking information belonging to Canadian residents or citizens who also happen to have the status as "United States Persons" as that term is defined by the *Agreement between the Government of Canada and the Government of the United States of America 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, App. B (the "Intergovernmental Agreement").

The United States enacted the *Foreign Account Tax Compliance Act* ("FATCA") in 2010 (passed as part of the *Hiring Incentives to Restore Employment Act*, Pub. L. No. 111-147, 124 Stat. 71 and codified in pertinent part as I.R.C. §6038D). FATCA imposes reporting obligations both on U.S. Persons directly, and on foreign financial institutions at which U.S. Persons hold certain types of accounts. Generally, FATCA imposes penalties on U.S. Persons, and a withholding tax on foreign financial institutions, who do not comply with the reporting requirements. To facilitate compliance with FATCA, the Intergovernmental Agreement concluded in 2014 relies on the Government of Canada to obtain and exchange information about reportable accounts that U.S. Persons hold at Canadian financial institutions instead of requiring those institutions to enter directly into arrangements with the Internal Revenue Service ("IRS"). The Intergovernmental Agreement details which institutions and accounts are subject to reporting, and what kinds of information about those accounts must be collected and exchanged.

In addition, the Intergovernmental Agreement provides that certain Canadian financial institutions and certain Canadian financial products are exempt from FATCA reporting requirements.

The Agreement Implementation Act provides that, in the event of any inconsistency between the provisions of the Agreement Implementation Act or the Intergovernmental Agreement and provisions of any other law, except Part XVIII of the ITA, the provisions of the Agreement Implementation Act and the Intergovernmental Agreement prevail. The central issue in this summary trial turns on the legal scope and effect of the Intergovernmental Agreement, the Agreement Implementation Act, the Tax Convention Act, and Part XVIII of the ITA (notably sections 241 and 248), and more particularly on the interpretation and application of three articles (articles XXV, XXVIA, and XXVII) of the Canada-US Tax Convention (Schedule I to the Tax Convention Act). While the Supplemental Christians Affidavit raises an interesting question with respect to U.S. constitutional law, it is not a matter that should be determined by the Court in this summary trial. The supplementary expert evidence now sought to be adduced was always available to the plaintiffs and should not be allowed in the plaintiffs' record at this late date further considering that the plaintiffs have already alleged in their original Statement of Claim dated August 11, 2014 at paragraph 34 that "The United States does not consider the Intergovernmental Agreement itself to constitute an international treaty, and accordingly it has not been submitted to the United States Congress for ratification".

Moreover, nothing in the defendants' Memorandum of fact and law suggests, or is dependent upon the Intergovernmental Agreement being a "treaty" under U.S. law. Rather, the defendants take the position that the Intergovernmental Agreement is an agreement between the United States and Canada respecting the interpretation or application of the Canada-US Tax

Convention, and as such may be considered in interpreting the latter which is a treaty pursuant to the *Vienna Convention and the Law of Treaties*, Can. TS 1980 No. 37. This argument is not affected by whether the Intergovernmental Agreement is a "treaty" under U.S. law or, instead, as Ms Christians opines, a "sole executive agreement". By the effect of section 3 of the Agreement Implementation Act, the Intergovernmental Agreement is approved and has the force of law in Canada during the period that the Intergovernmental Agreement, by its terms, is in force. Accordingly, I am not satisfied that the Supplemental Christians Affidavit is relevant to an issue to be determined in the motion for summary trial and sufficiently probative that it could affect the result, considering that the U.S. constitutional issue raised by Ms Christians is a debatable one and the defendants have had no opportunity to prepare responding evidence.

The Supplemental Wood Affidavit does not constitute rebuttal evidence but evidence in the nature of re-examination. However, fixing unfortunate cross-examination answers and rehabilitating a witness are not proper reasons for allowing the Court *ex post facto* after cross-examination on an affidavit to exercise its discretionary power under Rule 216(2)(b), and further considering here that the supplemental expert evidence of Mr. Wood has a doubtful relevance with respect to the issues to be determined in the summary trial itself. In particular, expert evidence that U.S. laws permit the IRS to unilaterally seize foreign bank account deposits in certain limited circumstances bears no relation to whether the United States could collect against assets located in Canada – a legal issue which incidentally concerns the interpretation and application of the Canada-US Tax Convention and which counsel have had the chance to fully argue at the summary trial.

