Court File No. A-407-15

FEDERAL COURT OF APPEAL

VIRGINIA HILLIS and GWENDOLYN LOUISE DEEGAN

APPELLANTS
(Plaintiffs)

and

THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF NATIONAL REVENUE

RESPONDENTS
(Defendants)

NOTICE OF MOTION

TAKE NOTICE THAT the Appellants Virginia Hillis and Gwendolyn Louise Deegan will make a motion to the Court on Monday, September 28, 2015, at 9:30 a.m. or as soon thereafter as the motion can be heard, to be heard by teleconference under Rule 35, at 701 West Georgia Street, Vancouver, British Columbia.

THE MOTION IS FOR:

1. An interlocutory injunction prohibiting the Defendant Minister of National Revenue or her authorized representative(s) from disclosing taxpayer information to the United States of America 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 "**Impugned Provisions**") pending judgment of the appeal in this matter.

THE GROUNDS FOR THE MOTION ARE:

1. The Appellants rely upon Rules 373 and 374 of the *Federal Court Rules* and this Court's broad original jurisdiction to make orders necessary for its own process: *Janssen Inc. v. Abbvie Corp.*, 2014 FCA 176, at para. 19.

2. The appeal is from the judgment of Martineau J. dismissing the Plaintiff's application for declaratory and injunctive relief by way of summary trial, which was pronounced by reasons for judgment issued September 16, 2015: 2015 FC 1082.

3. The plaintiffs sought a summary trial pursuant to Federal Court Rules 213 and 216 on some of the issues raised in their pleadings. Broadly speaking, those issues relate to the kinds and extent of information Canada may disclose to the United States pursuant to the Impugned Provisions without running afoul of the *Canada-United States Tax Convention Act, 1984*, S.C. 1984, c. 20 (the "***Tax Treaty Act***") or s. 241 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "***ITA***") (the "**Tax Treaty Issues**").

4. On September 18, 2015, the United States Internal Revenue Service ("**IRS**") issued Notice 2015-66 (the "**Notice**") which states, broadly, that the IRS will treat 2014 and 2015 as "transition years" and as a result is granting countries with Model 1A IGAs, like Canada, an extension until September 30, 2016 to exchange information pursuant to the Impugned Provisions. Accordingly, the Court can infer that granting the relief requested on this motion would not risk causing Canada to imminently default on disclosure obligations to the United States.

Citizenship-Based Taxation Under United States Law

5. The United States deems all United States citizens as permanent tax residents in the United States for federal income tax purposes. Accordingly, every Canadian resident who is a United States 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.

6. The United States is the only country in the world that comprehensively treats individuals as resident for tax purposes by virtue of their status as citizens or legal permanent residents under relevant immigration and nationality laws, as amended from time to time by statute and at common law (including retroactively). Eritrea is the only other country known for attempting to impose a tax on Eritrean citizens who live permanently outside the country, although the United States, Canada and other countries have rejected the right of Eritrea to collect this tax.

The Canada-US Tax Treaty

7. Canada and the United States have entered into 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 Treaty**"). Canada gave domestic force of law to the Canada-US Tax Treaty by enacting the *Tax Treaty Act*.

8. The Canada-US Tax Treaty aims at the avoidance of double-taxation and the prevention of fiscal evasion with respect to taxes on income and on capital. The Canada-US Tax Treaty is modeled in part on model agreements published by the Organization for Economic Co-operation and Development.

9. A large majority of United States citizens who are resident in Canada likely do not owe taxes to the United States in most years because the United States generally relieves such tax both as a matter of United States law and in accordance with the Canada-US Tax Treaty.

10. In addition to provisions relating to the avoidance of double-taxation, the Canada-US Tax Treaty contains a number of Articles through which Canada and the United States assist one another in detecting tax evasion and in collecting taxes. Some of the provisions of the Canada-US Tax Treaty also protect taxpayers.

The FATCA Provisions

11. The United States has enacted legislation and regulations under the umbrella of the *Foreign Account Tax Compliance Act* (described collectively herein as the "**FATCA Provisions**").

12. 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. The extrinsic evidence indicate that the purpose or objective of the legislation was to catch tax evaders and stop tax cheats.

13. The FATCA Provisions impose new reporting requirements on United States citizens and residents (referred to as "**US Persons**"), including US Persons resident in 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 the year.

