

Amended pursuant to the Order of Prothonotary Roger R. Lafrenière dated October 7, 2014

File No. T-1736-14

FEDERAL COURT

BETWEEN:

VIRGINIA HILLIS and GWENDOLYN LOUISE DEEGAN

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF NATIONAL REVENUE

DEFENDANTS

AMENDED STATEMENT OF CLAIM TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Court Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: _____

Issued by: _____

[Registry Officer]

FEDERAL COURT
COUR FÉDÉRALE
Copy of Document
Copie du document
Filed / Déposé
Received / Reçu
OCT 09 2014
Date _____
Registrar
Greffier MH

Address of local office: Federal Court of Canada
Pacific Centre, PO Box 10065
3rd Floor, 701 West Georgia Street
Vancouver BC V7Y 1B6

TO: The Attorney General of Canada
Attention: William F. Pentney,
Deputy Attorney General of Canada

CLAIM

1. The Plaintiffs claim:
 - a. a declaration that 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, and ss. 263 to 269 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), collectively, the “**Impugned Provisions**,” are *ultra vires* Parliament based on the *Constitution Act, 1867* and of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*;
 - b. in the alternative, a declaration that the Impugned Provisions do not apply to provincially regulated financial institutions on the basis of ss. 92(13) and 92(16) of the *Constitution Act, 1867* and the doctrine of interjurisdictional immunity;
 - c. in the further alternative, a declaration that the Impugned Provisions are inconsistent with the unwritten principles of the Constitution including the principle that Canada will not forfeit its sovereignty to a foreign state;
 - d. a declaration that the Impugned Provisions unjustifiably infringe s. 7 of the *Canadian Charter of Rights and Freedoms*, (the “*Charter*”), and are of no force and effect;
 - e. a declaration that the Impugned Provisions unjustifiably infringe s. 8 of the *Charter* and are of no force and effect;
 - f. a declaration that the Impugned Provisions unjustifiably infringe s. 15 of the *Charter* and are of no force and effect;
 - g. such just and appropriate remedy as may be ordered pursuant to s. 24 of the *Charter*;
 - h. in the further alternative, a declaration that any automatic collection and disclosure of taxpayer information to the United States as is required by the Impugned Provisions would be *ultra vires* based on the *Canada-United States Tax Convention Act, 1984*, S.C. 1984, c. 20 (the “*Tax Convention Act*”) 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 *Tax Convention Act* or the domestic tax laws of Canada or the United States; or

- (iii) the collection and 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;
- i. an order in the nature of an interlocutory or permanent prohibitive injunction preventing the collection and 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 *Tax Convention Act* or the domestic tax laws of Canada or the United States; or
 - (iii) the collection and 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 citizens resident in Canada are subjected;
- j. special costs (or solicitor-client costs) or alternatively costs, and applicable taxes on those costs; and
- k. such further and other relief as this Honourable Court deems just.

THE PARTIES

2. The Plaintiff Virginia Hillis (“**Ginny**”), age 68, is a retired lawyer who lives in Windsor, Ontario.
3. The Plaintiff Gwendolyn Louise Deegan (“**Gwen**”), age 52, is a business person and graphic designer who lives in Toronto, Ontario.
4. The Defendant, the Attorney General of Canada (“**Canada**”), has an address for service at 900 - 840 Howe Street, Vancouver, British Columbia, V6Z 2S9.
5. The Defendant, the Minister of National Revenue, has an office at 7th Floor, 555 MacKenzie Avenue, Ottawa, Ontario, K1A 0L5. The Minister of National Revenue and her authorized representative(s) are the “competent authorities” under the *Tax Convention Act*.

DEFINITIONS

6. For the purposes of this claim, the term “**United States**” means the United States of America.
 7. For the purposes of this claim, the term “**Financial Institution**” includes 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.
 8. For the purposes of this claim, the term “**Nonparticipating Financial Institution**” means any Financial Institution that is not in compliance with the Impugned Provisions and/or the FATCA Provisions (defined below).
 9. For purposes of this claim, the term “**Canadian Financial Institution**” 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.
 10. For the purposes of this claim, a “**High Value Account**” means an account with a value of more than \$1,000,000.
 11. For the purposes of this claim, a “**Lower Value Account**” means 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.
 12. For the purposes of this claim, a “**Low Value Account**” means 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.
 13. For purposes of this claim, “**US Person**” includes a citizen of the United States or a United States resident, as deemed by the United States now or in the future.
-

14. For the purposes of this claim, “**US Person Indicia**” includes any of the following information when it appears in a record relating to an account held by an individual:
 - a. identification of the accountholder as a United States citizen or resident;
 - b. unambiguous identification of a place of birth in the United States;
 - c. current United States mailing or residence address;
 - d. standing instructions to transfer funds to an account maintained in the United States;
 - e. currently effective power of attorney or signatory authority granted to a person with a United States address; or
 - f. an “in-care-of” or “hold mail” address that is the sole address relating to the account.

