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Docket: T-1736-14

Citation: 2019 FC 960

Ottawa, Ontario, July 22, 2019

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

GWENDOLYN LOUISE DEEGAN AND KAZIA HIGHTON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF NATIONAL REVENUE

Defendants

JUDGMENT AND REASONS

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[1] Unlike Canada, which taxes only those individuals who are resident in this country, the United States imposes tax on the worldwide income of its citizens, regardless of where they may reside.

[2] To help ensure compliance with this system, the United States enacted the *Foreign Account Tax Compliance Act* (*FATCA*) in 2010. *FATCA* requires that certain persons (including U.S. citizens) provide financial information to the American Internal Revenue Service (IRS). *FATCA* further requires that non-American financial institutions enter into direct reporting relationships with the IRS, and that they provide the IRS with account information for customers who may be subject to American tax laws. Financial institutions that do not enter into such agreements or who otherwise fail to comply with *FATCA*'s reporting obligations will be subject to a 30% withholding tax on a variety of types of payments received from U.S. sources.

[3] The enactment of *FATCA* led to concerns on the part of the Canadian government as to the potential negative consequences for the Canadian financial sector, its customers and investors, and the Canadian economy as a whole, if Canadian financial institutions were unwilling to comply with the requirements of *FATCA*. There were, moreover, concerns with respect to the ability of Canadian financial institutions to comply with *FATCA*, in light of Canadian banking and privacy laws.

[4] As a result of these and other concerns, the Canadian government entered into negotiations with the American government in an effort to mitigate the impact of *FATCA* in this country. These discussions culminated in the conclusion of an intergovernmental agreement between the Governments of Canada and the United States in 2014. This agreement was subsequently implemented into Canadian law through the enactment of the *Canada-United States Enhanced Tax Information Exchange Agreement Implementation Act*, S.C. 2014, c. 20, s. 99 (the *Implementation Act*) and sections 263 to 269 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (collectively "the Impugned Provisions"), the relevant provisions of which are attached as an appendix to these reasons.

[5] Broadly speaking, the Impugned Provisions cause Canada – specifically the Canada Revenue Agency (CRA) – to act as an intermediary between Canadian financial institutions and the IRS. Canadian financial institutions are now statutorily required to provide the CRA with certain information concerning financial accounts belonging to customers whose account information suggests that they may be "U.S. persons". The CRA then provides that information to the IRS.

[6] By this action, the Plaintiffs challenge the constitutionality of the Impugned Provisions, asserting that they result in the unreasonable seizure of financial information belonging to U.S. persons in Canada, contrary to section 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. The Plaintiffs further assert that the Impugned Provisions impose a burden on such persons because of their citizenship or their national or ethnic origin, contrary to section 15 of the *Charter*.

Finally, the Plaintiffs say that these violations do not constitute reasonable limitations on the privacy and equality rights of affected individuals, as contemplated by section 1 of the *Charter*.

[7] For the reasons that follow, I have concluded that while the Impugned Provisions allow for the seizure of account information, seizures carried out pursuant to the Impugned Provisions are not unreasonable and thus do not violate section 8 of the *Charter*. I have further concluded that although the Impugned Provisions draw a distinction based on the enumerated and analogous grounds of national origin and citizenship, any such distinction is not discriminatory and thus does not violate section 15 of the *Charter*. Consequently, the Plaintiffs' action will be dismissed.

I. Background

A. *The American Income Tax System*

[8] The vast majority of countries' income tax systems are based on the residency of taxpayers. Only the United States and Eritrea utilize a citizenship-based taxation system.

[9] Like Canada, the United States generally automatically grants citizenship to individuals born within its jurisdiction. Other circumstances, such as parentage, can also lead to a person being deemed to be an American citizen by the United States Government, even if the individual was born outside the United States. Indeed, some individuals may be considered to be U.S. citizens by the American Government despite the person never having had any substantive connection to that country.

[10] The United States deems all American citizens to be permanent tax residents in the United States for federal income tax purposes, taxing the worldwide income of "specified U.S.

persons" regardless of whether they live, work, or earn income in the United States. The term "specified U.S. persons" is defined under *FATCA* and relates to persons who are subject to U.S. tax laws.[1] In addition to American citizens, "U.S. persons" subject to U.S. tax laws include other categories of persons who reside in the United States, such as "Green Card" holders.

[11] The result of this is that every Canadian resident who is an American citizen is subject to U.S. federal taxation on all of their income from all sources, wherever that income may be derived, even if he or she is also a Canadian citizen. These individuals are generally required to register for a "taxpayer identification number" (or TIN) and file U.S. income tax returns on an annual basis.

[12] Like the Canadian income tax system, the American income tax system is largely based on self-reporting by taxpayers. The U.S. requires that taxpayers, including non-resident U.S. citizens, file income tax returns, regardless of whether they actually owe any taxes, as long as their income for the taxation year in question meets a specified threshold.

[13] According to the evidence of Professor Allison Christians, a professor of international and comparative tax law at McGill University, Canada has never been considered by Americans to be a "tax haven", as it has its own comprehensive and well-regulated income tax system that is

[1] There is a distinction between "U.S. persons" and "specified U.S. persons". While all specified U.S. persons are U.S. persons, not all U.S. persons are specified U.S. persons, as certain types of legal entities are excluded from the definition of "U.S. persons" including some forms of corporations, brokerages and trusts. The distinction between the two terms is not material to the issues before me, and in the interests of simplicity, those natural persons who are affected by the reporting provisions of the Impugned Provisions will be referred to as "U.S. persons" for the purpose of these reasons.

fundamentally similar to the tax system in the United States. Professor Christians states that Canada is also a highly cooperative member of the international community on matters involving tax and information sharing and, in her opinion, individuals seeking to evade taxes would be more likely to hide their assets in jurisdictions with bank secrecy laws. Such individuals would thus not consider Canada to be a favourable destination. Canada and the United States have, moreover, had a deep and long-standing cooperative relationship in tax compliance and enforcement. In Professor Christians' opinion, individuals seeking to thwart American tax compliance and enforcement efforts would not seek assistance in this effort by moving their assets to Canada.

[14] Indeed, the U.S. government estimates that fewer than 10% of all individuals who file American tax returns from a "tax home" located outside the United States ultimately owe any taxes to the American Government. Regardless of whether any tax is due, however, U.S. law requires extensive financial and asset reporting. Failure to comply with these requirements potentially attracts significant penalties.

[15] The *Canada-U.S. Tax Treaty* allows U.S. persons who are resident in Canada to receive credit for some taxes paid to the federal and provincial governments in Canada that would otherwise have been owed to the IRS: *Convention between Canada and the United States of America with respect to Taxes on Income and on Capital*, 26 September 1980, Can. T.S. 1984 No. 15 (as implemented by the *Canada-United States Tax Convention Act, 1984*, S.C. 1984, c. 20) (the *Canada-U.S. Tax Treaty*).

[16] U.S. persons are, however, subject to taxation in the United States for certain events that are not taxable in Canada, even if the event in question takes place in Canada. For example, when U.S. persons resident in Canada realize a capital gain on the sale of their personal residence (an event that is not taxable in Canada, but is generally taxable in the United States), they can be exposed to significant tax liability to the IRS. Other examples of matters that are taxable in the United States, but not in Canada, include lottery winnings and strike pay.

[17] Penalties (which can, in some cases, be substantial) may be imposed for failure to comply with the reporting requirements of the U.S. *Internal Revenue Code*, 26 U.S.C. § 1. That said, taxpayers may have defences where there is a reasonable explanation for their failure to file and it is not due to wilful neglect. There are, moreover, various amnesty programs available to allow taxpayers to become compliant with their U.S. tax obligations with reduced or no penalties.

[18] In addition to the obligations imposed on citizens under American income tax legislation, the U.S. *Bank Secrecy Act*, Pub. L. No. 91-508, 84 Stat. 1114 (1970) requires that American citizens file "Form 114" reports with the Financial Crimes Enforcement Network of the U.S. Treasury Department with respect to financial accounts held outside the U.S. that exceed $10,000 (USD) in aggregate. These reporting obligations pre-date *FATCA*. "Form 114" reports are known as Foreign Bank Account Reports or "FBARs".

[19] Requiring that individuals file reports with tax authorities with respect to property held outside the jurisdiction in question is not unusual. As noted above, the United States has its requirement that American citizens file FBAR reports with respect to financial accounts held outside the U.S. that exceed $10,000. Similarly, section 233 of the Canadian *Income Tax Act* states that individuals subject to Canadian tax law are required to file "T1135" reports

identifying property held in foreign jurisdictions, including bank accounts, foreign trusts and corporations, where the total value of the property in question exceeds $100,000. As is the case where individuals fail to file FBAR reports, penalties can be imposed by Canadian tax authorities for failure to file T1135 reports with respect to foreign property.

B. *The Enactment of FATCA*

[20] To help ensure compliance with its income tax system, in 2010 the United States enacted *FATCA*, as part of the *Hiring Incentives to Restore Employment Act*, Pub. L. No. 111-147, 124 Stat. 71. *FATCA* now comprises Chapter 4 of Subtitle A of the *Internal Revenue Code*.

[21] This Court has previously found that the purpose of *FATCA* was "to improve US tax compliance", and that "[t]he American authorities were particularly concerned in 2010 with the issue of tax evasion": *Hillis et al v. Canada (Attorney General)*, 2015 FC 1082 at para. 50, [2016] 2 F.C.R. 235.[2]

[22] In 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. These require that affected individuals report the name, address and identifying number for the financial institutions where their accounts are located to the IRS, along with information concerning the account type and number, and the maximum value of the account during the year. These reporting obligations apply to U.S. persons who are resident in Canada, including those who also hold Canadian citizenship, and are in addition to

[2] The *Hillis* decision was rendered in the context of this case. Virginia Hillis was originally a Plaintiff in this action, but subsequently discontinued her participation in the case, leaving Gwendolyn Deegan and Kazia Highton as the two Plaintiffs.

the pre-existing obligation under the U.S. *Bank Secrecy Act* to report foreign financial accounts to the U.S. Treasury Department through the mechanism of FBAR reports.

[23] The definition of a "U.S. person" under *FATCA* is intended to capture individuals who are subject to U.S. tax laws. *FATCA* establishes a series of criteria or indicia that suggest that account holders may be subject to American tax laws. These include the account holder:

- Being identified as a U.S. citizen or resident;
- Having been born in the United States;
- Having a current U.S. residence or mailing address (including a U.S. post office box);
- Having a current American telephone number as the only telephone number on file;
- Having both a current American telephone number and a non-American telephone number on file;
- Having provided standing instructions to wire funds to an account maintained in the United States;
- Having a currently effective power of attorney or signatory authority granted to a person with a U.S. address; and
- Having provided an "in-care-of" or "hold mail" address as the sole address on file for the account holder.

[24] Reporting is required for all U.S. persons with assets outside of the United States whose value exceeds certain thresholds based on the individuals' residency and filing status. For U.S. persons living abroad, including those individuals residing in Canada, reporting is required if an individual files as "single" or "married filing separately" and has 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 U.S. 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.

[25] Individuals who are not U.S. persons may be affected by the reporting requirements of *FATCA*, including the non-American spouses of U.S. persons who hold accounts jointly with their spouses. Canadian businesses that have U.S. persons with signing authority on financial accounts may also be subject to *FATCA*'s reporting requirements.

[26] *FATCA* also imposes reporting requirements on non-U.S. financial institutions. These include entities that: accept deposits in the ordinary course of a banking or similar business; hold financial assets for the account of others as a substantial portion of their business; or are engaged (or hold themselves out as being engaged) primarily in the business of investing, reinvesting or trading in securities, partnership interests, commodities or have any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.

[27] *FATCA* requires that foreign financial institutions (FFIs) disclose the identity of U.S. persons who are beneficial owners of foreign financial accounts. Reporting FFIs are required to follow prescribed procedures in order to determine whether or not an account holder is in fact a U.S. person. These procedures may differ slightly, depending on whether the account is owned

by a natural person or a legal person or "entity" such as a corporation or a trust, and whether the account was opened prior to or after *FATCA* coming into force.

[28] Once a FFI ascertains that an account holder's documentation indicates that the individual satisfies one or more of the "U.S. person" criteria, *FATCA* requires that FFIs contact the account holder in question in order to determine whether or not the individual is in fact a "U.S. person" for the purpose of the Act.

[29] *FATCA* gives foreign banks the choice of opting in or out of the *FATCA* regime. Financial institutions that decline to opt into the *FATCA* regime will be subject to the 30% withholding tax that will be imposed on U.S. source payments. "U.S. source payments" include U.S. source interest payments, dividends, royalties, fixed and determinable annual or periodic payments, and gross proceeds from the sale of any property that produced any U.S. source interest or dividends.

[30] FFIs that opt into the *FATCA* regime will be required to register with the U.S. authorities and to employ prescribed procedures in order to determine whether account holders qualify as "U.S. persons". As a general rule, these financial institutions will not be subject to the 30% withholding tax imposed on the U.S. source payments that they receive. They will, however, be required to impose the 30% withholding tax on U.S. source payments that they make to account holders who refuse to provide information regarding their status as U.S. persons (recalcitrant account holders) or to financial institutions that have opted out of the *FATCA* regime (pass-through payments).

C. *The Concerns for Canada Resulting from the Enactment of FATCA*

[31] The enactment of *FATCA* led to concerns on the part of the Government of Canada with respect to the risks that the legislation posed for the Canadian financial sector, its customers and investors, and the Canadian economy as a whole.

[32] Evidence with respect to these concerns was provided by Kevin Shoom. Mr. Shoom is the Director of International Taxation within the Business Income Tax Division of the Department of Finance. He was involved in the negotiations with the U.S. Government that followed the enactment of *FATCA*.[3]

[33] According to Mr. Shoom, the Department of Finance 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. Although *FATCA* applies to financial institutions around the globe (as long as those financial institutions do business in the U.S.), the Department of Finance determined that Canada likely faced the highest level of exposure to the negative consequences of *FATCA* as a result of the very high degree of interconnection between the Canadian economy and that of the United States.

[34] Mr. Shoom states that the 30% withholding requirements of *FATCA* "put at risk all Canadian and Canadian financial institution (FI) participation in US markets of all types". He

[3] Although it was not before Parliament when it enacted the Impugned Provisions, I would note that evidence with respect to the potentially very serious consequences for the Canadian economy as a whole (as well as for Canadian financial institutions and individual accountholders) that could result from the enactment of *FATCA* are described in greater detail in the evidence of Matthias Oschinski. Mr. Oschinski is an expert in economic impact analyses, including the use of advanced statistical techniques to assess potential behavioural changes following policy changes. His evidence, which I accept, essentially confirmed the evidence offered by Mr. Shoom as to the potentially serious economic consequences that could result from the implementation of *FATCA* in Canada.

notes that according to information provided by the Canadian Bankers' Association, in 2008, Canadians held $322 billion (CDN) worth of U.S. securities and received U.S. source income of $27 billion (USD) that would be subject to the 30% withholding tax if Canadian financial institutions did not comply with *FATCA*'s reporting requirements.

[35] Mr. Shoom says that this could have caused "serious instability in the financial system and therefore to all Canadians who had investments in the US, who relied on pensions which invest in the US, or who borrowed money from or otherwise had financial relationships with Canadian FIs". He further estimates that the negative impact of *FATCA* on the Canadian financial system and economy "would be severe and long lasting".

[36] Concerns also arose as to whether Canadian financial institutions' compliance with *FATCA'*s reporting requirements would bring them into conflict with Canadian law.

[37] In particular, the Government of Canada was concerned that Canadian privacy legislation may have prohibited the direct reporting of accountholder information to the IRS by Canadian financial institutions, absent the consent of the accountholders.

[38] A further concern arose out of Canadian banking legislation. In order to remain compliant with *FATCA*, Canadian financial institutions would, in some circumstances, be required to close the accounts of recalcitrant accountholders who refused to co-operate in providing the information necessary to determine whether or not they were "U.S. persons". However, Canadians have a right to basic banking services under the *Access to Basic Banking Services Regulations*, SOR/2003-184. These regulations require that Canadian banks provide retail depository accounts to individuals who can provide identification in all but exceptional cases

(where, for example, the account is to be used for illegal or fraudulent purposes, misrepresentation, or danger to other customers or employees).

[39] Despite these concerns, Mr. Shoom says that the Department of Finance recognized that "an enhanced exchange of information regime" could also potentially offer benefits for the Canadian tax system. Consequently, representatives of the Canadian government decided to enter into negotiations with their American counterparts, in the hope of mitigating the effect of *FATCA* on the Canadian economy and Canadians.