14. The FATCA Provisions also impose reporting requirements on non-US "**Financial Institutions**," defined broadly as being any entity that:

    a. accepts deposits in the ordinary course of a banking or similar business;

    b. holds financial assets for the account of others as a substantial portion of its business; or

    c. 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.

15. The FATCA Provisions require foreign Financial Institutions to disclose US Persons who are beneficial owners of foreign financial accounts. They also require such institutions to withhold 30% of all transactions sourced in the United States, payable to the US Treasury. The 30% withholding tax is waived if the foreign Financial Institution agrees to disclose its US Person accountholders.

16. The effect of the FATCA Provisions is that financial damage may be inflicted upon Financial Institutions who do not agree or cannot agree to disclose their US accountholders to the United States.

The Intergovernmental Agreement

17. The FATCA provisions raised a number of issues, including that Canadian Financial Institutions could not comply with certain aspects of FATCA due to Canadian domestic legal impediments.

18. As a result, on or about February 5, 2014, Canada and the United States signed an agreement described as the *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*, 5 February 2014, Can. T.S. 2014, No. 16 (the **"Intergovernmental Agreement"**).

19. Canada approved the Intergovernmental Agreement and gave it force of law in Canada by enacting the Impugned Provisions. The Intergovernmental Agreement forms Schedule 3 of the Impugned Provisions.

20. Generally speaking, the Intergovernmental Agreement requires Canada to collect information about certain accounts maintained by certain Canadian Financial Institutions 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"**).

21. The Canadian Financial Institutions to which the Intergovernmental Agreement applies includes any financial institution that is resident in Canada or any non-resident financial institution with a branch in Canada, but does not include any branch of a financial institution that is located outside of Canada, or any financial institution that is

identified in Annex II of Schedule 3 of the Impugned Provisions as a deemed compliant financial institution.

22. Whether or not an account is a US Reportable Account is determined by Canadian Financial Institutions by following the due diligence procedures set out in Annex I to the Intergovernmental Agreement and in the Impugned Provisions. Certain kinds of accounts are excluded from the operation of the Intergovernmental Agreement and the Impugned Provisions and are not US Reportable Accounts; these excluded accounts are listed in Annex II of the Intergovernmental Agreement.

23. The due diligence procedures followed by Canadian Financial Institutions generally require them to search their account records for indications that the accountholder is a US Person ("**US Person Indicia**"). US Person Indicia include a US place of birth or a current US mailing or residential address.

24. With respect to each US Reportable Account, the information that Canada must collect from Canadian Financial Institutions 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 numbers ("**TIN**") of each US Person or person associated with a US Person Indicia that is an accountholder, or if the 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.**"

25. Article 2 of the Intergovernmental Agreement requires Canada to collect Accountholder Information about US Reportable Accounts from Canadian Financial Institutions and then provide that information to the United States pursuant to Article XXVII of the Canada-US Tax Treaty. According to Article 2 of the Intergovernmental Agreement, Canada's disclosure of the Accountholder Information occurs annually and on an automatic basis pursuant to the provisions of Article XXVII of the Canada-US Tax Treaty.

26. According to Article 3, all information exchanged under the Intergovernmental Agreement is made subject to the confidentiality and other protections provided for in the Canada-US Tax Treaty.

Article XXVIA

27. Article XXVIA of the Canada-US Tax Treaty provides that Canada and the United States undertake to lend assistance to each other in the collection of taxes, together with interest, costs and additions to such taxes and civil penalties ("**Revenue Claims**").

28. Article XXVIA of the Canada-US Tax Treaty further provides that Canada shall not provide assistance for a Revenue Claim in respect of a taxpayer to the extent that the taxpayer can demonstrate that the Revenue Claim relates to a taxable period in which the taxpayer was a citizen of Canada.

29. By disclosing the Accountholder Information as defined by the Intergovernmental Agreement, Canada identifies individuals who are determined by their Financial Institutions to be US Persons, thereby identifying potential United States taxpayers who might otherwise be unknown to the United States. This allows the United States to begin its collection process by issuing notices and demands for payment against individuals in Canada who are identified as US Persons, and to begin the United States' Internal Revenue Service (the "**IRS**") assessment process. Accordingly, this disclosure of Accountholder Information constitutes assistance in the collection of Revenue Claims.

30. The United States often need not resort to protracted enforcement mechanisms. A simple notice, a demand for payment, or even a notice of balance due, all can generate fear in persons identified as US Persons. The *in terrorem* effect of a mere envelope from the IRS can be significant.