THIS COURT ORDERS that the present motion be dismissed with costs.

"Luc Martineau"

Judge

Federal Court  Cour fédérale

Date: 20150810

Docket: T-1736-14

Vancouver, British Columbia, August 10, 2015

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

VIRGINIA HILLIS AND
GWENDOLYN LOUISE DEEGAN

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA
AND
THE MINISTER OF NATIONAL REVENUE

Defendants

ORDER

UPON MOTION on behalf of the defendants pursuant to Rule 35(2)(b) of the *Federal Courts Rules* (the "Rules"), for:

(a) An order striking portions of the report of Allison Christians (the "Christians Report"), attached to the affidavit of Allison Christians sworn April 28, 2015 and filed in Court May 1, 2015;

(b) An order striking portions of the report of Robert W. Wood (the "Wood Report"), attached to the affidavit of Robert W. Wood sworn on April 29, 2015; and

(c) Costs of this motion;

AND UPON reading the materials filed on behalf of the parties and hearing submissions of counsel for the parties;

The Rules must be interpreted and applied as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The parties have agreed that the issues raised by the plaintiffs in their motion for summary trial were suitable for summary trial. The Christians and Wood reports are tendered as expert evidence that may assist the Court. No prejudice flows from the fact that portions of the impugned reports contain hearsay statements or an overview of Canadian domestic law. No useful purpose will be met in striking at this stage portions of the impugned reports which contain hearsay statements or an overview of domestic law.

The summary trial was conducted in this matter on August 4 and 5, 2015. Counsel have made all their legal arguments in their Memoranda of fact and law and at the hearing. I have decided to treat any outstanding issue with respect to the admissibility, relevance or weight to be given to any objectionable opinion, inference or statement by Ms Christians and Mr Wood in their reports, if necessary, at the time of disposal of the motion for summary trial.

THIS COURT ORDERS that the present motion be dismissed with costs.

"Luc Martineau"

Judge

Federal Court  Cour fédérale

Date: 20150810

Docket: T-1736-14

Vancouver, British Columbia, August 10, 2015

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

VIRGINIA HILLIS AND
GWENDOLYN LOUISE DEEGAN

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA
AND
THE MINISTER OF NATIONAL REVENUE

Defendants

ORDER

UPON MOTION on behalf of the plaintiffs pursuant to Rule 35(2)(b) of the *Federal Courts Rules* (the "Rules"), for:

(a) An order striking portions of the affidavit of Sue Murray, sworn July 3, 2015 (the "Murray Affidavit");

(b) An order striking portions of the affidavit of Stephanie Smith, sworn on July 4 , 2015 (the "Smith Affidavit"); and

(c) Costs of this motion;

AND UPON reading the materials filed on behalf of the parties and hearing submissions of counsel for the parties;

The Rules must be interpreted and applied as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The parties have agreed that the issues raised by the plaintiffs in their motion for summary trial were suitable for summary trial. The Murray and Smith affidavits provide general background information that may assist the Court. Neither is put forward as expert opinion evidence. No prejudice flows from the fact that portions of the Murray and Smith affidavits contain legal argument or hearsay statements. No useful purpose will be met in striking at this stage portions of the impugned affidavits which contain legal argument or hearsay statements.

The summary trial was conducted in this matter on August 4 and 5, 2015. Counsel have made all their legal arguments in their Memoranda of fact and law and at the hearing. I have decided to treat any outstanding issue with respect to the weight to be given to any objectionable statement by Ms Murray and Ms Smith in their affidavits, if necessary, at the time of disposal of the motion for summary trial.

THIS COURT ORDERS that the present motion be dismissed with costs.

"Luc Martineau"

Judge