D. *The Negotiations with the Government of the United States*

[40] The *Hiring Incentives to Restore Employment Act* (of which *FATCA* was a part) was signed into law in 2010. While the provisions of *FATCA* were initially not scheduled to come into effect until 2013, the effective date for *FATCA* was subsequently pushed back to 2014.

[41] After determining that there was no appetite for a co-ordinated international response to the American legislation, the Department of Finance decided to work as closely as possible with its American counterparts in an effort to reduce, to the extent possible, the risk posed by *FATCA* to Canadians, the Canadian financial system, and the Canadian economy.

[42] Numerous meetings and telephone calls took place between Canadian and American officials in the years between 2010 and 2014. In light of the long and mutually beneficial history of the automatic exchange of tax information between the CRA and the IRS, Canada initially attempted to mitigate the impact of *FATCA* by negotiating a "carve out" or blanket exemption for Canadian residents. American officials were, however, unwilling to entertain the possibility of creating any such an exemption on the basis that citizenship-based taxation was part of

American tax legislation, and the U.S. Government was obliged to administer its domestic tax laws as drafted.

[43] Having determined that a blanket exemption from the reporting requirements of *FATCA* was simply not possible, Canadian officials then decided to explore whether the Americans would be amenable to building on existing government-to-government arrangements for the exchange of tax information, rather than having Canadian financial institutions enter into direct reporting relationships with the IRS, as required under *FATCA*. The Department of Finance was of the view that a government-to-government approach would be less burdensome for Canadian financial institutions and financial consumers than full compliance with *FATCA*. A government-to-government approach would also avoid the potential conflict with Canadian privacy laws.

[44] The Department of Finance was also concerned that as a result of *FATCA*'s reporting requirements, the IRS could become aware of taxpayers residing in Canada who had not previously been filing tax returns with the IRS, who could then face potentially onerous penalties for their failure to file. To address this concern, the Department of Finance sought to broaden its negotiations with the U.S. Government to include discussions with respect to the possible expansion of voluntary disclosure programs to provide potential relief from IRS penalties for these taxpayers.

[45] In early 2012, while discussions between Canadian and American officials were ongoing, the United States announced that it was negotiating intergovernmental agreements with the United Kingdom, France, Germany, Italy and Spain. These proposed agreements (which became known as "Model I" agreements) contemplated government-to-government reporting relationships along the lines that had been proposed by Canadian negotiators.

[46] In mid-2012, the U.S. Treasury released a draft template Model I agreement. Under this type of agreement, financial institutions would report accountholders whose banking records included U.S. person indicia to the tax authority in the country where the taxpayer was resident. The domestic tax authority would then forward this information to the IRS under exchange of information arrangements between the U.S. Government and the country in question.

[47] Once the draft template Model I agreement had been developed, Department of Finance officials began discussions with officials from the U.S. Treasury Department with respect to the specific text of a Canada-U.S. intergovernmental agreement.

[48] At the same time, the Department of Finance sought input from the public with respect to these matters, and Mr. Shoom was the individual tasked with dealing with the public. He states that many of the comments that he received related to concerns with respect to the impact that U.S. tax laws and filing requirements would have for the affected individuals. Frustration was also expressed with respect to the additional tax that these individuals may have to pay, as well as the high cost of retaining advisors who could assist affected individuals in complying with their U.S. tax obligations. Concerns were also expressed with respect to the challenges that affected individuals would face in making use of tax-deferral plans such as tax-free savings accounts (TFSAs) and Registered Disability Savings Plans (RDSPs).

[49] In early 2013, the IRS released the final version of the *FATCA* regulations. According to Mr. Shoom, Canada's input was reflected in some of the regulations, resulting in the removal of the requirement that documentation be provided under penalty of perjury, and modifications being made to the requirement that documentation with respect to accounts had to be updated every three years.

[50] The *FATCA* regulations would govern financial institutions in countries that had not concluded intergovernmental agreements with the United States. However, it was expected that in countries that had negotiated intergovernmental agreements with the U.S., the terms of the intergovernmental agreement in question would largely supplant the requirements of the *FATCA* regulations.

[51] According to Mr. Shoom, the promulgation of the *FATCA* regulations gave Canadian negotiators a "clear picture of the bottom line application of the *FATCA* provisions". Once that "bottom line" had been established, Canadian negotiators could continue pushing to have a better arrangement for Canada incorporated into an intergovernmental agreement.

[52] These negotiations culminated in the conclusion of a Canada-U.S. intergovernmental agreement on February 5, 2014: *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 Canada and the United States of America with Respect to Taxes on Income and on Capital*, 5 February 2014, Can. T.S. 2014 No. 16 (the *Canada-U.S. IGA*).

[53] Like the intergovernmental agreements negotiated between the United States and the United Kingdom, France, Germany, Italy and Spain, the *Canada-U.S. IGA* involves a government-to-government approach, which Mr. Shoom describes as "the most crucial achievement of Canada and the international community". At this point, approximately 100 other countries have entered into intergovernmental agreements with the U.S., which agreements are similar to the *Canada-U.S. IGA.*

[54] The conclusion of the *Canada-U.S. IGA* was announced to the public on February 5, 2014. This announcement was accompanied by a call for comments on the detailed draft legislative proposals and accompanying explanatory notes in respect of proposed changes to the *Income Tax Act* that would implement the agreement. The deadline for comments was March 10, 2014.

[55] As was noted earlier, the *Canada-U.S. IGA* was subsequently implemented into Canadian law through the Impugned Provisions. Canadian financial institutions are bound to comply with the requirements of the agreement, and cannot choose to opt out of the IGA regime. With the *Canada-U.S. IGA* in place, Canadian financial institutions are deemed to be compliant with the requirements of *FATCA* if they comply with the provisions of the agreement: *Implementation Act*, section 99, Schedule 3; *Canada-U.S. IGA*, Article 4.

E. *The Canada-U.S. Intergovernmental Agreement and the Impugned Provisions*

[56] Mr. Shoom states that "[t]o the greatest extent possible in the circumstances", the *Canada-U.S. IGA* "improved the position of Canada, Canadian [financial institutions] and their customers". He further asserts that "[c]rucially, the [*Canada-U.S. IGA*] put in place a system that reduced the likelihood that withholding taxes would be applied, thereby mitigating the worst of the risks to the Canadian economy".

[57] Insofar as individual taxpayers are concerned, generally speaking, the *Canada-U.S. IGA* and the Impugned Provisions require that the CRA collect information about some types of accounts maintained by certain Canadian financial institutions that are held by one or more individuals where the financial institution has specific types of information linking the

accountholder to the United States. The types of information in question are set out in the *Canada-U.S. IGA*, and are referred to as "U.S. Person Indicia".

[58] Similar to the requirements of *FATCA*, "U.S. Person Indicia" include any of the following information when it appears in a record relating to an account held by an individual at a Canadian financial institution: identification of the accountholder as a United States citizen or resident; unambiguous identification of a place of birth in the United States; current United States mailing or residence address; current United States telephone number; standing instructions to transfer funds to an account maintained in the United States; currently effective power of attorney or signatory authority granted to a person with a United States address; or an "in-care-of" or "hold mail" address that is the sole address relating to the account.

[59] The *Canada-U.S. IGA* and the Impugned Provisions also require the reporting of 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 U.S. Persons.

[60] With respect to each account that is required to be reported ("U.S. Reportable Accounts"), the information that the CRA must collect from Canadian financial institutions includes:

a. the name and address of each U.S. Person that is an account holder;

b. the taxpayer identifying number ("TIN") of each U.S. Person, 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").

[61] Whether or not an account is a "U.S. Reportable Account" is determined by Canadian financial institutions by following the due diligence procedures set out in an Annex to the *Canada-U.S. IGA* and in the Impugned Provisions (the "Due Diligence Procedures"). Certain kinds of accounts (such as TFSAs, Registered Retirement Savings Plans (RRSPs), and Registered Education Savings Plans (RESPs) are excluded from the operation of the *Canada-U.S. IGA* and are not considered to be "U.S. Reportable Accounts" under the IGA and the Impugned Provisions.

[62] Different Due Diligence Procedures apply to accounts opened before and after June 30, 2014, and to Low Value Accounts (accounts with a balance or value of less than $50,000 USD, or a cash value insurance contract or annuity contract with a value of less than $250,000 USD), Lower Value Accounts (an account with a value of between $50,000 USD and $1,000,000 USD, or a cash value insurance contract or annuity contract with a value between $250,000 USD and $1,000,000 USD), and High Value Accounts (an account with a value of more than $1,000,000 USD).

[63] In accordance with the *Canada-U.S. IGA* and the Impugned Provisions, the Due Diligence Procedures to be followed by Canadian financial institutions with respect to

pre-existing individual accounts requires them to search their records for accountholders with U.S. Person Indicia. If a Canadian financial institution does not detect any U.S. Person Indicia associated with an account, it 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 U.S. Person Indicia being associated with the account.

[64] For pre-existing accounts that were not previously reportable, the Impugned Provisions only mandate ongoing review and reporting if the account balance exceeds $1 million (USD) at a later date. *FATCA* has an additional requirement that no longer applies in Canada: namely that such accounts also be reviewed for changes in circumstance which may indicate the accountholder is a U.S. person.

[65] In addition, customers opening accounts at a new bank (other than those financial institutions that are exempted from *FATCA*'s reporting requirements under the *Canada-U.S. IGA*) will now have to certify their tax residency, both for the purpose of the Common Reporting Standard (which will be discussed further on in these reasons) and for the purpose of the *Canada-U.S. IGA.* This requirement does not, however, apply to customers who simply want to open a new account at their existing bank.

[66] Low Value Accounts do not have to be reviewed, identified or reported as U.S. reportable accounts, but financial institutions have the discretion to elect to treat these accounts as U.S. Reportable Accounts. Indeed, certain individuals with Low Value Accounts have had their accounts frozen, and have been told that their accounts will not be reopened unless and until they present a Certificate of Loss of Nationality.

[67] If a financial institution discovers U.S. Person Indicia associated with a Lower Value or High Value Account, it must attempt to obtain or review information and documents that would clarify whether or not the accountholder is in fact a U.S. Person. If the Canadian financial institution cannot obtain or review the necessary information for an account associated with U.S. Person Indicia, the Canadian financial institution must treat the account as a U.S. Reportable Account.

[68] Article 2 of the *Canada-U.S. IGA* requires Canada to collect Accountholder Information about U.S. Reportable Accounts from Canadian financial institutions and then provide that information to the United States. Article 2 of the *Canada-U.S. IGA* further provides that Canada's disclosure of the Accountholder Information is to occur annually and on an automatic basis pursuant to the provisions of Article XXVII of the *Canada-U.S. Tax Treaty*.

F. *The Purpose of the Impugned Provisions*

[69] It is necessary to identify the purpose of the Impugned Provisions in order to assess the reasonableness of seizures of accountholder information carried out in accordance with the Impugned Provisions, and whether they violate section 8 of the Charter.

[70] As the Plaintiffs observe, the Supreme Court has stated that in identifying the purpose of legislation, "courts should be cautious to articulate the legislative objective in a way that is firmly anchored in the legislative text, considered in its full context": *R. v. Moriarty,* 2015 SCC 55 at para. 32, [2015] 3 S.C.R. 485.

[71] In identifying the purpose of the Impugned Provisions, the starting point must be the rationale underlying the enactment of *FATCA* itself.

[72] I agree with the Defendants that while the American government was undoubtedly concerned with the issue of tax evasion, the purpose underlying the enactment of *FATCA* was its desire to improve U.S. tax compliance. Indeed, Justice Martineau found that "[t]he stated purpose of *FATCA* is to improve US tax compliance by obtaining information from foreign financial institutions about accounts maintained by US taxpayers, directly or through intermediary entities": *Hillis*, above at para. 50.

[73] Insofar as the purpose of the *Canada-U.S. IGA* is concerned, Justice Martineau found that the *Canada-U.S. IGA* was concluded "for the purpose of implementing the obligations to obtain and exchange information with respect to reportable accounts": *Hillis*, above at para. 27. He further found that the intention of the two governments was clear from the wording of the *Canada-U.S. IGA*: namely that "they agree to obtain and exchange annually on an automatic basis all relevant information respecting reportable accounts subject to the confidentiality and other provisions of the Canada-US Tax Treaty": *Hillis*, above at para. 66.

[74] While the purposes identified by Justice Martineau may be true as far as they go, the Plaintiffs and the Defendants have each identified other purposes for the *Canada-U.S. IGA*.

[75] Referring to the recitals in the *Canada-U.S. IGA*, the Plaintiffs submit that the purpose of the Impugned Provisions is to assist the American government in implementing *FATCA* and finding American tax evaders and cheats. The Plaintiffs further contend that assisting the United States in catching tax cheats can hardly be considered to be a pressing and substantial issue for the Canadian Government, or for Canadians themselves, submitting that the scheme envisaged by the *Canada-U.S. IGA* is nothing more than a fishing expedition.

[76] The Defendants contend that it is an oversimplification to say that the purpose of the Impugned Provisions is simply to assist the American government in finding "tax evaders and cheats".

[77] According to the Defendants, Canada's purposes in entering into the *Canada-U.S. IGA*, and in implementing it through the Impugned Provisions were distinct from those of the U.S. From Canada's perspective, the primary purpose of both the *Canada-U.S. IGA* and 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.

[78] The Defendants identify Canada's secondary purposes for entering into the *Canada-U.S. IGA* and for implementing it through the Impugned Provisions as including the lessening of the burden on Canadian financial institutions and their customers that would have been imposed by the direct application of *FATCA*. Another such secondary purpose was to achieve the automatic exchange of information from the U.S. to Canada for Canadian taxation purposes in exchange for assisting with the application of *FATCA* in Canada.

[79] The Defendants submit that it is clear from the evidence of Mr. Shoom that there were serious concerns with respect to the potential impact of *FATCA* on Canadian financial institutions, their customers and the Canadian economy in general. As a consequence, the goal of avoiding this impact was an extremely important one. The only way that Canadian financial institutions could avoid these serious consequences was for them to comply with *FATCA*, or with some less onerous standard to which the American government had agreed. The Defendants submit that the Impugned Provisions represent that less onerous standard, and that the Impugned

Provisions therefore serve the important purpose of avoiding the serious consequences of *FATCA*.

[80] The Plaintiffs accept that Canada's *motive* for entering into the *Canada-U.S. IGA* may have been to avoid the negative consequences that *FATCA* would have on Canadian financial institutions, their customers and the Canadian economy in general. According to the Plaintiffs, however, there is a distinction between the *motive* underlying an agreement, and the *purpos*e of that agreement.

[81] The Plaintiffs note that the recitals to the *Canada-U.S. IGA* identify the purposes of the Agreement. Amongst other things, the recitals note that a number of issues had arisen with respect to *FATCA*, including the concern that Canadian financial institutions may not be able to comply with certain aspects of *FATCA* due to domestic legal impediments.

[82] The recitals also state that the Governments of both Canada and the United States support the underlying goal of *FATCA* of improving tax compliance on a reciprocal basis, and that the Government of the United States is committed to exchanging tax information with the Government of Canada at an equivalent level of exchange. The U.S. Government is further committed to working with Canada over the longer term toward achieving common reporting and due diligence standards for financial institutions.

[83] The recitals to the *Canada-U.S. IGA* also include the recognition by the U.S. government of the need to coordinate reporting obligations, and of the fact that an intergovernmental approach to *FATCA* implementation would facilitate compliance by Canadian financial institutions while protecting the ability of Canadians to access financial services. Also included

in the recitals is the statement that the parties desired to conclude an agreement to improve international tax compliance, and to provide for the implementation of *FATCA* based on domestic reporting and reciprocal automatic exchange of information pursuant to the provisions of the *Canada –U.S. Tax Treaty*, subject to the confidentiality and other protections provided therein.

[84] The Plaintiffs submit that what is notably absent from these recitals is any suggestion that the purpose of the *Canada-U.S. IGA* was to avoid the potentially catastrophic impact of *FATCA* on Canadian financial institutions as a result of a threat posed by the United States government if those institutions did not comply with its terms.

[85] It is clear from the recitals to the *Canada-U.S. IGA* that the Governments of Canada and the United States had a number of shared goals in negotiating the Agreement. Both Governments also recognized that there were concerns about the ability of Canadian financial institutions to comply with some of *FATCA*'s reporting requirements because of domestic legal impediments.

[86] However, as the Supreme Court observed in *Moriarty*, in articulating a legislative objective, regard must be had to the legislative text, *considered in its full context*: above at para. 32 [my emphasis]; see also *R. v. Advance Cutting and Coring Ltd*., 2001 SCC 70 at para. 255, [2001] 3 S.C.R. 209.