 15. For purposes of this claim, “**US Reportable Account**” includes an account maintained by a Canadian Financial Institution that is held by one or more US Persons, or an account that is held by a legal arrangement or legal person (such as a corporation or a trust) that is controlled by one or more US Persons; or an account treated as a US Reportable Account as described in paragraph 44, below.

 16. For the purposes of this claim, “**Accountholder Information**” includes the following information with respect to a US Reportable Account:
 - 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 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.
-

THE UNITED STATES LEGISLATION

17. The United States automatically considers anyone born in the United States to be a citizen and therefore a US Person. The United States also automatically considers anyone born outside the United States to be a citizen and a US Person if both of that person's parents were United States citizens at the time of birth, the parents were married at the time of birth, and at least one parent lived in the United States or its territories prior to the birth. The contours of United States citizenship and the definition of US Person are matters of United States law and/or policy and are subject to change by the United States at any time.
 18. The United States taxes the world income of US Persons regardless of whether the US Person lives, works, or earns income in the United States. US Persons must declare their income annually, whether or not they earn sufficient income to generate a United States tax liability, and must complete financial disclosure statements relating to some of their accounts.
 19. By virtue of the *Convention Between Canada and the United States of America With Respect to Taxes on Income and Capital*, dated September 26, 1980, as amended (the "**Canada-US Tax Treaty**"), US Persons resident in Canada can credit limited and specific taxes paid to Canada and to Canadian provinces against some taxes they would otherwise pay to the United States.
 20. However, US Persons resident in Canada who comply with United States taxation laws can sometimes face tax liabilities to the United States where an event is not taxable in Canada but is taxable in the United States. For example, when US Persons resident in Canada realize capital gains on a personal residence (which is not a taxable event in Canada, but is a taxable event in the United States subject to certain exceptions), they can be exposed to very significant tax liability to the United States.
 21. US persons resident in Canada can also be subjected to double taxation when US law does not provide a credit for taxes paid in Canada.
 22. The United States can levy penalties and interest upon those it considers to be United States citizens who fail to file tax returns and declarations of foreign bank accounts in accordance with United States taxation laws. This can be the case even where no tax would have been payable had the person filed tax returns and declarations of foreign bank accounts in accordance with United States taxation laws.
 23. 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.
-

24. In order to relinquish citizenship and the obligation to report and/or pay United States tax, a US Person must first bring herself or himself into compliance with United States tax laws, which generally requires the filing of overdue tax returns and foreign bank account information forms for the previous five taxation years. 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. A US Person who seeks to relinquish United States citizenship must apply for a certificate by the United States (a "**Certificate of Loss of Nationality**").
25. 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**") that permit non-US Financial Institutions to voluntarily enter into agreements with the IRS under which Financial Institutions agree to identify all accountholders who appear to be US Persons and provide the IRS with the Accountholder Information of those accountholders.
26. Nonparticipating Financial Institutions are subject to a US-imposed withholding tax of 30% on the gross amount of any US-source amounts earned by the Nonparticipating Financial Institution, plus any non-US-source amounts paid to the Nonparticipating Financial Institution from any other Financial Institution in the world that has itself entered an agreement with the IRS (the "**Withholding Tax**").
27. The effect of the FATCA Provisions is that financial damage may be inflicted upon Nonparticipating Financial Institutions with exigible business or assets in the United States unless they were to enter into agreements with the United States pursuant to the FATCA Provisions. However, the entering into of such agreements could subject foreign Financial Institutions to sanction for violation of privacy legislation in their home countries, including in Canada.