31. Some US tax advisers advise clients to pay an IRS bill rather than to dispute it, particularly if the amounts are relatively minor or if the issues that may be raised are sensitive. A simple notice from the IRS is by its very nature significant. Regardless of whether such a notice is correct or incorrect, it often may prompt payment.

32. The most basic mechanism for the IRS is to assess taxes, interest and penalties. An IRS assessment generally consists of notices sent to a taxpayer's last known address that become final if timely protest is not made and that culminate in the recording and collection of a tax liability. The potential liability can extend for many years.

33. After it has assessed taxes, the United States has a variety of domestic mechanisms through which to collect assessed taxes, including: the filing of a general lien; enforcement by court action; levying and

seizure of a US Person's property, and selling the seized property in satisfaction of the tax debt; garnishing wages from employment and prosecution for criminal tax consequences. While these remedies are primarily exercisable within the United States, a US Person may be in jeopardy if even temporarily present in the United States.

34. The exchange of the Accountholder Information of US Persons constitutes "assistance in collection" by identifying individuals as US Persons and providing the United States with the means to begin its assessment and collection efforts. To the extent that the Accountholder Information relates to an account whose accountholder is or was a citizen of Canada in the taxable period during which the Revenue Claim arose, the disclosure of Accountholder Information by Canada is *ultra vires* the Canada-US Tax Treaty and the *Tax Treaty Act*.

Article XXVII

35. Article XXVII of the Canada-US Tax Treaty provides in part as follows:

> The competent authorities of the Contracting States shall exchange such information as may be relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes to which this Convention applies insofar as the taxation thereunder is not contrary to this Convention.

36. In the case of Canada, the competent authorities are the Minister of National Revenue and her authorized representative(s).

37. Article XXVII does not permit unlimited exchange of information. Instead, it circumscribes the scope of information that may be disclosed to information that "may be relevant" to the provisions of the Canada-US Tax Treaty or to the domestic laws of Canada or the United States in respect of taxation.

The disclosed Accountholder Information must meet the "may be relevant" standard.

38. Article XXVII requires that any information disclosed meet a standard of potential relevance: the "may be relevant" standard.

39. Article XXVII has been amended by the *Protocol Amending the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital Done at Washington on 26 September 1980, as amended*, 21 September 2007, Can. T.S. 2008 No. 11 (the "**Fifth Protocol**").

40. The Fifth Protocol changed the wording of Article XXVII to provide that competent authority may exchange information where that information "may be relevant" for carrying out the provisions of the Canada-US Tax Treaty or the domestic laws of Canada and the United States concerning taxes. The United States prepared a technical explanation of this and other amendments made pursuant to the Fifth Protocol (the "**Technical Explanation**"). The Technical Explanation is an official United States guide to the Fifth Protocol.

41. The Government of Canada reviewed the Technical Explanation and subscribed to its contents. Canada and the United States agreed that the Technical Explanation accurately reflects the policies behind particular protocol provisions, as well as understandings reached with respect to the application and interpretation of the Protocol and the Canada-US Tax Treaty.

42. According to the Technical Explanation, the language "may be relevant" would not support a request in which the United States asked for information regarding all bank accounts maintained by residents of the United States in Canada.

43. *A fortiori*, under Article XXVII the United States cannot demand of Canada and Canada cannot disclose all Accountholder Information

regarding accounts maintained by all US Persons resident in Canada. Only information that is shown to meet the "may be relevant" standard can be disclosed.

Article XXV

44. Article XXV of the Canada-US Tax Treaty provides that United States nationals resident in Canada cannot be subjected by Canada to any taxation or other requirement connected therewith that is more burdensome than the taxation and connected requirements to which Canadian nationals resident in Canada are or may be subjected.

45. The Impugned Provisions result in Canada subjecting United States nationals resident in Canada to taxation and requirements connected therewith that are more burdensome than the taxation and connected requirements to which Canadian nationals resident in Canada are or may be subjected. Those burdens include a loss of privacy in the form of disclosure of banking information to a foreign government and providing that foreign government with assistance in collection.

46. The Impugned Provisions and Intergovernmental Agreement contemplate Canada providing the United States with Accountholder Information in relation to accounts held by persons identified by Financial Institutions as US Persons. Canada does not provide the United States with Accountholder Information in relation to accounts held by Canadian nationals that are not identified as belonging to US Persons. United States nationals who are US Persons are accordingly subjected to a burden to which other Canadians are not.