[87] Evidence with respect to the context in which the *Canada-U.S IGA* was negotiated was provided by Mr. Shoom. It is, moreover, clear from Mr. Shoom's evidence that there were serious concerns on the part of Canadian officials with respect to the impact that *FATCA* would have on Canadian bank customers, Canadian financial institutions and the Canadian economy as

a whole. These concerns were clearly a primary reason why Canada was prepared to enter into an intergovernmental agreement with the American government. It is, moreover, evident that, from Canada's perspective, one of the main purposes of the Agreement was to mitigate the negative impact of *FATCA* in this country. Indeed, I understand the Plaintiffs to concede that these concerns may well have been the reason why Canada entered into the *Canada-U.S. IGA*.

[88] This then takes us to consider the purpose of the Impugned Provisions. In the narrowest sense, the purpose of the Impugned Provisions was simply to implement the provisions of the *Canada-U.S. IGA* into Canadian law. There is, however, more to the purpose of the Impugned Provisions than just that: based on the evidence of Mr. Shoom, I find that 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.

[89] I further agree with the Defendants that other objectives underlying the enactment of the Impugned Provisions include the lessening of the burden on Canadian financial institutions and their customers that would have resulted from the direct application of *FATCA*, and the facilitation of the automatic exchange of information between the U.S. and Canada for Canadian taxation purposes.

G. *The Advantages of the Canada-U.S. IGA and the Impugned Provisions over the Requirements of FATCA*

[90] According to the evidence of the Defendants' witnesses, a number of advantages have been realized as a result of the conclusion of the *Canada-U.S. IGA*. Evidence regarding these advantages was provided by Mr. Shoom and by Katherine T. Johnson. Ms. Johnson is a Senior

Manager in the Toronto office of PricewaterhouseCoopers, where she specializes in Global Information Reporting.

[91] As a starting point, the *Canada-U.S. IGA* is much shorter and more readily comprehensible than *FATCA* and the regulations enacted thereunder. Moreover, in the interest of improving clarity and consistency, the *Canada-U.S. IGA* uses Canadian terminology to the extent possible, with few references being made to American law. In addition, most of the provisions of the *Canada-U.S. IGA* are to be interpreted in accordance with Canadian domestic law. As a consequence, it is much easier for Canadian financial institutions and individuals to understand their legal obligations as to which accounts have to be reported to the U.S. authorities and which do not.

[92] Because of the government-to-government nature of the reporting scheme envisaged by the *Canada-U.S. IGA*, the exchange of tax information with the IRS attracts the protection of the *Canada-U.S. Tax Treaty*, which imposes confidentiality requirements and restrictions on the use that can be made of the information exchanged under the provisions of the Treaty: *Canada-U.S. IGA*, Articles 2 and 3(7). These confidentiality requirements and restrictions would not apply if information was transmitted directly to the IRS by Canadian financial institutions under the provisions of *FATCA*.

[93] The Department of Finance was also successful in restricting the number of accounts that are shared with the U.S. tax authorities by limiting the number of financial institutions that are subject to *FATCA*'s reporting requirements.

[94] At the same time, the Department of Finance was able to broaden the category of institutions that were not required to conduct Due Diligence Procedures to include First Nations governance bodies. Finance was also able to include a set of provisions in the *Canada-U.S. IGA* which allowed Canadian life insurers to assume that policy beneficiaries were not U.S. persons: *Canada-U.S. IGA*, Annex I.

[95] Section II B (3) of Annex I of the *Canada-U.S. IGA* requires that Canadian financial institutions report accounts to the CRA when they come across listed U.S. Person Indicia. However, in an effort to protect accountholders from over-reporting, Section II B (4) of Annex I of the *Canada-U.S. IGA* empowers Canadian financial institutions to first try to "clear" the U.S. Person Indicia. Moreover, subsection 265(5) of the *Income Tax Act* requires that where any U.S. Person Indicia are discovered, reporting Canadian financial institutions "must seek to obtain or review the information … that is relevant in the circumstances and must treat the account as a U.S. Reportable Account unless one of the exceptions … applies with respect to that account".

[96] In addition, the Department of Finance successfully negotiated a more generous "carve-out" for pre-existing cash value insurance and annuity contracts, such that they will be grandfathered if U.S. laws or regulations effectively prevented the sale of such products to U.S. residents.

[97] "Carve-outs" were also negotiated that expanded the categories of Canadian financial institutions that are exempted from the reporting requirements of *FATCA*: *Canada-U.S. IGA*, Annex II. Entities that are to be treated as "Non-reporting Canadian Financial Institutions" include retirement funds and "Deemed-Compliant Financial Institutions", which include

financial institutions with a local client base, central co-operative credit societies and smaller credit unions.

[98] Annex II of the *Canada-U.S. IGA* further contains a broad list of types of accounts that are not to be treated as U.S.-reportable accounts. These include RRSPs, RESPs, RDSPs, TFSAs, Registered Pension Plans, Registered Retirement Income Funds, Pooled Registered Pension Plans, eligible funeral arrangements and certain escrow accounts. Also exempted are the Canada Pension Plan and Quebec Pension Plan.

[99] According to Mr. Shoom, the Department of Finance considered the negotiation of this broad list of exempted accounts to be a "major success" that would significantly reduce the compliance burden for Canadian financial institutions and their customers. Ms. Johnson further asserts that the exclusion of certain types of accounts under the *Canada-U.S. IGA* and the Impugned Provisions has significantly decreased the compliance burden for Canadian financial institutions and their customers who may otherwise have been required to complete self-certifications or report under the U.S. Requirements.

[100] Another advantage of the *Canada-U.S. IGA* over *FATCA* that was identified by Ms. Johnson relates to the treatment of the foreign affiliates of Canadian financial institutions. In accordance with the provisions of *FATCA*, a Canadian financial institution would be required to close its foreign affiliate if it was located in a jurisdiction that had not entered into an inter-governmental agreement with the U.S. and whose bank secrecy laws did not permit the sharing of customer information. That is, in order for a Canadian financial institution to remain compliant with the requirements of *FATCA*, it would have to shut down its operations in

jurisdictions that could not comply with *FATCA*. As a result of Article 4(5) of the *Canada-U.S. IGA*, this is no longer the case.

[101] The Department of Finance also negotiated an assurance from the U.S. Government that Canadian financial institutions would not be required to close accounts held by recalcitrant accountholders or to deny service to their customers: *Canada-U.S. IGA*, Article 4(2). This avoided the potential conflict with the requirements of Canadian banking legislation as well as negative economic consequences for Canadian financial institutions.

[102] Evidence with respect to this latter point was provided by Mr. Oschinski, who states that as a result of the saturation of the Canadian market by Canadian financial institutions, the success of the Canadian banking sector is largely based on its ability to "go global". As a consequence, it would have been problematic for the health of the Canadian banking sector if Canadian financial institutions had been required to close affiliates in other jurisdictions.

[103] The Department of Finance was further able to ensure that administrative errors would not put a Canadian financial institution into non-compliance, thereby reducing the risk of exposure to the 30% withholding tax. Article 5 of the *Canada-U.S. IGA* requires that the IRS advise the CRA if it has concerns regarding a potential compliance issue, and, where possible, such errors are to be resolved between the Canadian financial institution and the CRA, without the further involvement of the IRS.

[104] In cases where there is significant non-compliance, the financial institution in question will have 18 months to resolve the issues before the withholding tax will be imposed: *Canada-U.S. IGA*, Article 5. There will, moreover, be fewer instances of non-compliance, as Canadian

financial institutions are all deemed to be *FATCA*-compliant under the provisions of the *Canada-U.S. IGA*, and because of the proliferation of intergovernmental agreements around the world.

[105] The *Canada-U.S. IGA* also imposes obligations on the United States in terms of the reciprocal exchange of information. It expands the amount of information that the CRA receives from American authorities, in particular through the provision of the Canadian tax identification numbers of account holders. The *Canada-U.S. IGA* also contains provisions preventing the U.S. Government from unilaterally changing the terms of the agreement.

[106] As a result of discussions with the Canadian Department of Finance, the U.S. Government also announced changes to its voluntary disclosure programs to streamline the process and provide options for individuals who were not deliberately using non-U.S. accounts to evade U.S. tax.

[107] It is, however, important to note that nothing in the *Canada-U.S. IGA* has any impact on the U.S. tax liability of any U.S. persons residing in Canada. That liability, which is governed by the provisions of the American *Internal Revenue Code*, exists independently of the *Canada-U.S. IGA*, as do individuals' personal reporting requirements under the *Internal Revenue Code* and the *Bank Secrecy Act*.

II. The Plaintiffs' Situation

[108] The Plaintiffs in this case are Gwendolyn Louise Deegan and Kazia Highton. Both are American citizens as a result of each having been born in the United States, although neither spent more than a few years there as children. Both Ms. Deegan and Ms. Highton are now Canadian citizens, and neither one has any real ongoing connection with the United States.

[109] Ms. Deegan has provided an affidavit in which she explains that she is a graphic designer and business person living in Toronto, Ontario. She was born in Washington State to an American mother and a Canadian father. Ms. Deegan resided in the United States with her parents from the time of her birth until she was approximately five years old, when she and her parents moved to Canada. Ms. Deegan has not resided in the United States since that time.

[110] Ms. Deegan has never worked in the United States, and she does not own any assets or hold any financial accounts in that country.

[111] Ms. Highton has not provided an affidavit in this case with the result that little is known about her. However, according to the agreed statement of facts provided by the parties, Ms. Highton is an elementary school teacher living in Victoria, British Columbia, who was born in Michigan to Canadian parents. Ms. Highton has a United States Social Security Number.

[112] Neither Ms. Deegan nor Ms. Highton has ever filed a United States tax return or paid any American income taxes.

[113] Ms. Deegan explains her failure to file U.S. tax returns in the following terms: “I have not filed United States tax returns because I had no idea I was supposed to. I have not lived in the United States since I was five years old, and I never even considered that I would need to file taxes in a place where I have never lived as an adult and where I have never earned income”. Ms. Deegan goes on to state that: “I am a Canadian citizen and taxpayer and I do not believe the United States has any right to know about my personal affairs, including my banking”.

[114] Ms. Deegan explains her interest in this proceeding, stating that she is concerned that “if Canada gives my banking information to the United States, it may attempt to collect taxes from

me or to penalize me, and that it may make it difficult for me to travel". She further asserts that she does not want her private banking information to be disclosed to a foreign country with which she has no real connection.

[115] As of the time the evidence was filed in this case, the CRA had provided information to the IRS for the 2014, 2015, and 2016 taxation years. The Defendants provided an affidavit from Cindy Negus, who is the Director, Competent Authority Services Division, International Large Business Directorate, International Large Business and Investigations Branch at the CRA. Ms. Negus has reviewed the information that has been provided to the IRS for three taxation years identified above. She confirms that no information regarding either Ms. Deegan or Ms. Highton has been provided to the IRS for any of the three taxation years in question.

[116] The Defendants note that there are several possible explanations as to why information regarding certain U.S. citizens resident in Canada has not been reported to the IRS. It may be that some of the financial institutions where Ms. Deegan and Ms. Highton have accounts are financial institutions that do not have reporting obligations under the *Canada-U.S. IGA*. Another possible explanation is that the balances in Ms. Deegan and Ms. Highton's accounts are below the reportable threshold. Finally, it may be that there are no U.S. Person Indicia for either Ms. Deegan or Ms. Highton recorded in their banks' records.

[117] Ms. Johnson explains in her third report that she has reviewed Ms. Deegan's and Ms. Highton's financial holdings and that she has concluded that their holdings are not reportable because the financial instruments that they hold are accounts with aggregate values under the prescribed thresholds. Their assets further include instruments such as RRSPs and TFSAs, and accounts held at deemed-compliant financial institutions (i.e. non-registering local

banks). According to Ms. Johnson, the Impugned Provisions' treatment of such accounts protects Ms. Deegan and Ms. Highton from exposure to substantial review or reporting requirements.

[118] While not disputing the substance of Ms. Johnson's evidence on this point, the Plaintiffs nevertheless object to the admissibility of this aspect of her evidence. The Plaintiffs say that not only is Ms. Johnson not a lawyer, her evidence involves the interpretation and application of Canadian law – something that the Plaintiffs say usurps the role of this Court and is not a proper subject for expert evidence. I do not accept this submission.

[119] First of all, the Plaintiffs' objection to the admissibility of Ms. Johnson's evidence on this issue was not raised in a timely manner.

[120] The Defendants served Ms. Johnson's third report on the Plaintiffs on April 26, 2018, and this Court directed the parties to provide notice of any objections to the opposing parties' expert reports by June 15, 2018. The Plaintiffs did not object to any of the Defendants' expert evidence by the deadline, or at any time prior to the filing of their Reply. Moreover, given that the Plaintiffs cross-examined Ms. Johnson on these issues in July of 2018, it also cannot be argued that they could not have reasonably anticipated this issue prior to filing their main submissions. Rather than raising these issues in an appropriate manner, the Plaintiffs instead waited until their Reply Submissions to object to the third Johnson Report for the first time.

[121] It is a well-established principle that new arguments are not the proper subject of Reply. The purpose of a Reply is to respond to matters raised by the opposing party, not to produce new arguments or new evidence that should have been raised in first instance. Proper Reply is limited

to issues that a party had no opportunity to deal with, or which could not reasonably have been anticipated. That is not the case here.

[122] I am, moreover, satisfied that Ms. Johnson's evidence on this issue is properly the subject of expert evidence.

[123] It is evident from a review of Ms. Johnson's reports and her *curriculum vitae* that she has extensive experience advising Canadian financial institutions on the implications and implementation of *FATCA* and related matters. She was, moreover, heavily involved in consulting with American law-makers during the period the consultations were underway with respect to the formulation of the *FATCA* regulations. She was also a member of industry groups in Canada that dealt with the implementation of *FATCA* and the Impugned Provisions.

[124] Ms. Johnson's third report sets out her opinion based on her personal experience. It does not represent an attempt to usurp the Court's role, nor is it a reworking of the Defendants' arguments in the guise of an expert opinion. Rather, the report attempts to assist the Court by assessing complex and technical facts, explaining how Canadian financial institutions would treat the Plaintiffs' financial holdings under certain scenarios. As such, it does not provide an opinion on the state of the law, but rather on the likely actions of Canadian financial institutions. These are issues that fall squarely within Ms. Johnson's area of expertise.

[125] As a result, I am satisfied that Ms. Johnson is qualified to offer an opinion as to why Canadian financial institutions would not report information regarding Ms. Deegan's and Ms. Highton's financial holdings to the CRA. I would also note that the Plaintiffs have not taken issue with the substance of Ms. Johnson's evidence on this issue, nor have they suggested that

Ms. Johnson's assessment of the reportability of their financial holdings is inaccurate in any way. Indeed, the Plaintiffs acknowledge that counsel for the Defendants could make the same submissions in argument.

III. The Evidence of Other Affected Individuals

[126] As will be seen below, given the complexities associated with U.S. immigration law, it can be difficult, as a practical matter, for a person to determine whether they are a U.S. citizen for tax purposes – something that can involve an assessment of the legal consequences of events that took place many decades in the past. As a consequence, individuals can expend considerable resources in attempting to determine whether they are required to comply with U.S. tax filing and compliance requirements.

[127] A U.S. person who seeks to relinquish his or her American citizenship for tax purposes may first have to bring themselves into compliance with American tax laws for the five preceding taxation years or risk having to pay an "exit tax". Bringing themselves into compliance with American tax laws generally requires the filing of overdue tax returns and FBARs. Individuals seeking to obtain a Certificate of Loss of Nationality may also be required to renounce their U.S. citizenship before a consular official.

[128] The difficulties that have been encountered as a result of the enactment of *FATCA* and the Impugned Provisions are described in affidavits from a number of individuals who have been affected in various ways by the enactment of these provisions.

[129] For example, Marilyn Ginsberg was born in the United States and has lived in Canada since 1971. She was previously a dual citizen of Canada and the U.S. but has renounced her

American citizenship because of her concerns regarding her American tax obligations. Ms. Ginsberg's evidence shows that it can be both difficult and expensive to renounce one's U.S. citizenship, which is one of the things that individuals with U.S. person status can do if they want to remove themselves from the application of *FATCA* and the Impugned Provisions.

[130] Ms. Ginsberg explains that she and her husband had never failed to file U.S. tax returns in addition to their Canadian tax returns, and that, on occasion, they paid taxes in both countries. After becoming aware of the enactment of *FATCA*, however, Ms. Ginsberg began thinking about whether she should renounce her American citizenship, and by mid-2014 she was convinced that remaining a dual citizen "was no longer worth the associated risk, anxiety and expense".