THE IMPUGNED PROVISIONS

28. Canada enacted the Impugned Provisions in response to the United States enacting the FATCA Provisions. Broadly speaking the Impugned Provisions cause Canada to act as an intermediary between Canadian Financial Institutions and the IRS: Canadian Financial Institutions provide the Accountholder Information of US Persons to Canada, and Canada provides that Accountholder Information to the United States.
 29. The Impugned Provisions have three components:
 - a. an agreement between the United States and Canada (the "**Intergovernmental Agreement**"), which sets out Canada's obligations towards the United States;
-

- b. an annex to the Intergovernmental Agreement (“**Annex I**”), which describes the procedures Canadian Financial Institutions must undertake in order to determine which of its accounts are held by US Persons (the “**Due Diligence Procedures**”); and
- c. Part XVIII of the *Income Tax Act* (“**Part XVIII**”), which require Canadian Financial Institutions to undertake the Due Diligence Procedures.

The Intergovernmental Agreement

- 30. On or about February 5, 2014, Canada and the United States signed the Intergovernmental Agreement, namely 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*, February 5, 2014 , Can. T.S. 2014/16 (entered into force June 27, 2014).
- 31. Under Article 2 of the Intergovernmental Agreement, Canada agrees to collect Accountholder Information with respect to each US Reportable Account held at each Canadian Financial Institution. Canada agrees to provide the Accountholder Information to the United States on an automatic basis pursuant to the provisions of Article XXVII of the Canada-US Tax Treaty.
- 32. Under Article 3 of the Intergovernmental Agreement, Canada must provide the collected Accountholder Information to the United States ~~in~~ with respect to 2014 and each year thereafter. The Accountholder Information must be exchanged within nine months after the end of the calendar year to which the information relates.
- 33. Article 4 of the Intergovernmental Agreement provides that Reporting Canadian Financial Institutions will be deemed compliant with the FATCA Provisions if:
 - a. Canada collects and discloses the Accountholder Information to the United States; and
 - b. the Canadian Financial Institution:
 - i. identifies US Reportable Accounts to Canada and reports the Accountholder Information to Canada each year;
 - ii. for each of 2015 and 2016, reports annually to Canada the name of each Nonparticipating Financial Institution to which the Canadian Financial Institution has made payments and the aggregate amount of such payments;

- iii. registers with the IRS on a FATCA Provision related website; and
 - iv. in some circumstances, withholds 30% of any US source payments made to any Nonparticipating Financial Institution.
34. Under Article 4 of the Intergovernmental Agreement, Canada is not required to begin exchanging information prior to the date by which Financial Institutions are required to report similar information to the IRS under the FATCA Provisions. Under the FATCA Provisions, Financial Institutions are required to exchange information by March 31, 2015.
35. If these requirements are met, the United States agrees to treat Canadian Financial Institutions as complying with the FATCA Provisions and not subject to the Withholding Tax sanction.
36. 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.

Annex I

37. Annex I to the Intergovernmental Agreement sets out the Due Diligence Procedures for Canadian Financial Institutions. Different Due Diligence Procedures apply to accounts opened before and after June 30, 2014, and to Low Value Accounts, Lower Value Accounts, and High Value Accounts.
38. Annex I cl. II sets out the Due Diligence Procedures that apply to accounts opened before June 30, 2014 (the “**Pre-existing Account Procedures**”).
39. Annex I cl. II(A) provides that certain accounts need not be reviewed, identified, or reported, including Low Value Accounts opened before June 30, 2014. The Canadian Financial Institution may elect to treat the account as a US Reportable Account even if the account is a Low Value Account.
40. Annex I cl. II(B) provides that Canadian Financial Institutions must electronically search their data for any US Person Indicia associated with each Lower Value Account opened before June 30, 2014.
41. Annex I cl. II(D) provides that Canadian Financial Institutions must electronically search their data for any US Person Indicia associated with each High Value Account opened before June 30, 2014, and in certain circumstances the Canadian Financial Institution must take other steps such as making a search of its paper records for US Person Indicia associated with the account.
-