47. Furthermore, a witness for the Respondents admitted that information collected under the IGA will be used for domestic Canadian compliance, and that accordingly US citizens resident in Canada will no longer benefit from the due process rights afforded under ss. 231.1

to 231.7 of the *ITA* in respect of their financial account information, while non-US Persons continue to enjoy such rights (the "**Article XXV Admission**").

48. Accordingly, the requirements of the Impugned Provisions and Intergovernmental Agreement are *ultra vires* the Canada-US Tax Treaty and the *Tax Treaty Act*.

***Income Tax Act*, s. 241**

49. Section 241(1) of the *ITA*, provides that except where otherwise authorized in s. 241 no official or other representative of a government entity shall knowingly provide, knowingly allow to be provided or knowingly allow any person to have access to any taxpayer information.

50. Section 241(4) of the *ITA* provides that taxpayer information may be disclosed in a number of circumstances, including under a provision contained in a tax treaty with another country or in a "listed international agreement."

51. Section 248(1) of the *ITA* defines "listed international agreement" as the *Convention on Mutual Administrative Assistance in Tax Matters*, concluded at Strasbourg on January 25, 1988, as amended from time to time by a protocol, or other international instrument, as ratified by Canada, or a comprehensive tax information exchange agreement that Canada has entered into and that has effect, in respect of another country or jurisdiction.

52. The Accountholder Information is taxpayer information for the purposes of s. 241 of the *ITA*.

53. The Impugned Provisions and the Intergovernmental Agreement are not a tax treaty or a listed agreement, and the disclosure of the

Accountholder Information is not otherwise permitted under s. 241(4) of the *ITA*.

54. The Respondents in their pleadings do not assert that the Impugned Provisions and the Intergovernmental Agreement are a tax treaty or a listed agreement. Instead they assert that the provision of information to the United States occurs under the Canada-US Tax Treaty.

55. To the extent that the disclosure of Accountholder Information is not expressly authorized by the Canada-US Tax Treaty and *Tax Treaty Act*, disclosing that Accountholder Information is also contrary to s. 241(4) of the *ITA*.

Section 4 of the Impugned Provisions

56. Section 4 of the Impugned Provisions provides that in the event of any inconsistency between the provisions of the Impugned Provisions and the provisions of any other law, the provisions of the Impugned Provisions prevail to the extent of the inconsistency.

57. Likewise, s. 3(2) of the *Tax Treaty Act* provides that in the event of any inconsistency between the *Tax Treaty Act* or the Canada-US Tax Treaty and the provisions of any other law, the provisions of the *Tax Treaty Act* and the Canada-US Tax Treaty prevail to the extent of the inconsistency.

Appropriateness of Injunctive Relief

58. The Appellants acknowledge that the three part test in *RJR-MacDonald Inc. v. Canada (A.C.),* [1994] 1 S.C.R. 311 applies to this application.

59. With respect to whether the Appellants have raised a "serious question" on the appeal, that branch of the test will be satisfied if on a limited review of the issues the Court concludes that the Appellants

"may" have a meritorious appeal: *Coca-Cola Ltd. v. Pardhan*, (1999), 85 C.P.R. (3d) 501 (F.C.A.).

60. In this case, that threshold is easily satisfied. For example, in his reasons for judgment, Martineau J.:

a. entirely fails to address the meaning and import to be accorded the Technical Interpretation, which unambiguously states that Article XXVII prohibits bulk exchange of financial institution account information;

b. engages in an unduly formalistic and narrow construction of Article XXVIA;

c. entirely fails to address the Article XXV admission which unanswerably shows that the Impugned Provisions violate the Canada-US Tax Treaty; and

d. reaches the conclusion that for the purposes of Canadian law, the Intergovernmental Agreement is a treaty or listed agreement for the purposes of s. 241(4) of the *ITA* when that was not pled by the Respondents, where the Intergovernmental Agreement explicitly purports to be subordinate to the Canada-US Tax Treaty, and where the Appellants sought to tender evidence showing that from the point of view of the other party to the agreement it certainly is not a treaty.

61. With respect to whether the Appellants would suffer irreparable harm, there is a real risk that the appeal would be rendered moot insofar as the existing Account information of U.S. Persons is concerned if an injunction were not granted.

62. Under Article 4 of the Intergovernmental Agreement, Canada is required to begin providing the Accountholder Information to the United States by September 30, 2015.