[131] Once Ms. Ginsberg and her husband decided to renounce their American citizenship, it took several months to obtain an appointment at a U.S. consulate to allow them to do so. While the couple live in Toronto, they ultimately attended at the U.S. consulate in Quebec City to renounce their American citizenship, as there was a lengthy wait time for appointments at the U.S. consulate in Toronto. The couple renounced their American citizenship on November 12th, 2014, and their daughter "expatriated" herself in March of 2015.[4]

[132] In the meantime, Ms. Ginsberg says that she and her husband spent approximately $7,000 for the preparation of U.S. and Canadian tax filings and forms. The couple incurred several thousand more dollars in expenses associated with the renunciation of their American

[4] American citizenship can be lost for immigration purposes under U.S. law by committing an "expatriating act". Evidence regarding "expatriating acts" was provided by Roy A. Berg, an international tax lawyer and partner at Moodys Gartner Tax Law. Mr. Berg explains that, amongst other things, "expatriating acts" include taking employment with the government of a foreign state with the intent to relinquish one's American citizenship. Other "expatriating" acts include actions such as taking an oath of allegiance to a non-U.S. sovereign or becoming a citizen of another country. Mr. Berg notes, however, that expatriating acts may result in a loss of U.S. citizenship for nationality purposes but not necessarily for tax purposes as American law distinguishes between the two types of loss of citizenship.

citizenship. This included sums spent on professional advice regarding cross-border tax planning, $565 for legal advice and $4,700 (USD) for renunciation fees.

[133] Additional fees were incurred by Ms. Ginsberg in closing two trust accounts held in the U.S. and in making changes to her mother's will to reflect a change in the way that Ms. Ginsberg will take under the will. Ms. Ginsberg also estimates that she spent approximately 30 hours of her own time gathering information and attending meetings to prepare for her citizenship renunciation, and additional expenses were incurred in relation to her daughter's expatriation.

[134] Evidence on behalf of the Plaintiffs was also provided by Travis Miller. Mr. Miller was born in Texas and moved to Canada in 1990, becoming a Canadian citizen in 1995, while retaining his U.S. citizenship.

[135] Mr. Miller explains that he is autistic and that, because of his condition, he is unable to work. He has received disability benefits under the Ontario Disability Savings Plan since 2006. Mr. Miller states in his affidavit that "I am not IRS compliant. I have not filed a U.S. tax return since 2007 as my only income is currently from the ODSP and only amounts to approximately $13,500 per year", which, Mr. Miller believes, is still over the threshold for being required to file an annual return in the United States.

[136] Mr. Miller says that he would like to renounce his U.S. citizenship to avoid any current or future filing requirements or issues arising from *FATCA* and the *Canada-U.S. IGA*. However, he cannot afford the costs associated with becoming IRS-compliant, which he understands is required in order to renounce his citizenship. He further asserts that he is unable to afford the renunciation fee of $2,350 (USD).

[137] The Defendants note that the IRS would already be aware of Mr. Miller because he has filed U.S. tax returns in the past. Moreover, the Canadian accounts that Mr. Miller identified in his affidavit are registered accounts that are not reportable under the *Canada-U.S. IGA* and the Impugned Provisions. As a consequence, the Defendants say that the impact of *FATCA* on Mr. Miller would be insignificant.

[138] Carol Tapanila is a U.S.-born dual citizen who has lived in Canada for the last 50 years. She has two Canadian-born children, one of whom is developmentally delayed.

[139] For many years, Ms. Tapanila was under the impression that she was no longer a U.S. citizen. Consequently, she did not comply with American tax filing requirements. Upon ascertaining that she was in fact still a U.S. citizen, she sought professional advice to find out what would be required for her to become U.S. tax-compliant. She says that she then incurred $10,683.75 in professional fees to bring herself into good standing for the 2005, 2006 and 2007 taxation years, and approximately another $10,000 in fees for the filings for the next three taxation years.

[140] Upon learning about *FATCA*, Ms. Tapanila says that she became very concerned as to whether her disabled child was a U.S. citizen and the impact that this could have on her ability to ensure that he would be provided for after her death. While Ms. Tapanila was prepared to renounce her own American citizenship, she was told that her son lacked the mental capacity to do so and that she could not renounce her son's citizenship on his behalf. Ms. Tapanila asserts that her son is thus "trapped into U.S. citizenship and the tax reporting consequences that come with the U.S. tax regime, despite having only the most tenuous connection with the U.S.".

[141] Ms. Tapanila says that she spent approximately $57,000 out of her retirement savings on tax preparation and legal advice, in addition to the hours of her own time that she has devoted to trying to resolve these issues. She asserts that the fact that Canada is exposing her son to U.S. tax requirements "has taken away [her] peace of mind that [her] son will be taken care of after [she] is gone", and she no longer feels that she is in control of her life. Ms. Tapanila further attributes the breakdown of her marriage to the stress she has suffered as a result of her concerns for her son's well-being after her death.

[142] Nathaniel Highton is a Canadian citizen and the husband of the Plaintiff, Ms. Highton. He states in his affidavit that he and his wife have a joint investment account at RBC Dominion Securities and that he had recently received a letter from that company requiring that he "submit a W-8BEN form if [he] was not a U.S. person". The letter went on to advise Mr. Highton that if he did not provide the requested information, his account may in the future be subject to a higher rate of withholding tax applied to U.S.-sourced income paid to his account, as well as trading restrictions on his account limiting him to sell orders only with respect to U.S. securities.

[143] Mr. Highton was further advised that if he did not provide the requested information, his account would be treated as a U.S. reportable account, and that his account information would be disclosed to the CRA, which would then provide his information to the IRS.

[144] The Defendants note, however, that the withholding discussed in the RBC Dominion Securities letter was likely withholding under Chapter 3 of the *Internal Revenue Code*, which imposes withholding tax on passive income flows to foreign persons, i.e. not U.S. persons. This is different from the 30% withholding tax imposed by *FATCA*, and pre-dates the enactment of *FATCA*.

[145] Danielle De Banné is a family physician residing in Ontario who was born in Houston, Texas to Canadian parents. The family moved to Ottawa in 1964, at which time Dr. De Banné was registered as a Canadian born abroad. She is a Canadian citizen, and holds a Canadian passport. Dr. De Banné has never had an American passport or social security number, and has never filed a U.S. tax return. Dr. De Banné has lived in Canada exclusively since 1964, aside from one year in the 1970's when the family lived in the United States while her father, a university professor, was on sabbatical.

[146] Dr. De Banné states that she heard about *FATCA* in or around December of 2014. While she did not think that she was an American citizen, and that she would thus not be affected by *FATCA*, she decided to seek legal advice to confirm that this was in fact the case.

[147] Dr. De Banné says that she subsequently received an opinion from a U.S. immigration attorney advising that she was in fact a U.S. citizen. Consequently, she decided to get an opinion from an accountant regarding how much it would cost her to bring herself into compliance with U.S. tax law so that she could renounce her American citizenship. Dr. De Banné was subsequently advised that it would cost approximately $45,000 to renounce her U.S. citizenship. This would include the cost of bringing herself into compliance with her U.S. tax obligations, as well as the cost of preparing and filing the necessary renunciation documentation and the fees for the renunciation itself.

[148] Dr. De Banné also addressed the difficulties that she has experienced with her professional corporation for her family practice. She states that TD Wealth wrote to her in 2016, advising that in order to comply with the Impugned Provisions, her professional corporation was required to provide tax classification information based on which TD Wealth would determine

whether her corporation was a U.S. entity, such that its account information would be reported to the CRA and shared with the IRS.

[149] Dr. De Banné asserts that she has now filed the necessary forms for her professional corporation with TD Wealth, but that this entire situation caused her a great deal of stress. She states that she has spent a lot of time and money trying to figure out exactly how she will be affected by the disclosure requirements of *FATCA* and the Impugned Provisions. She further asserts that she is "frustrated that the Canadian government is not protecting [her], as a Canadian citizen from the enforcement of the U.S. tax regime".

[150] Kathleen Sullivan was born in the United States, but came to Canada when she was four months old, becoming a Canadian citizen several years later. She says that she has never had a U.S. passport, social security number or taxpayer identification number. Ms. Sullivan worked for the municipal government in Whistler for some 10 years, in the course of which she was required to take an oath of allegiance to the Queen.

[151] Ms. Sullivan states that she learned about *FATCA* through the media, but that she initially did not think that it would affect her as a Canadian citizen, given that she had lived in Canada for all but the first four months of her life, and because she had never worked in the U.S. or held a U.S. passport. However, Ms. Sullivan became concerned over time, and after doing some research, she decided that it would be a good idea for her to get a Certificate of Loss of Nationality (or CLN).

[152] Ms. Sullivan then went to the U.S. consulate in Vancouver and applied for her CLN. The person that she spoke to was uncertain whether her employment with Whistler constituted the

relinquishment of her U.S. citizenship. Ms. Sullivan says that she was encouraged to renounce her citizenship instead, which she was told would have cost $450 at that time.

[153] Ms. Sullivan decided not to renounce her citizenship, instead submitting the paperwork for relinquishment. She was told that the final decision as to whether her employment with Whistler constituted a relinquishment of her U.S. citizenship would be made in Washington. Several months later, Ms. Sullivan received her CLN.

[154] Prior to receiving her CLN, however, Ms. Sullivan ran into difficulties with her bank. She says that she was looking for a new provider of financial service, and endeavoured to open a direct investing account at the Royal Bank of Canada (RBC). While filling out the necessary paperwork, Ms. Sullivan was asked whether she had been born in the U.S., to which she responded in the affirmative. Her account was subsequently opened without any apparent difficulty, and RBC accepted her money, placing it in her account.

[155] Less than a week later, however, Ms. Sullivan received a call from an RBC employee informing her that she had completed the wrong form, asking that she complete a “W-9” form as she was a U.S. person. Ms. Sullivan was advised that her account would be frozen until she could provide a copy of her CLN or a completed W-9 form, and that the only transaction that could occur would be a withdrawal.

[156] Ms. Sullivan was subsequently advised that although the *Canada-U.S. IGA* allows for either a “reasonable explanation” or a CLN to be provided as proof of non-U.S. citizenship, RBC policy was to only accept a CLN as proof of loss of U.S. citizenship. Ms. Sullivan was further

advised that it was also RBC policy to report all accounts, including RRSP and TFSA accounts, to the CRA, even though the *Canada-U.S. IGA* specifically excludes those accounts.

[157] Ms. Sullivan says that she filed a complaint with the RBC's complaints department regarding the treatment that she had received, but that she eventually lost patience with the whole process, giving up on her efforts to reach a resolution with RBC, and deciding to transfer her investments elsewhere. She says that RBC initially refused to transfer her funds to another financial institution as her RBC account had been frozen, but this situation was ultimately resolved, and Ms. Sullivan's funds were transferred to the Vancity Credit Union.

[158] In her affidavit, Erika Kristensen describes the difficulties that she has encountered trying to deal with a youth account at TD Canada Trust that had been opened in the name of her American-born infant daughter. Ms. Kristensen affirms that her daughter will be unable to renounce her U.S. citizenship until she reaches the age of 18 and that, until then, Ms. Kristensen and her husband are required to comply with the requirements of *FATCA* on her behalf.

[159] Mona Nicholls is another U.S.-born dual citizen who has lived in Canada since her late teens. She is a part-owner of a steel fabrication business.

[160] In her affidavit, Ms. Nicholls discusses the implications that remaining *FATCA*-compliant has had for her business. She asserts that she was required to file FBAR reports for the four business accounts on which she had signing authority, something that she says angered her business partners. She has also been required to file reports with respect to her business accounts in accordance with the requirements of the Impugned Provisions. Ms. Nicholls says that her

business partners have told her on several occasions that they feel that she has compromised them and the company by sending their business' financial information to a foreign government.

[161] However, the Defendants point out that the requirement to file FBAR reports pre-date and exist independently of the *Canada-U.S. IGA* and the Impugned Provisions, and that only information relating to U.S. corporations and passive non-financial entities controlled by U.S. Persons are reportable under the *Canada-U.S. IGA*. The forms produced by Ms. Nicholls indicate that her company is an active non-financial foreign entity, with the result that its accounts are not reportable under the *Canada-U.S. IGA*.

[162] Ms. Nicholls also says that after learning about what *FATCA* meant for her and her business interests, she decided to renounce her American citizenship. She says that over a period of five years she spent some $4,000 on professional fees for her U.S. personal and business tax filings, and that she expects to incur a further $1,200 in fees with respect to her final year of U.S. tax filings.

[163] After five years of being U.S. tax-compliant, Ms. Nicholls says that she was able to apply to renounce her U.S. citizenship. Ms. Nicholls says that she spent $11,200 in legal fees related to her renunciation, as well as $2,350 in renunciation fees and $200 in airfare to attend her renunciation interview.

[164] Ms. Nicholls says that the whole situation has caused both her and her husband considerable stress, and that she feels like Canada has treated her like a second-class citizen as she does not have the same rights as her Canadian husband when it comes to investing and freedom in banking.

[165] David Ash is another dual Canadian-American citizen. He is a venture capitalist who resides in the State of Washington. Mr. Ash is a graduate of the University of Waterloo, and he says that while he would like to donate to his alma mater using a Canadian bank account, he is reluctant to do so "because the risk of holding a foreign account with more than $10,000 (USD) is too high". Mr. Ash further asserts that his ability to participate in Canadian start-up companies "is severely hampered by *FATCA* and the Intergovernmental Agreement because [his] participation would cause company's financial and shareholder information to be disclosed to the IRS".

[166] The Defendants point out that not only is Mr. Ash's evidence on this latter point opinion evidence that he is not qualified to offer, it is, moreover, incorrect. That is, there is nothing in the *Canada-U.S. IGA* that requires the disclosure of shareholder information. The only company information that is required to be disclosed under the terms of the *Canada-U.S. IGA* is information relating to companies that qualify as "U.S. persons" with bank accounts in Canada, or are passive non-financial institutions in Canada (such as investment-type corporations) with a controlling person who is a U.S. person.

IV. The History of this Litigation

[167] This action was commenced on August 11, 2014. The Plaintiffs assert in their amended statement of claim that the automatic collection and disclosure of taxpayer information to the IRS as required by the Impugned Provisions is *ultra vires* the federal legislation that implemented the *Canada-U.S. Tax Treaty* and/or section 241 of the *Income Tax Act*.

[168] In an effort to prevent the communication of financial information relating to U.S. persons to the IRS, the Plaintiffs brought a motion seeking a permanent prohibitive injunction preventing the collection and disclosure of taxpayer information to the IRS where:

> (a) the taxpayer information related to a taxation year in which the taxpayer was a citizen of Canada;
>
> (b) the taxpayer information was not shown to be relevant for carrying out the provisions of the *Canada-U.S. Tax Treaty* or the domestic tax laws of Canada or the U.S.; or
>
> (c) the collection and disclosure of the taxpayer information subjects U.S. 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.

[169] Canada was required to transmit taxpayer information collected under the Impugned Provisions to the IRS for the 2014 taxation year by September 30, 2015, and the CRA was intending to start sending such information to the IRS on or around September 23, 2015: *Hillis*, above at para. 6. Justice Martineau heard the Plaintiffs' motion in August of 2015, rendering his decision a few weeks later.

[170] Justice Martineau concluded that the collection and automatic disclosure of accountholder information about U.S. Reportable Accounts contemplated by Articles 2 and 3 of the *Canada-U.S. IGA* was legally authorized by the Impugned Provisions. He further found that the collection and automatic disclosure of any such information was not inconsistent with the

provisions of the *Canada-U.S. Tax Treaty* and did not otherwise violate section 241 of the *Income Tax Act*.

[171] Justice Martineau further observed that paragraph 1 of Article XXVII of the *Canada-U.S. Tax Treaty* provides that 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 …". He was also satisfied that the automatic collection and disclosure of account holder information subject to the *Canada-U.S. IGA* "meets the standard of 'may be relevant' under Article XXVII, having regard to the purposes of the *Canada-US Tax Treaty*, the language of Article XXVII, and the overall legal and factual context": *Hillis*, above at para. 68.

[172] Consequently, Justice Martineau dismissed the Plaintiffs' request for declaratory and injunctive relief, without prejudice to their right to pursue their claim that the Impugned Provisions are *ultra vires* or inoperative because they are unconstitutional or otherwise unjustifiably infringe *Charter* rights. The Plaintiffs have since withdrawn their *vires* arguments, but the *Charter* issues remain to be decided and are the subject of the present summary trial.

V. Issues

[173] The parties agree that this action raises the following substantive issues:

a. Whether the Impugned Provisions infringe section 8 of the *Charter*;

b. Whether the Impugned Provisions infringe section 15 of the *Charter*; and

c. If the Impugned Provisions limit any of the rights set out in sections 8 or 15 of the *Charter*, whether any such limitation is a reasonable limit that is justifiable in a free and democratic society within the meaning of section 1 of the *Charter*.