42. Annex I cls. II(B)(2) and II(D)(5) provide that if a Canadian Financial Institution performs a search and/or review and records and does not detect any US Person Indicia associated with an account, then the Canadian Financial Institution 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.
 43. Annex I cls. II(B)(4) and II (D)(5)(b) provide that if the Financial Institution conducts a search and/or review of records and discovers US Person Indicia associated with a Lower Value Account or a High Value Account, the Canadian Financial Institution 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. a self-certification that the accountholder is neither a US citizen nor a US resident for tax purposes;
 - b. 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
 - c. a copy of the account holder’s Certificate of Loss of Nationality or a reasonable explanation of either the reason the account holder 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.
 44. If the Canadian Financial Institution cannot obtain or review a Proof of Loss of Citizenship for an account associated with a US Person Indicia, the Canadian Financial Institution must treat the account as a US Reportable Account.
 45. Annex I cl. III sets out the Due Diligence Procedures that apply to accounts opened after June 30, 2014 (the “**Self-Certification Procedures**”).
 46. Annex I cl. III(A) provides that certain accounts need not be reviewed, identified, or reported, including Low Value Accounts that are depository accounts and that were opened after June 30, 2014. The Canadian Financial Institution may elect to treat the account as a US Reportable Account even if the account is a Low Value Account.
 47. Annex I cl. III(B) applies to Lower Value Accounts and High Value Accounts opened after June 30, 2014. Within 90 days of the opening of the account the Canadian Financial Institution must obtain a self-certification from the accountholder that allows the Canadian Financial Institution to
-

determine whether the accountholder is a US Person. The Canadian Financial Institution must confirm the reasonableness of the self-certification based on the information it has obtained in connection with the account opening.

48. Annex I cl. III(B)(2) provides that if the Self-Certification Procedure establishes that the accountholder is a US Person, the Canadian Financial institution must treat the account as a US Reportable Account.
49. Annex I cl. III(B)(3) provides that if there is a change of circumstances with respect to an account opened after June 30, 2014, that causes the Canadian Financial Institution to know or have reason to know that the original self-certification is incorrect or unreliable, the Canadian Financial Institution must obtain a new and valid self-certification. If it cannot obtain a new and valid self-certification, it must treat the account as a US Reportable Account.
50. Section 265(2)(c) of the *Income Tax Act* provides that for any clearly identifiable group of accounts opened after June 30, 2014, a Canadian Financial Institution may choose either to apply either the Self-Certification Procedures or the Pre-Existing Account Procedures.

Part XVIII

51. Part XVIII of the *Income Tax Act*, entitled “Enhanced International Information Reporting,” requires Canadian Financial Institutions to undertake the Due Diligence Procedures.
52. Section 264 provides that each year a Canadian Financial Institution may designate an account as being a non-US-Reportable Account, including in circumstances where the account is a Low Value Account.
53. Section 265 requires Canadian Financial Institutions to establish, maintain, and document the Due Diligence Procedures.
54. Section 266 requires each Canadian Financial Institution to file with the minister an information return relating to each US Reportable Account maintained by the Canadian Financial Institution in the immediately preceding calendar year.

The Canada-US Tax Treaty

55. Canada’s disclosure of Accountholder Information to the United States is required to occur on an automatic basis pursuant to the provisions of Article XXVII of the Canada-US Tax Treaty.
 56. Article XXVII of the Canada-US Tax Treaty provides that the “competent authorities” of Canada and the United States shall exchange such information
-

as may be relevant for carrying out the provisions of the Canada-US Tax Treaty or the domestic taxation laws of Canada and the United States.

57. In the case of Canada, the competent authorities are the Minister of National Revenue and her authorized representative(s).
58. 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”).
59. 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.
60. 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.
61. Parliament implemented the Canada-US Tax Treaty by passing the *Tax Convention Act*.
62. Section 3(2) of the *Tax Convention Act* provides that in the event of any inconsistency between the provisions of the *Tax Convention Act* or the Canada-US Tax Treaty and the provisions of any other law, the provisions of the *Tax Convention Act* or the Canada-US Tax Treaty prevail.

Income Tax Act s. 241

63. Section 241(1) of the *Income Tax Act* 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.
 64. Section 241(4) of the *Income Tax Act* 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”.
 65. Section 248(1) of the *Income Tax Act* 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.
-

THE PLAINTIFFS

Virginia ("Ginny") Hillis

66. Ginny was born in the United States in 1946 to two Canadian citizens. Ginny and her parents resided in Michigan until approximately 1951, when Ginny and her parents returned to Canada. Ginny has not resided in the United States since she was five years old.
67. Ginny has never worked in the United States and has never declared or paid any taxes in the United States. Ginny does not have a United States TIN. Ginny only recently learned that the United States requires non-resident citizens to declare and pay income tax.
68. Ginny has never held a United States passport. She travels to the United States, and has been told by a border officer that as a person with a United States birthplace she should obtain a United States passport to travel into and out of the United States, but she has not done so.
69. Ginny is married to a Canadian citizen, with whom she owns a number of accounts at Canadian Financial Institutions. Some of Ginny and her spouse's accounts had a value of more than \$50,000 on June 30, 2014, and continue to have a value of more than \$50,000. Since Ginny was born in Michigan, her accounts are associated with a US Person Indicia.
70. Ginny has not sought or obtained a Certificate of Loss of Nationality.