63. Canada previously advised that it intended to begin disclosing the Accountholder Information to the United States on September 23, 2015. On September 18, 2015 the Appellants informed the Respondents of their intent to seek a stay and requested the Respondents' confirmation that any exchange of information pursuant to the Impugned Provisions would be delayed as a result of it. On September 22, 2015, the Respondents informed the Appellants that no information would be exchanged until September 29, 2015.

64. Once Canada has disclosed the Accountholder Information, the information will be irretrievable. The impact on the individuals whose Accountholder Information is disclosed will be permanent and irremediable.

65. This is particularly so given that this first disclosure will identify the Appellants and others in their position to the IRS as US Persons where previously the IRS would not have had that information.

66. Thus, once the information is disclosed, the primary purpose of the appeal for such persons and for such information, to prevent such disclosure, will have been rendered moot.

67. With respect to the balance of convenience, the Appellants acknowledge that there is a strong presumption in favour of legislation enacted by Parliament being in the public interest, which presumption is rebuttable if it can be shown that injunctive relief would serve a public interest greater than that served by maintaining the challenged legislation in immediate force: *Allard v. Canada*, 2014 FC 280.

68. Further, it should be noted that the present motion does not seek a complete suspension of the IGA, but rather only an exemption in respect of a subclass of persons to whom it applies and then only insofar as it seeks to enjoin the disclosure of Accountholder Information and not the collection. Courts have drawn a distinction between injunctions which seek to suspend legislation, and those which seek exemptions from the application of legislation. Those seeking only exemptions are subjected to a less stringent test: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110.

69. Moreover, in the present case, there are, on their face, competing public interests embodied in section 241 of the *ITA,* the *Tax Treaty Act*, and the *Impugned Provisions*.

70. Privacy over taxpayer information has been recognized by this Court and the Supreme Court of Canada as an important public interest under s. 241 of the *ITA* because it is a key tool to promote compliance in self-assessment tax systems: *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430; *Gernhart v. Canada*, [2000] 2 F.C.R. 292 (F.C.A.).

71. The Technical Interpretation evinces that privacy of taxpayer financial account information specifically is a public interest that animates the Canada-US Tax Treaty and, accordingly, therefore the *Tax Treaty Act*.

72. There can be no doubt that unless an injunction is granted to prevent imminent disclosure under the Intergovernmental Agreement, the public interest in privacy of taxpayer information will have been compromised. The question as to whether such compromise is lawful is the very question under appeal. In that sense, the *status quo* very much favours the granting of an injunction.

73. Furthermore, there is reason to believe that the specific public interest the Impugned Provisions purport to advance, enhanced taxpayer compliance, will not actually be achieved. Indeed, Martineau J. explicitly recognized in paragraph 76 of his Reasons that in many quarters, the regime the FATCA regime is regarded as ineffective, as well as costly and unjust. The record before him amply supports the conclusion that such may well be the case.

74. It is to be recalled that both the *Tax Treaty Act* and the *Impugned Provisions* contain paramountcy clauses. If in fact the provisions of the two pieces of legislation cannot be reconciled in the manner that either the Appellants or Respondents advocate, and if the paramountcy clause in the *Tax Treaty Act* were to be found primary over the paramountcy clause in the *Impugned Provisions*, then failure to issue an injunction will have resulted in the will of Parliament to protect the public interest in privacy over taxpayer confidentiality as expressed in s. 241 of the *ITA,* the *Tax Treaty Act* having been subverted.

75. On the other hand, if an injunction is granted, there will only be a delay while the appeal proceeds, and the Appellants submit that in that case the appeal should be expedited to minimize the delay. Further, it is apparent from the Notice that the IRS is aware that a number of jurisdictions may not be ready to exchange information by the original deadlines pursuant to their IGAs, and is for that reason treating 2014 and 2015 as "transition years" and granting certain countries extensions for the exchange of information. It is submitted that common sense would prevail, and the United States would refrain from taking any steps while its ally and treaty partner adheres to the rule of law.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

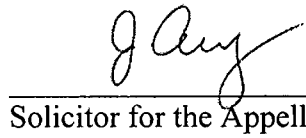
1. Affidavit of Sally Yee, affirmed September 23, 2015;

2. Affidavit of Virginia Hillis, sworn September 23, 2015;

3. Affidavit of Gwendolyn Louise Deegan, sworn September 23, 2015; and

4. Record before Martineau J. in Federal Court file No. T-1736-14.

September 23, 2015



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