[174] Before addressing the merits of the action, however, there are several preliminary issues that must be addressed. These are:

a. Whether the Plaintiffs have standing to challenge the constitutionality of the Impugned Provisions;

b. Whether this case is appropriate for determination by way of a summary trial; and

c. Whether this Court has jurisdiction to grant the relief sought by the Plaintiffs.

[175] These issues will be addressed first.

VI. Do the Plaintiffs have Standing to Bring this Action?

[176] The Defendants note that the Plaintiffs bear the burden of establishing that they have standing to bring this action: *Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 at 688, 107 D.L.R. (4th) 634.

[177] While the Defendants do not dispute that the Plaintiffs bear U.S. person indicia, they say that unless their information is recorded in their banks' databases, the Plaintiffs will not be affected by the Impugned Provisions. There is, moreover, no evidence before the Court that any of the financial institutions that the Plaintiffs deal with are aware of their places of birth.

[178] The Defendants further note that no information about either Ms. Highton or Ms. Deegan has been shared with the IRS under the laws they seek to challenge, and that the mere possibility that a law may affect someone in the future is not sufficient to provide that individual with personal standing: *Smith v. Ontario (Attorney General)*, [1924] S.C.R. 331 at 333, 337-38, 347, [1924] 3 D.L.R. 189.

[179] As neither Plaintiff has had her rights impacted by the Impugned Provisions, the Defendants say that it follows that they do not have standing as of right to bring this action.

[180] The Defendants further contend that the Plaintiffs have also failed to demonstrate that they meet the test for public interest standing. Amongst other things, the test for public interest standing established by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 requires that a party seeking public interest standing must demonstrate that they have a genuine interest in the issues raised by the proceeding: at para. 2. Given that Ms. Highton failed to file any evidence in this case, the Defendants say that she cannot possibly establish that she has a real stake or a genuine interest in the issues raised by this case.

[181] In the event that the Court were to find that the Plaintiffs do have standing to pursue this action, the Defendants ask that the Court be clear as to whether that standing is as of right or is public interest standing. This distinction is important, the Defendants say, as it bears directly on the type of remedies that are available to the Plaintiffs. That is, the Defendants say that a remedy under section 24 of the *Charter* is only available to the Plaintiffs in their personal capacity, whereas a section 52 remedy is also available in cases where the Plaintiffs have public interest standing.

[182] The Plaintiffs submit that they have indeed been directly affected by the Impugned Provisions. Because they are both "U.S. persons", the Plaintiffs' bank accounts are automatically at risk of being disclosed now or in the future. This, they say, is sufficient to grant them standing as of right.

[183] The Plaintiffs further assert that they meet the test for public interest standing set out by the Supreme Court in *Downtown Eastside*. This case, they say, clearly raises serious justiciable issues in which the Plaintiffs have a real stake or a genuine interest. As counsel put it, Ms. Deegan is "clearly carrying the torch for what she considers to be the million Canadians or so who are designated as U.S. persons in Canada and who are affected by this decision". This action is, moreover, a reasonable and effective way to bring these issues before the Court.

[184] I would start my analysis of the standing issue by observing that I am troubled by the timing of the Defendants' objection to the Plaintiffs' standing to bring this action. The action was commenced in 2014, and no issue was raised by the Defendants with respect to the standing of the Plaintiffs to maintain this action until the Defendants filed their memorandum of fact and law for this summary trial on November 20, 2018 – approximately two months before the commencement of the trial – after there had clearly been an enormous expenditure of resources on both sides.

[185] The Defendants assert that it was not until they had conducted their examinations for discovery of the Plaintiffs that they became aware of the facts that give rise to their objection to the Plaintiffs' standing. However, these examinations evidently took place in the summer of 2017, and yet no objection was taken to the Plaintiffs' standing until the eleventh hour.

[186] The Defendants say that no motion was brought to strike the action for want of standing as the burden was on the Plaintiffs to establish that they do indeed have the requisite standing to bring this action, and not on the Defendants to prove otherwise. It was, moreover, possible that the Plaintiffs' information may, at some point, have been captured and shared with the American tax authorities.

[187] It bears noting, however, that this is an action, and not an application for judicial review. Consequently, the admonition that interlocutory motions to strike should be discouraged has no application here: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, 176 NR 48 (C.A.). Moreover, as was noted above, it is troubling that rather than raise the standing issue in a timely manner, the Defendants waited until the very last minute to raise their objection, after the case was ready for hearing, and after all the resources had been expended getting the case ready for trial.

[188] The law of standing governs who will be entitled to bring a case before the Courts. It is intended to limit the ability of those with no real stake in a matter from over-burdening the Court system with frivolous or duplicative cases, ensuring that cases are determined based upon the competing arguments of those directly affected by matters in dispute.

[189] This preserves the proper role of Courts and their constitutional relationship to the other branches of government, and allows the Courts to fulfill their proper function within our democratic system of government: *Downtown Eastside*, above at paras. 22 and 25; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at 631, 33 D.L.R. (4th) 321; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 252, 88 D.L.R. (4th) 193.

[190] The Supreme Court has thus observed that the law of standing requires the striking of a balance "between ensuring access to the courts and preserving judicial resources": *Downtown Eastside*, above at para 23, citing *Canadian Council of Churches*, above at 252. The Supreme Court further stated that in determining whether to grant standing, "courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action": *Downtown East Side*, above at para. 23.

[191] Those whose individual rights are at stake or who have been directly affected by government action are generally entitled to pursue legal action to enforce those rights or interests. The Supreme Court observed in *Downtown Eastside* that having a plaintiff with standing as of right is generally to be preferred: at para. 37. That said, standing may also be granted to individuals and organizations to advance a case before the Courts where it is in the public interest to do so.

[192] I am not persuaded that the Plaintiffs have standing as of right to pursue this action. There is no evidence indicating that they have, as yet, been directly affected by the Impugned Provisions, and it is speculative to say that they may be so affected in the future.

[193] However, as was noted earlier, it is also open to the Courts to grant standing to individuals and organizations to advance a case before the Courts where it is in the public interest to do so. The question, then, is whether the Court should exercise its discretion and grant the Plaintiffs public interest standing to pursue their action.

[194] The parties agree that the test for public interest standing is that articulated by the Supreme Court of Canada in the *Downtown Eastside* case, and again in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623.

[195] In these cases the Supreme Court recognized that in public law cases such as the one before me, courts "have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations [on standing]": *Downtown Eastside*, above at para. 1. See also *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para. 18, [2018] 1 S.C.R. 6. As noted earlier, the Court further noted in *Downtown Eastside* that "[a]t the root of the law of standing is the need to strike a balance 'between ensuring access to the courts and preserving judicial resources'": *Downtown Eastside*, above at para. 23, citing *Canadian Council of Churches*, above at 252.

[196] There are three factors that a Court must weigh in deciding whether or not to exercise its discretion in favour of granting public interest standing. These are:

1. Whether the case raises a serious justiciable issue;

2. Whether the party bringing the action has a real stake or a genuine interest in its outcome; and

3. Whether, having regard to a number of factors, the proposed action is a reasonable and effective means to bring the case to court.

[197] In exercising the Court's discretion with respect to a question of public interest standing, these factors are not, however, to be treated as "technical requirements". "Instead, the factors

should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes": *Downtown Eastside,* above at para. 36. The principles governing the exercise of this discretion should, moreover, "be interpreted in a liberal and generous manner": *Downtown Eastside*, above at paras. 2 and 35, citing *Canadian Council of Churches,* above at 253.

A. *Does this Case Raise a Serious Justiciable Issue?*

[198] Dealing first with the question of whether this case raises a serious justiciable issue, the Supreme Court has held that a "serious justiciable issue" is one that raises a substantial or important constitutional issue that is "far from frivolous": *Downtown Eastside*, above at para. 42, citing *Finlay,* above at 633. This case unquestionably raises serious justiciable issues.

B. *Do the Plaintiffs have a Genuine Interest in this Proceeding?*

[199] The Supreme Court addressed this second aspect of the test for public interest standing in *Downtown Eastside*, where it noted that "this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody": at para. 43, citing *Finlay*, above at 633. The Supreme Court went on to describe this factor as being concerned with "whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise": at para. 43.

[200] As noted earlier, it is difficult to conclude that Ms. Highton has a genuine interest or real stake in this proceeding, given that she has not filed any evidence in support of the Plaintiffs' case or participated in this proceeding in any meaningful way. I am, however, prepared to find that although Ms. Deegan has not yet been directly affected by the Impugned Provisions, she is not a mere busybody, but is, rather, deeply concerned about the consequences that the Impugned

Provisions may have for her in the future, and for others who may be viewed as being "U.S. persons".

C. *Is Granting Public Interest Standing to the Plaintiffs a Reasonable and Effective Way to Bring these Issues Before the Court?*

[201] The Supreme Court observed in *Downtown Eastside* that courts are required to consider whether, in light of a number of considerations, the proposed suit is "a reasonable and effective means to bring the challenge to court": above, at para. 44. The Court stressed the need for this third factor, in particular, to be "assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes": *Downtown Eastside*, above at para. 20.

[202] In considering whether there are other reasonable and effective ways of bringing the issues raised by this case before the Court, the question must be addressed "from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs propos[e] to bring": *Downtown Eastside*, above at para. 47.

[203] The Supreme Court further instructed that this third factor is not to be applied rigidly but purposively, so as to ensure a full and complete adversarial presentation and conserve scarce judicial resources: *Downtown Eastside*, above at para. 49. Amongst other things, courts should consider "whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality": *Downtown Eastside*, above at para. 50. Consideration must also be given to realistic alternatives: *Downtown Eastside*, above at para. 50.

[204] I accept that it is foreseeable that individuals who have already been directly affected by the Impugned Provisions may choose to challenge these provisions at some point in the future. That said, this action has now been tried and is ready for decision. The Plaintiffs were well-represented at the trial by experienced counsel, and substantial resources have clearly been expended by both sides to develop a substantial evidentiary record in this case.

[205] Factual evidence has been provided by the Plaintiff, Ms. Deegan, and by numerous other individuals who assert that they have been impacted by the enactment of *FATCA* and the Impugned Provisions. Detailed factual evidence has also been adduced with respect to the negotiations that went on between Canada and the United States with respect to the implementation of *FATCA* and the conclusion of the *Canada-U.S. IGA*.

[206] In addition, a substantial body of expert evidence has been adduced by the parties in fields as diverse as U.S. tax and immigration law, economics, international taxation and the sharing of tax information between countries.

[207] In light of this, I am satisfied that this action is indeed a reasonable and effective way to bring the issues raised by this case before the Court. The issues raised by this case have, moreover, been carefully advanced by experienced counsel on both sides, through a full and complete adversarial presentation. Allowing this action to proceed to judgment is, moreover, an economical use of judicial resources, and permitting this action to go forward serves the purpose of upholding the principle of legality. Indeed, I do not understand the Defendants to be strenuously opposing the granting of public interest standing to Ms. Deegan.

[208] For these reasons, I am therefore prepared to grant Ms. Deegan public interest standing in this matter.

VII. Is this Case Appropriate for Determination by Way of a Summary Trial?

[209] The next preliminary issue that requires determination is whether this action is suitable for determination by way of a summary trial, as requested by the Plaintiffs.

[210] The Defendants do not object to this matter proceeding in this fashion, and I agree that this action is appropriate for determination by way of a summary trial.

[211] In coming to this conclusion, I note that there are no significant questions of credibility in this case that require resolution on the basis of *viva voce* evidence. What are at issue in this proceeding are the legal consequences that flow from the largely uncontroverted facts of the case. Although somewhat novel, these issues can be dealt with as easily through the summary trial process as through a full trial: *0871768 BC Ltd v Aestival (Vessel)*, 2014 FC 1047 at para. 58, [2014] F.C.J. No. 1155, citing *Teva Canada Limited v. Wyeth and Pfizer Canada Inc.*, 2011 FC 1169 at para 36, 99 C.P.R. (4th) 398, rev'd on other grounds 2012 FCA 141. I am, moreover, satisfied that I can find the facts necessary to resolve the issues in this case on the basis of the record before me.

VIII. Does this Court have Jurisdiction to Grant the Relief Sought by the Plaintiffs?

[212] The final preliminary issue that must be addressed is whether this Court has jurisdiction to grant the declaratory relief sought by the Plaintiffs pursuant to subsection 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[213] Section 52(1) provides that the Constitution is the "supreme law of Canada", and that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

[214] No objection was raised by the Defendants with respect to the Court's jurisdiction to grant the constitutional relief sought by the Plaintiffs. It is nevertheless necessary for me to be satisfied that I do indeed have the jurisdiction necessary to deal with a given matter: *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 4; *Hupacasath First Nation v. Canada (Minister of Foreign Affairs*), 2015 FCA 4 at para. 38, 379 D.L.R. (4th) 737; *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 218 at paras. 6-7, 141 C.P.R. (4th) 165; *Brooke v. Toronto Belt Line Railway Co.* (1891), 21 O.R. 401 (H.C.); *C.N.R. v. Lewis*, [1930] Ex. C.R. 145, [1930] 4 D.L.R. 537.

[215] Consequently, I asked the parties to address the jurisdictional issue in light of recent comments by the Supreme Court of Canada that appear to cast doubt on the remedial power of this Court to declare legislation to be constitutionally invalid, inapplicable or inoperative under section 52 of the *Constitution Act, 1982*.

[216] That is, in *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54 at para. 70, [2016] 2 S.C.R. 617 (*Windsor Bridge*), Justice Karakatsanis (writing for the majority) noted "the important distinction between the power to make a constitutional finding which binds only the parties to the proceeding and the power to make a formal constitutional declaration which applies generally and which effectively removes a law from the statute books".

[217] Justice Karakatsanis accepted that this Court clearly has the power to make constitutional findings that bind only the immediate parties to a proceeding: *Windsor Bridge*, above at para. 71. However, she found it unnecessary to determine whether the Federal Court also has the remedial power to declare legislation to be constitutionally invalid, inapplicable or inoperative, expressly declining to comment on this issue: *Windsor Bridge*, above at para. 71. She went on, however, to state that her silence on this question "should not be taken as tacit approval of the Federal Court of Appeal's analysis or conclusion" that this Court does indeed have the power to grant a general declaration of statutory invalidity under section 52 of the *Constitution Act, 1982*.

[218] While the Supreme Court has thus clearly raised a question as to this Court's jurisdiction to grant general declarations of constitutional invalidity, I am nevertheless satisfied that I do indeed have the power to grant the relief sought by the Plaintiffs in this case.

[219] In coming to this conclusion, I would start by noting that Justice Karakatsanis' comments were clearly made in *obiter*. As such, they are not binding on this or any other Court.

[220] I would also observe that curiously – perhaps because it was unnecessary to decide the issue – the majority made no mention of the Supreme Court's earlier decision in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paras. 35-36, 147 F.T.R. 305, a case that, until now, appeared to have definitively decided that this Court does indeed possess plenary jurisdiction to regulate proceedings before it. This power was said to be analogous to the inherent powers of provincial superior courts to control their own processes and proceedings: *Lee v. Canada (Correctional Service)*, 2017 FCA 228 at para. 7, [2017] F.C.J. No. 1131; David Stratas, "A Judiciary Cleaved: Superior Courts, Statutory Courts and the Illogic of Difference", (2017) 68 U.N.B.L.J. 54 at 65 (Stratas, "A Judiciary Cleaved").

[221] The comments of the majority in *Windsor Bridge* have been the subject of considerable judicial and academic commentary: see, for example, *Lee*, above; *Bilodeau-Massé v. Canada (Attorney General)*, 2017 FC 604 at paras. 38-88, [2018] 1 F.C.R. 386; *Fédération des francophones de la Colombie-Britannique v. Canada (Minister of Employment and Social Development)*, 2018 FC 530 at paras. 55-65, [2018] F.C.J. No. 534; Stratas, "*A Judiciary Cleaved*, above; Nicolas Lambert, "Death by a Thousand Cuts: Federal Court Jurisdiction and the Constitution" (2018) 31:2 Can. J. Adm. L. & Prac. 115; Paul Daly, "When Is a Court Not a Court? Windsor (City) v. Canadian Transit Co., 2016 SCC 54" (12 December 2016), online (blog): Administrative Law Matters <https://www.administrativelawmatters.com/blog/2016/12/12/when-is-a-court-not-a-court-windsor-city-v-canadian-transit-co-2016-scc-54/> [https://perma.cc/S7VL-2EBS]; Han-Ru Zhou, "Erga Omnes or Inter Partes? The Legal Effects of Federal Courts' Constitutional Judgments" (Zhou, "*Erga Omnes* or *Inter Partes*?), unpublished; Adam Giancola, "When Court Jurisdiction Meets Statutory Interpretation: Windsor (City) v Canadian Transit Co" (online: https://www.thecourt.ca/when-court-jurisdiction-meets-statutory-interpretation-windsor-city-v-canadian-transit-co/).