Gwen Deegan

71. 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.
 72. Gwen has never worked in the United States and has never declared or paid any taxes in the United States. Gwen does not have a United States TIN.
 73. Gwen has never held a United States passport. She has travelled to the United States in the past and has been questioned by a border officer as to why she, a person with a United States birthplace, does not have a United States passport to travel into and out of the United States, to which she always replies: "because I am a Canadian."
 74. Gwen is married to a Canadian citizen, with whom she owns accounts at Canadian Financial Institutions. None of the accounts held by Gwen and her spouse had a value of more than \$50,000 on June 30, 2014, or now have a
-

value of more than \$50,000. Since Gwen was born in Washington State, any new accounts she opens will be associated with a US Person Indicia.

75. Gwen has not sought or obtained a Certificate of Loss of Nationality.
76. Gwen and her spouse own and control a graphic design company, of which they are the equal and sole shareholders. The company also holds accounts at Canadian Financial Institutions. The company's accounts did not have value of more than \$50,000 on June 30, 2014, and do not have a value of more than \$50,000 today.

CONSTITUTION ACT, 1867

77. The collection and disclosure of the Accountholder Information of Canadian Financial Institutions customers engage the privacy and property rights of individual accountholders and also constitute the regulation of a particular industry (the financial industry). These are matters within the exclusive jurisdiction of the provinces under ss. 92(13) and 92(16) of the *Constitution Act, 1867*.
78. There is no federal head of power under s. 91 of the *Constitution Act, 1867* under which Canada could validly enact the Impugned Provisions. Accordingly, the Impugned Provisions are *ultra vires* Canada and invalid.
79. In the alternative, if there is any federal head of power under s. 91 of the *Constitution Act, 1867* under which Canada could validly enact the Impugned Provisions, the doctrine of interjurisdictional immunity applies to confer a limited grant of immunity from the Impugned Provision as they apply to provincially regulated financial institutions, because the regulation of a particular industry is an exercise of the province's core powers related to property and civil rights under s 92(13) of the *Constitution Act, 1867*. Accordingly, the Impugned Provisions are inoperative as they apply to provincially regulated Canadian Financial Institutions.
80. The Impugned Provisions also offend the unwritten principles of the Constitution in that Canada is forfeiting its sovereignty by facilitating the extra-territorial taxation of Canadian citizens by a foreign state.

CHARTER, SECTION 7

81. The Plaintiffs rely on s. 7 of the *Charter*, which states as follows:

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.
 82. The Impugned Provisions breach s. 7 of the *Charter* in that they expose the Plaintiffs to a deprivation of their liberty and security of the persons in
-

manner not in accordance with the principles of fundamental justice, which includes the principles against arbitrary, overbroad and grossly disproportionate laws and the principle that foreign tax debts are not enforceable in Canada

CHARTER, SECTION 8

83. The Plaintiffs rely on s. 8 of the *Charter*, which states as follows:

Everyone has the right to be secure against unreasonable search or seizure.

84. The Plaintiffs have a reasonable expectation of privacy in their Accountholder Information.

85. The Impugned Provisions breach s. 8 of the *Charter* in that the Impugned Provisions require or authorize Canadian Financial Institutions to collect Accountholder Information relating to US Reportable Accounts and disclose that information to Canada which will or can in turn disclose that information to the United States and its various agencies:

- a. without prior or any authorization by a neutral and impartial arbiter capable of acting judicially;
- b. without application of the reasonable and probable grounds standard or, in the alternative, without the application of any clear and articulable legal standard;
- c. without notice to the individual whose Accountholder Information is to be collected and/or disclosed;
- d. without an opportunity to be heard for the individual whose Accountholder Information is to be collected and/or disclosed;
- e. without a judicial determination of whether or not the accountholder is a US Person;
- f. without any consideration of the usefulness of the individual Accountholder Information to be collected and/or disclosed;
- g. without any right to appeal or review; and
- h. without sufficient and effective restriction on the use to which the Accountholder Information may be put.