[222] I do not intend to review this commentary in detail. I do, however, adopt the reasoning of the Federal Court of Appeal in the *Lee* case, and of this Court in *Bilodeau-Massé* and *Fédération des francophones de la Colombie-Britannique* and would also offer the following additional comments.

[223] Like the Supreme Court of Canada, the Federal Court is a statutory court created under section 101 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985,

App. II, No. 5. This provision empowers Parliament to establish "additional Courts for the better Administration of the Laws of Canada".

[224] In contrast to the inherent jurisdiction enjoyed by provincial superior courts, the Supreme Court held in *Windsor Bridge* that the Federal Courts have only the jurisdiction that has been conferred on them by statute, and that they are without inherent jurisdiction: at para. 33. This of course begs the question: if the Federal Courts' jurisdiction is constrained by the fact that they are statutory courts created under section 101 of the *Constitution Act, 1867*, how is it that the jurisdiction of the Supreme Court of Canada – another statutory court created under section 101 of the *Constitution Act, 1867* – is not similarly constrained?

[225] Indeed, as the Federal Court of Appeal observed in *Lee*, "the Supreme Court and the Federal Courts (through their predecessor, the Exchequer Court) are both statutory courts under section 101 of the *Constitution Act, 1867*, born at the same time from a single joint statute: *Supreme and Exchequer Court Act*, S.C. 1875, c. 11": above at para. 13. The Federal Court of Appeal went on to observe in *Lee* that "the Supreme Court and the Federal Courts must be seen as identical twins" in terms of their ability to manage their processes and proceedings, that is, their plenary powers: *Lee*, above at para. 13.

[226] As the Federal Court of Appeal further observed in *Lee*, the Federal Courts' plenary powers emanate not from any particular legislative provision in the *Federal Courts Act*, R.S.C. 1985, c. F-7 or the *Federal Courts Rules*, S.O.R./98-106, but rather from their constitutional status as courts: at para. 8. The Court went on to observe that "[t]he Federal Courts are not just ordinary agencies of government but rather part of the judicial branch within the constitutional separation of powers", and that "[i]f courts are to be courts and to fulfil their function as part of

the judicial branch, they must have certain plenary powers to manage their processes and proceeding": *Lee*, above at para. 8. See also *Lee*, above at para. 12.

[227] The fact is that the Federal Court is neither an inferior court nor an administrative tribunal: *Lee*, above at para. 12*; Bilodeau-Massé*, above at para. 72. It is, rather, a superior court of record having civil and criminal jurisdiction: *Federal Courts Act*, s. 4. As a superior court, the Federal Court has plenary jurisdiction to determine any matter of law arising out of its original jurisdiction. This includes constitutional jurisdiction in matters that are properly before the Court.

[228] Section 17 of the *Federal Courts Act* grants the Federal Court jurisdiction over all cases in which relief is sought against the Crown. In accordance with the definition section of the *Federal Courts Act*, "relief" includes declaratory relief: section 2. Section 18 of the *Federal Courts Act* grants exclusive original jurisdiction to the Federal Court to issue injunctions against federal boards, commissions or tribunals, or to hear and determine any proceeding brought against the Attorney General of Canada.

[229] The Supreme Court confirmed in *Windsor Bridge* that the Federal Court has jurisdiction over the subject matter of a claim where the three-part test espoused in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641 (*ITO*), has been satisfied.

[230] The Supreme Court held in *ITO* that this Court has jurisdiction to deal with claims where there is:

(1) a statutory grant of jurisdiction by Parliament;

(2) an existing body of federal law, essential to the disposition of the case, which nourishes the statutory grant of jurisdiction; and

(3) law underlying the case falling within the scope of the term “a law of Canada” used in s. 101 of the *Constitution Act, 1867*.

[231] This case involves a claim for relief against the federal Crown, and thus falls within the jurisdiction conferred on this Court by section 17 of the *Federal Courts Act*.

[232] There is, moreover, an existing body of federal law that is essential to the disposition of the case that nourishes the statutory grant of jurisdiction. The Impugned Provisions form part of the federal *Income Tax Act* and the *Implementation Act*, federal legislation implementing an agreement with a foreign state governing the sharing of information under a bilateral tax treaty. It also bears noting that no body of provincial law is implicated in this proceeding, and that the case does not involve competing spheres of jurisdiction. The case thus involves the application of federal law in an area of federal jurisdiction.

[233] The laws on which the case is based are, moreover, “laws of Canada” within the meaning of section 101 of the *Constitution Act, 1867*. The *Income Tax Act* and the *Implementation Act* are federal statutes dealing with matters coming within the federal government’s exclusive areas of legislative competence.

[234] There is, moreover, no bar to the Federal Court considering the constitutionality of the federal legislation that is the subject of this action.

[235] It also bears noting that the *Federal Courts Act* specifically contemplates the exercise of constitutional jurisdiction by the Federal Courts. That is, section 57(1) of the *Federal Courts Act* provides that where the constitutional validity, applicability or operability of an Act of Parliament is in question before the Federal Courts, such legislation "shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province …".

[236] Similarly, subsection 18.3(2) of the *Federal Courts Act* contemplates references being brought by the Attorney General of Canada for this Court to determine "any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament".

[237] As the Supreme Court recently observed in *R. v. Jarvis*, 2019 SCC 10 at paragraph 56, [2019] S.C.J. No. 10 (*Jarvis* #1), Parliament is presumed to have a mastery of existing law: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at 543. Sections 57 and 18.3(2) of the *Federal Courts Act* would have no practical utility if this Court did not have the jurisdiction to declare legislation to be constitutionally invalid, inapplicable or inoperative, whether under section 52 of the *Charter* or otherwise: *Bilodeau-Massé*, above at para. 88.

[238] Moreover, as Professor Zhou has observed, the Federal Courts have for decades been rendering constitutional judgments with "*erga omnes*" effects, and up until the majority's comments in *Windsor Bridge*, the Supreme Court has never questioned their power to do so: Zhou "*Erga Omnes* or *Inter Partes*", above at 18-19.

[239] Indeed, the Supreme Court has historically assumed that the Federal Courts have the power to grant general declarations of constitutional invalidity, and there has been "no perceived effort on the part of the Supreme Court to restrict the scope of their remedial powers": Zhou "*Erga Omnes* or *Inter Partes*", above at 6-9, citing *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 101, 125 N.R. 241; *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 692, 139 N.R. 1; and *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 22, 163 F.T.R. 284.

[240] For these reasons, I am satisfied that this Court does indeed have jurisdiction to grant the declaratory relief sought by the Plaintiffs pursuant to subsection 52(1) of the *Constitution Act, 1982*. The question, then, is whether they have established that such a remedy is appropriate in this case. This takes us next to the merits of the Plaintiffs' case.

IX. Do the Impugned Provisions Violate Section 8 of the *Charter*?

[241] Section 8 of the *Charter* provides that "[e]veryone has the right to be secure against unreasonable search or seizure".

[242] The Defendants concede that the Impugned Provisions result in the seizure of accountholder information of U.S. persons. They submit, however, that the Plaintiffs and similarly situated individuals do not have an objectively reasonable expectation of privacy in their banking information, and that the seizure of the banking information in question is reasonable.

A. *The Plaintiffs' Arguments*

[243] The Plaintiffs acknowledge that the root of the problem in this case is the United States' citizenship-based taxation system. They further accept that there is nothing this Court can do about American income tax laws.

[244] The Plaintiffs observe that prior to 2014, the *Canada-U.S. Tax Treaty* operated in a reciprocal fashion, with the two countries helping each other in gathering relevant information with respect to the taxes on people resident in both countries. However, the Plaintiffs say that Canada subsequently changed its own domestic laws in order to help the American Government discover and tax U.S. citizens residing in Canada.

[245] According to the Plaintiffs, the American government has now insisted that Canada give effect to its citizenship-based taxation laws. Canada's agreement to do so through the mechanisms contemplated by the *Canada-U.S. IGA* has created the constitutional problems that the Defendants now face, by infringing the privacy and equality rights of Canadian citizens and residents.

[246] In particular, the Plaintiffs say that the Impugned Provisions unjustifiably infringe section 8 of the *Charter*'s guarantee of the right to be secure against unreasonable searches or seizures. They contend that the Impugned Provisions require that Canadian financial institutions transfer the banking information of an indeterminate number of Canadians (potentially in the hundreds of thousands in any one year) to the CRA, without prior judicial authorization or any state oversight, which information will then be handed over to the IRS.

[247] This occurs solely because Canadian financial institutions have determined that their customers are, or might be, U.S. persons. According to the Plaintiffs, this is "a massive fishing expedition and a seizure that offends every core precept of the citizenry's […] right to a reasonable expectation of privacy".

[248] The Plaintiffs say that they (and other affected individuals) have a reasonable expectation of privacy in their accountholder information. Canadian courts have observed that personal financial information *prima facie* attracts a reasonable expectation of privacy, and that people can reasonably expect their financial institutions to keep their banking information confidential. They further contend that the fact that the accountholder information may already be in the hands of Canadian financial institutions does not affect the Plaintiffs' and others' reasonable expectations of privacy in that information.

[249] While acknowledging that they (and other U.S. persons) have pre-existing obligations to report certain information to the IRS under American law, the Plaintiffs submit that they generally *do not* have an obligation to report this information to the Defendants. Canada has nevertheless admitted that the accountholder information it receives as a result of the Impugned Provisions is being used for domestic tax compliance purposes.

[250] The Plaintiffs contend that as a result of the *Canada-U.S. IGA* and the Impugned Provisions, the CRA now receives accountholder information with respect to affected individuals, whether or not those individuals are in fact U.S. persons. As a consequence, the seizure of accountholder information that takes place pursuant to the Impugned Provisions results in that information being in the possession of, and potentially used by, both Canadian and American tax authorities.

[251] The Plaintiffs further observe that some individuals whose accountholder information is shared with the IRS pursuant to the Impugned Provisions do not, in fact, have any reporting obligations under American law. The extent of this overreach cannot be measured, however, as the Defendants do not keep track of how many of the account records that have been shared with the IRS are associated with individuals who are not actually U.S. persons.

[252] The Plaintiffs submit that the Defendants cannot demonstrate that the searches and seizures authorized by the Impugned Provisions are reasonable because:

(a) they are warrantless and lack any judicial supervision of any kind,

(b) it is impossible to test their reliability in achieving their objective, and

(c) they almost certainly capture an inordinate number of individuals who have no American tax and reporting obligations.

[253] Finally, the Plaintiffs contend that the Defendants cannot possibly establish that the CRA's use of accountholder information obtained pursuant to the Impugned Provisions for domestic tax compliance purposes is reasonable as its use of that information is unrelated to the objectives underlying the Impugned Provisions. The Defendants only possess this information as an incident to the Impugned Provisions, which are directed at providing this information to the United States, and not to Canadian tax authorities.

B. *Analysis*

(1) The Role of the Courts in Reviewing Government Policy Choices

[254] In order to provide context for the Plaintiffs' arguments, consideration must first be given to the role of the Courts when reviewing actions taken by the legislative branch of government.

[255] In exercising its powers, the legislative branch is not exempt from constitutional scrutiny. As the Supreme Court observed in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, once a government policy choice has been translated into state action, it becomes reviewable under the *Charter*: at para. 105.

[256] However, a number of factors favour a high degree of deference being accorded to governmental policy choices as reflected in legislative action. The Supreme Court has identified a non-exhaustive list of these factors as including "the prospective nature of the decision, the impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state": *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 95, [2005] 1 S.C.R. 791. The Court further observed in *Chaoulli* that government policy choices are "often complex and difficult, and that the government must have the necessary time and resources to respond": above at para. 95.

[257] That said, as the Supreme Court observed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 136, 127 D.L.R. (4th) 1, "... care must be taken not to extend the notion of deference too far". Indeed, the Court went on to observe that "[d]eference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable": at para. 136.

[258] Indeed, it is the duty of the Courts to ensure that governments "do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 497, 24 D.L.R. (4th) 536, citing *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576 at 590, 11 N.R. 222.

(2) The Section 8 Analytical Framework

[259] In *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, the Supreme Court observed that the protection that section 8 of the *Charter* provides for individuals' privacy interests, whether it be personal, territorial or informational, "is essential not only to human dignity, but also to the functioning of our democratic society". At the same time, the Court observed that section 8 "permits *reasonable* searches and seizures in recognition that the state's legitimate interest in advancing its goals or enforcing its laws will sometimes require a degree of intrusion into the private sphere": both quotes from *Goodwin*, above at para. 55 [emphasis in original].

[260] The purpose of section 8 of the *Charter* is thus to protect individuals' reasonable expectation of privacy against unwarranted intrusions by the State: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159-60, 11 D.L.R. (4th) 641; *Jarvis* #1, above at para. 57.

[261] The Supreme Court identified several criteria in *Hunter v. Southam* that have to be satisfied in order for a search to be reasonable. These include the requirements that:

> (a) [there be] a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;

(b) …the impartial arbiter must satisfy [him- or herself] that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;

(c) …the impartial arbiter must satisfy [him- or herself] that the person seeking the authorization has reasonable grounds to believe that something that will afford evidence of the particular offence under investigation will be recovered; and

(d) …the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation: as summarized in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 499, 72 O.R. (2d) 415, Wilson J., dissenting.

[262] The Plaintiffs rely on the criteria established in *Hunter v. Southam* as support for their contention that the seizure of information authorized by the Impugned Provisions is unreasonable.

[263] The criteria articulated by the Supreme Court in *Hunter v. Southam* were, however, formulated in the context of an appeal challenging the validity of a statutory provision that was criminal or quasi-criminal in nature: *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at 641, 72 OR (2d) 798.

[264] As the Supreme Court subsequently observed, the suspicion cast on individuals subject to criminal investigations can seriously lower their standing in the community. Consequently, citizens have a very high expectation of privacy in relation to criminal investigations, and they

may expect that their privacy will be invaded only where the state can show that it has serious grounds to suspect guilt. This expectation is strengthened by the central position that the presumption of innocence plays in our criminal law: *Thomson Newspapers*, above at 507-508, La Forest J., concurring.

[265] As a consequence, the Supreme Court has been clear that the *Hunter v. Southam* criteria "are not hard and fast rules which must be adhered to in all cases under all forms of legislation", and that "[w]hat may be reasonable in the regulatory or civil context may not be reasonable in a criminal or quasi-criminal context": *Thomson Newspapers*, above at 495-96, Wilson J., dissenting, as cited in *McKinlay Transport*, above at 643.

[266] The Supreme Court went on in *Thomson Newspapers, above,* to observe that "[w]hat is important is not so much that the strict criteria be mechanically applied in every case but that the legislation respond in a meaningful way to the concerns identified … in *Hunter* [*v. Southam*]": at 496, Wilson J., dissenting.

[267] That said, the Supreme Court has held that the closer the legislation in question is to traditional criminal law, the more likely it is that that departures from the criteria established in *Hunter v. Southam* will not be countenanced: *Thomson Newspapers*, above at 496, Wilson J., dissenting.

[268] This case involves income tax legislation and legislation relating to the exchange of information for income tax purposes. The Supreme Court held in *McKinlay Transport* that the *Income Tax Act* "is essentially a regulatory statute since it controls the manner in which income tax is calculated and collected": at 641. In his concurring judgment in *McKinlay Transport*,

Justice La Forest described the *Income Tax Act* as being "essentially of an administrative nature": at 650. The same may be said of the *Implementation Act*.

[269] While it is true that the *Income Tax Act* creates criminal offences, the purpose of the legislation is not to penalize criminal conduct, but rather to enforce compliance with the Act: *McKinlay Transport*, above at 641; *R. v. Jarvis*, 2002 SCC 73 at paras. 57 and 62, [2002] 3 S.C.R. 757 (*Jarvis* #2).

[270] In light of the self-assessing and self-reporting nature of the income tax scheme, the Supreme Court further held in *McKinlay Transport* that the Minister must be given broad powers in supervising the regulatory scheme: at 648.

[271] Given the regulatory nature of income tax legislation and the scheme that it enacted, the Supreme Court found in *McKinlay Transport* that the *Hunter v. Southam* criteria were ill-suited to determining whether a seizure under a provision of the *Income Tax Act* was reasonable: above at 648. Rather than applying a rigid approach to section 8 of the *Charter*, the Court held that a flexible and purposive approach should be taken, given that the provision "must be capable of application in a vast variety of legislative schemes": at 644 and 647. That is, the scope of the *Charter* right may vary according to the circumstances: *Jarvis* #2, above at para. 63.

[272] Indeed, the Supreme Court has observed that the application of a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the application of section 8 of the *Charter*: *Thomson Newspapers*, above at 506, La Forest J., concurring.

[273] For section 8 of the *Charter* to be engaged, there must first be a search or seizure. Assuming that to be the case, the question then is whether the search or seizure was reasonable: *Jarvis* #2, above at para. 69; *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406 at 437, 115 DLR (4th) 702.

[274] The Supreme Court held in *R. v. Dyment*, [1988] 2 S.C.R. 417 that "the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent": at 431. As noted earlier, the Defendants acknowledge that the Impugned Provisions result in the seizure of account information belonging to people whose banking records suggest that they have U.S. person indicia.

[275] The question, then, is whether the seizure of the affected individuals' banking information is reasonable.

[276] According to the Supreme Court, searches or seizures conducted without a warrant are presumptively unreasonable, with the result that the burden of establishing reasonableness thus rests with the state: *Goodwin*, above at para. 56, citing *Hunter v. Southam*, above at 161.

[277] As was noted earlier, the determination as to whether a particular search or seizure is reasonable is a context-specific inquiry, requiring an assessment as to whether in the circumstances of the case, the interest of affected individuals in being left alone must give way to the government's interest in intruding on the individual's privacy in order to advance its goals: *Jarvis* #2, above at para. 69, quoting *Hunter v. Southam*, above at 159-60; *Thomson Newspapers*, above at 495, Wilson J., dissenting.

[278] Where, for example, an individual has only a minimal expectation that certain information will remain private, this may tip the balance in the favour of the state interest: *R. v. Plant*, [1993] 3 S.C.R. 281, 157 N.R. 321; *Smith v. Canada (Attorney General)*, 2001 SCC 88, [2001] 3 S.C.R. 902.

[279] The Supreme Court has further observed that individuals "have different expectations of privacy in different contexts and with regard to different kinds of information and documents". Consequently, the Court stated that "the standard of review of what is 'reasonable' in a given context must be flexible if it is to be realistic and meaningful": both quotes from *McKinlay Transport*, above at 645.

[280] After noting that there is "a large circle of social and business activity in which there is a very low expectation of privacy", Reid and Young stated that "[t]he issue is not *whether*, but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements". While observing that everyone who files an income tax return may be said to enjoy a low expectation of privacy with respect to information regarding his or her income, there is nevertheless an expectation "that demands for information have limits, and will be administered under terms that are fair and reasonable", which is what section 8 of the *Charter* is all about: all quotes from Alan D. Reid & Alison Harvison Young, "Administrative Search and Seizure under the Charter" (1985) 10 Queen's L.J. 392 at 399-400 [emphasis in original], as quoted in *McKinlay Transport*, above at 646 [additional emphasis removed].

[281] The Supreme Court has, moreover, observed that in considering the concept of informational privacy, "individuals have a valid claim 'to determine for themselves when, how, and to what extent information about them is communicated to others'": *Jarvis* #1, above at para.

66, quoting *R. v. Tessling*, 2004 SCC 67 at para. 23, [2004] 3 S.C.R. 432. The Court further observed in *Jarvis* #1 that personal information is "also closely tied to the dignity and integrity of the individual": at para. 66. In considering whether there is a reasonable expectation of privacy in certain information, the Court stated in *Jarvis* #1, above, that regard had to be had to the nature and quality of the information: at para. 66.

[282] Thus not all seizures violate section 8 of the *Charter*; only unreasonable ones will do so: *Thomson Newspapers*, above at 96, Wilson J., dissenting. How then does one determine whether the seizure of information in a given set of circumstances is reasonable?

[283] The Supreme Court stated in *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, 158 D.L.R. (4th) 577 that in assessing the extent of a person's reasonable expectation of privacy, consideration has to be given to factors such as "the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and [where applicable] the seriousness of the crime being investigated": at para. 21, citing *R. v. Plant*, above at 293. The Court further noted in *Schreiber*, above, that regard must also be had to the nature of the activity that brings the individual into contact with the state, as this may affect the expectation of privacy to which the individual is entitled, especially in the context of regulatory regimes: at para. 21.

[284] In considering the constitutionality of a statute authorizing a search or seizure, the Court's focus should be on the impact of the search or seizure on the subject of the search or seizure, and not just on its rationality in furthering a valid government objective: *Hunter v. Southam*, above at 157.

[285] With this understanding of the relevant legal principles, I turn now to consider whether the seizure of information in accordance with the Impugned Provisions is reasonable.

(3) Do the Plaintiffs and Other Affected Individuals have a Reasonable Expectation of Privacy in Their Banking Information?

[286] As noted earlier, to be able to claim the protection of section 8 of the *Charter*, an individual must first establish that they have a reasonable expectation of privacy in the subject matter of the search. That is, the individual must demonstrate that he or she subjectively expected that the material in issue would be kept private, and that this expectation was objectively reasonable. Whether the individual has a reasonable expectation of privacy in a given situation has to be assessed in the totality of the circumstances: *R. v. Marakah*, 2017 SCC 59 at para. 10, [2017] 2 S.C.R. 608; *R. v. Mills*, 2019 SCC 22 at paras. 13 and 20.

[287] I will deal first with the question of the Plaintiffs' subjective expectation of privacy with respect to their banking information. Ms. Deegan does not expressly address this issue in her affidavit, although she does refer to her banking information as "private", asserting that she does not want her private banking information to be shared with a foreign country with which she has no real connection. As noted earlier, Ms. Highton did not provide an affidavit in this case with the result that we have no evidence from her as to the nature of her subjective expectations with respect to her banking information.

[288] There is also little direct evidence in the affidavits of the other lay witnesses as to their subjective expectation of privacy. Indeed, the focus of most of the affiants' attention is the concerns that they developed as a result of the enactment of *FATCA*, rather than the Impugned Provisions.

[289] It is, however, clear from affidavits of the lay witnesses that they were surprised and unhappy about the fact that their banking information could be shared with American tax authorities. From this, I am prepared to find that those affected by the Impugned Provisions likely have some subjective expectation of privacy with respect to their banking information.

[290] The question, then, is whether that expectation is objectively reasonable.

[291] The Supreme Court observed in *Schreiber* that privacy is not a right that is tied to property. It is, rather "a crucial element of individual freedom which requires the state to respect the dignity, autonomy and integrity of the individual". The Court went on in *Schreiber* to observe that "[t]he degree of privacy which the law protects is closely linked to the effect that a breach of that privacy would have on the freedom and dignity of the individual": both quotes from para. 19.

[292] As a consequence, the Court held in *Schreiber* that individuals will have an extremely high expectation of privacy in relation to their bodily integrity – where, for example, the taking of a blood sample is in issue, as was the case in *R. v. Dyment*, above. Similarly, individuals will have a high expectation of privacy in relation to their homes: *R. v. Feeney*, [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609.

[293] The material that is subject to seizure in this case is banking information that is turned over to the CRA by Canadian financial institutions. The seizure of this information does not involve an encroachment on individuals' bodily integrity in the way that the taking of a blood sample would, nor does it involve an incursion into the homes of the affected individuals. As such, the mechanism of the seizure is minimally intrusive, suggesting that there is an objectively

lower expectation of privacy with respect to the information in question than there would be with respect to matters such as blood samples or the contents of an individual's home.

[294] The Supreme Court has further held that individuals generally have a diminished expectation of privacy in respect of records and documents that they produce during the ordinary course of regulated activities: *Thomson Newspapers*, above at 507, La Forest J., concurring.

[295] Insofar as income tax information is concerned, the Court has found that taxpayers' privacy interest in records that may be relevant to the filing of income tax returns is "relatively low": *McKinlay Transport*, above at 649-50. Indeed, the Supreme Court has observed that taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the *Income Tax Act*, or in documents that they are obliged to produce during an audit: *Jarvis* #2, above at para. 95.

[296] As the Supreme Court further observed in *McKinlay Transport*, above, spot checks or random monitoring "may be the only way in which the integrity of the tax system can be maintained": at 648. Consequently, the Minister has broad powers to audit taxpayers' returns and to inspect records relevant to the preparation of these returns: *McKinlay Transport*, above at 648. This includes the power to conduct compliance audits of taxpayers' records, potentially on a random basis, something that further diminishes taxpayers' reasonable expectation of privacy in their financial records.

[297] The Plaintiffs submit that some of the information that is shared with the IRS in accordance with the Impugned Provisions (such as account balances) is information that does not have to be shared with the CRA under the *Income Tax Act*. The Supreme Court has, moreover,

observed that the compelled production of documents that are not subject to the strict filing and maintenance requirements of the *Income Tax Act* may well extend to information and documents in which the taxpayer has a privacy interest in need of protection under section 8 of the *Charter*: *McKinlay Transport*, above at 642.

[298] I recognize that some of the information that may be turned over to the CRA by Canadian financial institutions in accordance with the Impugned Provisions may not necessarily be information that is relevant to the filing of Canadian income tax returns (although I do note that information with respect to account balances could potentially be relevant in calculating interest income – something that *is* taxable under Canadian law).

[299] Moreover, section 230 of the *Income Tax Act* requires that taxpayers keep records and books of account that contain "such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined". This information is thus subject to production to the CRA under Canadian law, further limiting the expectation of privacy that taxpayers could have in the information in question.

[300] Justice Martineau also observed in *Hillis*, above, that the reporting requirements of *FATCA* are "similar in principle to certain Canadian reporting requirements under the [*Income Tax Act*] that also do not require information indicating income tax or tax liability": at para. 71.

[301] In support of this finding, Justice Martineau noted that section 233.3 of the *Income Tax Act* requires that certain Canadian taxpayers report holdings of a wide range of foreign property with a cost of more than $100,000, regardless of whether or not that property generates income

that is taxable in Canada. He further observed that these reporting requirements "exist to assist the CRA in administering the Canadian tax system", and that similar types of information about American taxpayers is relevant to the carrying out the provisions of U.S. tax laws in relation to Canadian residents who are U.S. persons: *Hillis*, above at para. 71.

[302] Justice Martineau thus concluded that the banking information to be reported under the *Canada-U.S. IGA* (and by extension, the Impugned Provisions) was "foreseeably relevant" to U.S. tax compliance, thus satisfying the requirements of paragraph 1 of Article XXVII of the *Canada-U.S. Tax Treaty*: *Hillis*, above at paras. 14, 68. This provision states that the Canadian and American competent authorities "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 …" [emphasis added].

[303] The Supreme Court has nevertheless held that personal financial records contain information of the sort that individuals would expect would remain confidential, as they are part of what the Court described as the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state": *R. v. Plant*, above at 293, as cited in *Schreiber*, above at para. 22.

[304] I am, however, satisfied that U.S. persons still have only a limited expectation of privacy in the accountholder information at issue in this case. This is because U.S. persons have a pre-existing legal obligation to provide their banking information to the IRS in accordance with the provisions of *FATCA*, quite apart from the disclosure requirements of the Impugned Provisions. In addition, some of this information is also subject to disclosure to the U.S. government by way of FBAR reports.

[305] Indeed, as Mr. Shoom observes in his affidavit, although the IRS now receives information from Canadian financial institutions with respect to accounts of U.S. persons residing in Canada, the obligation to provide this information originates from the enactment of *FATCA* by the U.S. Government. It exists, moreover, regardless of whether the information is transmitted through a government-to-government relationship (as contemplated by the *Canada-U.S. IGA* and the Impugned Provisions), or is communicated directly to the IRS by Canadian financial institutions (as contemplated by *FATCA*).

[306] The fact that the Plaintiffs and other U.S. persons have the pre-existing obligation to report their banking information to the IRS under American tax laws (as well as the obligation to file the FBAR reports that are required under the U.S. *Bank Secrecy Act*) suggests that their privacy interest in that information is limited.

[307] The U.S. tax obligations of American citizens exist, moreover, regardless of whether or not the IRS is actually aware of such individuals.

[308] The Plaintiffs submit that the suggestion that individuals' expectation of privacy can be affected by foreign tax reporting requirements "has concerning implications". In support of this contention, the Plaintiffs submit that Canada could not maintain that the affected individual had little or no reasonable expectation of privacy in information regarding a person's religious practices if another state's laws required a person in Canada to report such information. That is not, however, this case.

[309] Indeed, there are limits on the extent to which Canada will cooperate with foreign jurisdictions in the enforcement of the laws of those states, and it will not do so in situations where application of the foreign law could lead to a result that is contrary to Canadian values.

[310] For example, while Canada will generally cooperate with foreign jurisdictions by extraditing individuals charged with criminal offences to allow them to face trial in the country where the offence occurred (assuming the existence of an extradition treaty with the country in question), it will not do so if the individual faces the death penalty: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283.

[311] The Defendants say the Plaintiffs are asking this Court to strike down the Impugned Provisions on the basis of an alleged constitutional right to be protected from the consequences of violating the tax laws of a country of which they are citizens.

[312] It bears noting, however, that if the Court were to strike down the Impugned Provisions, U.S. persons resident in Canada would *still* be subject to the filing and compliance obligations of *FATCA* and the American *Bank Secrecy Act*, and their account information may well still be shared with the IRS by Canadian financial institutions.

[313] Having concluded that those affected by the Impugned Provisions have only a limited expectation of privacy in their banking information, the next question is whether the seizure of their banking information is reasonable.

(4) Is the Seizure of Information under the Impugned Provisions Reasonable?

[314] As the Supreme Court observed in *Goodwin*, above, section 8 of the *Charter* "permits *reasonable* searches and seizures in recognition that the state's legitimate interest in advancing

its goals or enforcing its laws will sometimes require a degree of intrusion into the private sphere": at para. 55 [emphasis in original].

[315] Canada clearly found itself in an extremely difficult position as a result of the enactment of *FATCA* by the American government. Indeed, I accept the evidence of Mr. Shoom (which, I note, is consistent with the evidence of Mr. Oschinski) as to the potentially serious consequences for the Canadian economy, financial institutions and bank customers that would result if Canadian financial institutions were to comply with the requirements of *FATCA*, as well as the negative consequences that would follow their refusal to do so.

[316] I have, moreover, previously concluded that as far as the Canadian Government was concerned, one of the major purposes underlying the conclusion of the *Canada-U.S. IGA* and the enactment of the Impugned Provisions was to avoid the potentially catastrophic impact that compliance with *FATCA* would have for Canadian financial institutions, their customers and the Canadian economy as a whole.

[317] The question, then, is whether the seizure of affected individuals' banking information in accordance with the Impugned Provisions is reasonable. To answer this question, the apprehended harm (and the corresponding need to avoid it) has to be weighed against the extent of the impairment of U.S. persons' section 8 *Charter* rights that will result and the interest of affected individuals in being left alone: *Jarvis* #2, above at para. 69, quoting *Hunter v. Southam*, above at 159-60.

[318] When counsel for the Plaintiffs was asked what Canada should have done in light of the threat posed by *FATCA*, his response was that Canada should have negotiated a better deal with

the American government – one that did not encroach on the constitutionally-protected privacy and equality rights of those U.S. persons who are resident in Canada.

[319] With respect, that is not a satisfactory response.

[320] As the Federal Court of Appeal observed in *Hupacasath*, above, there are cases that suggest that decisions of the executive to enter into a treaty are not, without more, justiciable: at para. 68, citing *R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex. P. Everett*, [1989] 1 All E.R. 655 at 690, [1989] Q.B. 811, and *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 at para. 52, 199 D.L.R. (4th) 228 (C.A.).

[321] The Court went on in *Hupacasath*, above, to observe that "[t]his makes sense, as the factors underlying a decision to sign a treaty are beyond the courts' ken or capability to assess, and any assessment of them would take courts beyond their proper role within the separation of powers": at para. 68.

[322] That said, the issues raised by this action are clearly justiciable, given that what is being challenged is the legislation implementing an intergovernmental agreement, and the fact that the action is framed entirely under the *Charter*: *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 at 472, 18 D.L.R. (4th) 481, Wilson J., concurring; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paras. 36-37, [2010] 1 S.C.R. 44.

[323] However, the Plaintiffs' argument essentially asks this Court to second-guess the way that Canada has exercised its prerogative powers in concluding an agreement with another country. While the Federal Court has the power to review federal exercises of pure prerogative

power, courts should nevertheless be reluctant to do so: *Hupacasath*, above at para. 54; *Operation Dismantle*, above at 472-473, Wilson J., concurring.