CHARTER, SECTION 15

86. The Plaintiffs rely on s. 15(1) of the *Charter*, which states as follows:

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.

87. The Impugned Provisions create a distinction between citizens and residents of Canada who are US Persons and those who are not. The Impugned Provisions also create a distinction between accountholders whose accounts are associated with US Person Indicia (such as a United States place of birth) and accountholders whose accounts are not associated with US Person indicia.
 88. These are distinctions on analogous and enumerated grounds, including but not limited to distinctions on the basis of national origin and country of citizenship.
 89. The distinction created by the Impugned Provisions causes the Plaintiffs disadvantage, including but not limited to the facts that the Plaintiffs:
 - a. may have their Accountholder Information collected and disclosed to Canada, the United States, and the IRS;
 - b. may be asked to provide additional information and proof regarding their place of birth, residence, and citizenship when opening or continuing to hold an account;
 - c. may be unable to obtain bank accounts to the extent that Canadian Financial Institutions may refuse to deal with US Persons;
 - d. may be inhibited from progressing in their careers;
 - e. may have their Accountholder Information used by the IRS to investigate or prosecute for failing to file or pay taxes or completing other financial disclosure documents;
 - f. may be required to expend significant sums on tax professionals; and
 - g. may be denied many retirement planning and investment opportunities or other tax advantages available to Canadians of any other citizenship or national origin, particulars of which will be provided.
 90. These disadvantages perpetuate prejudice and stereotyping for reasons including that:
 - a. US Persons living in Canada are subject to prejudicial stereotypes and treatment in Canada and the United States;
-

- b. the Impugned Provisions are grossly over-inclusive in that they capture persons who have no tax liabilities to the United States;
- c. the Impugned Provisions have no ameliorative effects on more disadvantaged groups in society; and
- d. the Impugned Provisions seriously interfere with the privacy, liberty, and economic interests of US Persons and persons whose accounts are associated with US Person Indicia.

CHARTER, SECTION 1

91. Section 1 of the *Charter* provides as follows:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- 92. The said infringements of s. 7 cannot be justified pursuant to the criteria of s. 1, the burden of proof of which lies on Canada.
- 93. The said infringements of s. 8 cannot be justified pursuant to the criteria of s. 1, the burden of proof of which lies on Canada.
- 94. The said infringements of s. 15 cannot be justified pursuant to the criteria of s. 1, the burden of proof of which lies on Canada.

THE CANADA-US TAX TREATY

- 95. To the extent that the Impugned Provisions and the terms of the Canada-US Tax Treaty conflict, the terms of the Canada-US Tax Treaty prevail pursuant to s. 3(2) of the *Tax Convention Act*.
- 96. The collection and disclosure of Accountholder Information from Canada to the United States pursuant to the Impugned Provisions is *ultra vires*:
 - a. to the extent that the Accountholder Information relates to a taxable period in which the accountholder was a citizen of Canada pursuant to Article XXVIA of the Canada-US Tax Treaty;
 - b. because automatic disclosure of Accountholder Information cannot meet the “may be relevant” standard required by Article XXVII of the Canada-US Tax Treaty; and/or
 - c. the collection and 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, contrary to Article XXV of the Canada-US Tax Treaty.

THE INCOME TAX ACT

97. The Accountholder Information is taxpayer information for the purposes of s. 241 of the *Income Tax Act*.
98. The Impugned Provisions 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 *Income Tax Act*.
99. Because automatic disclosure of the Accountholder Information to the United States pursuant to the Impugned Provisions by the Minister of National Revenue and her authorized representative(s) is *ultra vires* to the extent set out above, that disclosure is contrary to s. 241(1) of the *Income Tax Act*.

The Plaintiffs propose that this action be tried at Vancouver, British Columbia.

DATED at the City of Vancouver, in the Province of British Columbia, this 9th ~~14th~~
day of October ~~August~~, 2014.



**Joseph J. Arvay, Q.C. and
David E. Gruber**
Farris, Vaughan, Wills & Murphy LLP
PO Box 10026, Pacific Centre South
25th Floor, 700 West Georgia Street
Vancouver BC V7Y 1B3
Tel: 604.684.9151 / Fax: 604.661.9349
Email: jarvay@farris.com