[324] It is also by no means clear that the American government would have agreed to a more favorable arrangement with Canada. Not only have the Plaintiffs not provided any evidence to support their argument, as the Supreme Court observed in *Operation Dismantle*, above, "the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability": at 452. As a consequence, the Court found that it would be speculative to try to anticipate how a foreign country would react in a given situation: *Operation Dismantle*, above at 452.

[325] That said, it is doubtful that Canada could have negotiated a better deal with the United States. The evidence before the Court is that some 100 countries have entered into intergovernmental agreements with the American government in efforts to mitigate the consequences of *FATCA* in each of these countries. Some of these countries, like Canada, are major trading partners with the United States. There is, however, no suggestion that any of these countries were able to negotiate agreements with the American government that were any more advantageous or less intrusive than the *Canada-U.S. IGA*.

[326] The Plaintiffs also suggested that the Impugned Provisions are overly-broad, and that they should apply only to those individuals who were not complying with their obligations under American law. However, the difficulties that would be encountered in practice in implementing such a system were addressed by Sue Murray, one of the Defendants' witnesses. Ms. Murray is the Director of the Competent Authority Services Division, in the International and Large Business Directorate of the Compliance Programs Branch at the CRA.

[327] Ms. Murray explains that international tax agreements contemplate that the administrative functions to be performed under the agreements are the responsibility of each country's "Competent Authority". The "Competent Authority" in Canada is the Minister of National Revenue, although, in practice, the functions of the Competent Authority are carried out by officials within the CRA.

[328] Ms. Murray further explains that it would be impossible in practice for the CRA to determine whether there would be any impact on an individual's tax liability in the receiving state for a taxpayer identified in a proposed exchange of information. This is because the CRA would need to know all of the treaty partners' domestic tax laws and all of the facts related to each particular taxpayer's tax situation under those laws for each taxation year in question.

[329] In assessing the reasonableness of the seizure of information carried out in accordance with the Impugned Provisions, regard must also be had to the global environment as it relates to the sharing of tax information between countries.

[330] Evidence with respect to the global environment was provided by Mr. Shoom and by Stephanie Smith, the Senior Chief, Tax Treaties Section at the Department of Finance. They state that at the same time that Canada was negotiating the *Canada-U.S. IGA* with the American government, members of various multilateral bodies, in particular, the Organization for Economic Cooperation and Development (OECD), were involved in discussions aimed at developing and implementing a common standard for the automatic multilateral exchange of financial account information along the lines of the *Canada-U.S. IGA*.

[331] These discussions occurred in response to a request from the G20 group of nations, in recognition of the increased globalization of the financial markets. This initiative reflected the international community's commitment to a higher level of tax transparency, with the goal of reducing the ability of taxpayers to hide assets in foreign jurisdictions around the globe and improving tax compliance. These discussions culminated in the formulation of a "Common Reporting Standard" (or "CRS") - that is, a global model providing for the automatic exchange of financial account information between countries. The type of information that is to be exchanged in accordance with the CRS is similar to the account information that is subject to disclosure in accordance with the Impugned Provisions.

[332] The CRS's due diligence and reporting requirements have now been implemented in Canada as Part XIX of the *Income Tax Act*.

[333] As Justice Martineau observed, there are differences between the OECD's CRS and the Impugned Provisions. In particular, the CRS's reporting requirements are triggered by residency as opposed to citizenship, and they do not entail the same sanctions as the Impugned Provisions (i.e. imposition of a withholding tax) in the case of non-compliance: *Hillis*, above at para. 49. That said, the CRS nevertheless draws extensively on the government-to-government approach taken in implementing the *FATCA* regime, as reflected in the *Canada-U.S. IGA*.

[334] According to Ms. Negus, over 100 countries, including Canada have now committed to implement the CRS. It requires that participating jurisdictions collect information about non-resident accountholders from their financial institutions, and that they share this information with the jurisdictions relevant to the particular case.

[335] In accordance with Part XIX of the *Income Tax Act*, most Canadian financial institutions are now required to provide the CRA with information about accounts held by non-residents of Canada and the U.S., on an annual basis. The CRA then shares this information with the competent authorities of partner jurisdictions that have activated an exchange relationship with Canada. In return, the CRA receives information about Canadian residents' foreign financial accounts.

[336] Part XIX of the *Income Tax Act* requires the reporting of information that is similar in nature to the information that must be reported under the Impugned Provisions, including the account holder's name, date of birth, address, jurisdiction of residence, taxpayer identification numbers, account balances and information about income types and payments received. Under the Impugned Provisions, only accounts identified as U.S. reportable accounts give rise to the reporting requirements, whereas the CRS and Part XIX of the *Income Tax Act* require that information be collected about all non-resident account holders, other than U.S. residents.

[337] From this, it is apparent that the sharing of taxpayer information between countries has received international acceptance, further suggesting that the sharing of U.S. persons' accountholder information with the IRS pursuant to the Impugned Provisions is indeed reasonable.

[338] The reasonableness of seizures that are carried out in accordance with the Impugned Provisions is further confirmed by the fact that the banking information in issue is shared with the IRS in confidence, in accordance with the provisions of the *Canada-U.S. Tax Treaty*, and is subject to the restrictions on the use that can be made of information exchanged under the

Treaty. This would not be the case if Canadian financial institutions were to provide account-holders' banking information directly to the IRS, in accordance with the provisions of *FATCA*.

[339] As to whether the Impugned Provisions are overly broad, the Plaintiffs note that Canada does not collect data on the number of non-U.S. persons whose account information has been reported to the IRS in accordance with the Impugned Provisions. However, the Plaintiffs submit that the Impugned Provisions "almost certainly capture an inordinate number of individuals with no US tax obligations of any kind".

[340] It is true that the Impugned Provisions may lead to the account information of certain non-U.S. persons (such as the Canadian spouses of American citizens) being shared with the IRS, as that information will be shared to the extent that it relates to the U.S. person. However, the name of the non-U.S. person holding a joint account with a U.S. person will not be shared with American tax authorities.

[341] Moreover, to the extent that some people may be caught up in the system as a result of having been identified as potentially being U.S. persons when that is not in fact the case, it will be recalled that Canada took steps to protect accountholders from over-reporting. Indeed, subparagraph II B (4) of Annex I of the *Canada-U.S. IGA* empowers Canadian financial institutions to try to "clear" U.S. Person Indicia before turning account holders' banking information over to the CRA.

[342] Even if the banking information of individuals who are not subject to American tax law is captured by the Impugned Provisions, the information is shared with the IRS under the *Canada-*

U.S. Tax Treaty, with the result that it can only be used for the purposes of U.S. tax law. As a consequence, any impact on the privacy interests of the individuals in question is minimal.

[343] In support of their argument that the Impugned Provisions are overly broad, the Plaintiffs also rely on Professor Christians' evidence that fewer than 10% of all of the individuals who file American tax returns from a "tax home" located outside the United States ultimately owe any taxes to the United States government. While that may well be the case, the fact that certain of the affected individuals may not end up owing American income tax does not relieve them from their filing obligations under U.S. income tax and banking laws. Indeed, as was previously noted, one of the purposes underlying the enactment of both *FATCA* and the Impugned Provisions was to ensure compliance with U.S. tax laws.

[344] The Plaintiffs further submit that the Impugned Provisions are overbroad because only those individuals whose gross annual income equals or exceeds a specified exemption amount will have filing obligations under U.S. income tax laws. This may be so, but these individuals may also have obligations to file FBAR reports under the American *Bank Secrecy Act* if the aggregate value of their Canadian bank accounts exceeds $10,000 at any time during the calendar year in question.

[345] Moreover, it seems unlikely that there would be many individuals whose annual income is less than the annual exemption amount who nevertheless have more than $50,000 in their bank account. It will be recalled that $50,000 is the threshold for "Lower Value Accounts" – that is, those accounts that *must* be reported to the CRA under the Impugned Provisions. Canadian financial institutions do, however, have the discretion to report "Low Value Accounts" – that is, those with a balance below $50,000.

[346] Another contextual element that must be considered in assessing the reasonableness of the seizures carried out in accordance with the Impugned Provisions is the fact that U.S. persons have legal obligations *vis à vis* the U.S. government under American tax laws, obligations that are independent of any actions that may be taken by the Canadian government under the Impugned Provisions.

[347] Several of the Plaintiffs' affiants have expressed their concern that the Impugned Provisions will lead to the American government discovering that they exist, thereby exposing them to the enforcement of American tax laws.

[348] First of all, as noted earlier, the U.S. tax obligations of American citizens exist regardless of whether or not the IRS is actually aware of such individuals. I also agree with the Defendants that the benefit that would accrue to those affected by the Impugned Provisions by their ability to ignore their obligations under American tax laws is outweighed by the need to protect Canada as a whole from the economic consequences of *FATCA*.

[349] I further agree with the Defendants that the ability of those individuals resident in Canada to claim immunity from the duly-enacted laws of another democratic state of which they are citizens is not the kind of interest that the *Charter* was ever intended to foster.

[350] Finally, the Plaintiffs submit that even if the Court were to accept that Canada had no choice but to enter into the *Canada-U.S. IGA* in an effort to mitigate the negative consequences of *FATCA*, this would only serve to justify the IRS' use of the banking information of U.S. persons resident in Canada. It would not justify the use of that information by the CRA for domestic tax purposes.

[351] I have already concluded that those affected by the Impugned Provisions have only a limited expectation of privacy in the banking information in issue in this case. The Supreme Court has, moreover, held that once the CRA has obtained documents, taxpayers can no longer have any reasonable expectation of privacy in the documents in question: *Jarvis* #2, above at para. 95. That being the case, the use of the documents by the CRA for domestic income tax purposes will not result in the unreasonable seizure of the information in question contrary to the provisions of section 8 of the *Charter*.

[352] I thus find that the use by the CRA of account-holder information obtained under the Impugned Provisions for domestic tax purposes does not violate section 8 of the *Charter*.

(5) Conclusion with Respect to the Plaintiffs' Section 8 Claim

[353] As discussed above, I have concluded that the principle purpose underlying the *Canada-U.S. IGA* and the Impugned Provisions - namely avoiding the consequences of the direct application of *FATCA* in Canada - is an important one. I have also found that individuals have a limited privacy interest in their banking records, and that the method used to collect this information is minimally intrusive. I have also found that the information that is shared with the IRS is afforded protection under the *Canada-U.S. Tax Treaty*.

[354] Balancing all of these considerations has led me to conclude that the seizure of banking information contemplated by the Impugned Provisions is reasonable, and that it does not violate section 8 of the Charter. This being the case, it is unnecessary for me to consider whether the Impugned Provisions can be justified by the Defendants under section 1 of the Charter.

[355] This takes us to consider whether the Impugned Provisions violate section 15 of the *Charter*. This issue will be addressed next.

X. Do the Impugned Provisions Violate Section 15 of the Charter?

[356] Subsection 15(1) of the *Charter* provides that "[e]very 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".

[357] "National origin" is thus an enumerated ground under section 15 of the *Charter*. While citizenship is not expressly mentioned in section 15, the jurisprudence of the Supreme Court of Canada has established that it is an analogous ground: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 152, 56 D.L.R. (4th) 1.

[358] Subsection 15(1) is qualified by subsection 15(2), which provides that "[s]ubsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". There is no suggestion that any of the Impugned Provisions involve an ameliorative program, or that subsection 15(2) of the *Charter* is engaged in this case.

A. *The Plaintiffs' Arguments*

[359] The Plaintiffs acknowledge that prior to the enactment of the Impugned Provisions, American law still required that U.S. persons resident in Canada file American tax returns and pay U.S. taxes. There was, however, no Canadian law to that effect, and the American

government thus had no way of identifying individuals in Canada who were subject to U.S. tax laws. This is, the Plaintiffs say, because it is a fundamental postulate of international law that other countries cannot assert their jurisdiction on Canadian soil without the consent of Canada.

[360] According to the Plaintiffs, the Impugned Provisions provide the enforcement mechanisms that the American laws lacked. They assist the United States in enforcing its tax laws in this country by requiring that Canadian financial institutions disclose information regarding certain Canadian citizens and residents that the American government wants, but could not otherwise obtain. This allows the IRS to obtain information with respect to the identity of U.S. citizens residing in Canada, where they live, where they bank, and how much money is in their bank accounts.

[361] Under the Impugned Provisions, U.S. persons resident in Canada are exposed to the extraterritorial enforcement of another state's taxation and tax compliance regime in a way that non-U.S. persons are not. U.S. persons are subject to taxation and filing requirements that are more burdensome than the taxation and filing requirements to which non-U.S. persons resident in Canada are subjected. The Plaintiffs contend that this discriminates against U.S. persons on the basis of their citizenship and national origin by denying them a basic aspect of full membership in Canadian society: namely the protection of the sovereignty of the state.

[362] In support of this contention, the Plaintiffs note that distinctions that deny access to fundamental social institutions associated with membership in Canadian society are more likely to be discriminatory: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 53-54, 170 D.L.R. (4th) 1; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 556, 124 D.L.R. (4th) 609; *Quebec (Attorney General) v. A.*, 2013 SCC 5 at para. 159, [2013] 1 S.C.R. 61.

In the Plaintiffs' submission, one such "fundamental social institution" is the protection afforded by Canadian sovereignty.

[363] The Plaintiffs thus argue that the Impugned Provisions draw a distinction between citizens and residents of Canada who are U.S. persons and those who are not, based on the individuals' national origin or citizenship.

[364] The Plaintiffs further submit that the distinctions created by the Impugned Provisions are discriminatory because they impose arbitrary disadvantages on U.S. persons in Canada.

[365] Citing the Supreme Court's decisions in cases such as *Quebec (Attorney General) v. A.*, above at paras. 155-59, 331, and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, at para. 55, the Plaintiffs observe that several contextual factors are to be considered in assessing whether a law is discriminatory. These include:

(1) the pre-existing disadvantage, if any, of the identified group;

(2) the degree of correspondence between the differential treatment and the claimant group's reality;

(3) whether the law or program has an ameliorative purpose or effect in terms of combatting discrimination; and

(4) the nature of the interest affected.

[366] The Plaintiffs note that the Supreme Court has held that not all of these factors will be relevant in every case, and they should not be rigidly applied. Rather, the "objective is to determine the actual situation of the group and assess the potential of the impugned law to worsen their situation": *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 98, [2018] 1 S.C.R. 464 (Côté, Brown and Rowe JJ, dissenting) (*Alliance du personnel*).

[367] Insofar as the first factor is concerned, that is, the pre-existing disadvantage, if any, of the identified group, the Plaintiffs state that while individuals having American citizenship or an American place of birth have arguably faced some degree of historical stereotyping in Canada, such historical disadvantage is not necessary to establish a breach of subsection 15(1) of the *Charter*: *Law*, above at para. 65. See also *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, where a law was found to discriminate against men.

[368] The Plaintiffs contend that even if the Court were to find that the Impugned Provisions do not perpetuate any historical disadvantage on the part of U.S. persons, they nevertheless "impose and initiate disadvantage" on these individuals.

[369] The Plaintiffs contend that the third factor is not engaged in this case because, as noted earlier, the Impugned Provisions are not directed at remedying any pre-existing disadvantage suffered by a particular group. As a consequence, the Plaintiffs say that the Defendants are not entitled to the deference that would apply if the Impugned Provisions had such an ameliorative purpose.

[370] The Plaintiffs submit, however, that the second and fourth factors identified above lead to the conclusion that the Impugned Provisions are discriminatory, as they impose several disadvantages on affected individuals.

[371] The first such disadvantage has been discussed earlier in connection with the Plaintiffs' section 8 claim: that is, the undermining of the privacy interests of those affected by the Impugned Provisions.

[372] The second disadvantage identified by the Plaintiffs is that the Impugned Provisions create significant practical disadvantages for affected individuals, for example, by restricting their access to financial services. Affected individuals may be asked to provide additional proof regarding their place of birth, residence and citizenship when opening or continuing to hold a bank account. They may also be unable to obtain bank accounts or otherwise access banking services as effectively as other individuals, and they may, moreover, be inhibited from progressing in their careers or participating in financial opportunities that would otherwise be available to them.

[373] Affected individuals may also be required to expend significant sums on accounting and tax professionals in order to comply with their obligations under U.S. law, or to relieve themselves of their obligations to do so by renouncing their American citizenship.

[374] In this regard, I note that there is a disagreement between the parties as to whether individuals seeking to avoid these disadvantages by renouncing their American citizenship will also be subject to an American "Exit Tax", and whether any such obligation exists independent of *FATCA*. It is, however, unnecessary to resolve this question, as I do not understand there to be

any disagreement about the fact that whether or not affected individuals are indeed subject to an Exit Tax, they will nevertheless face significant costs in terms of professional fees and administrative costs associated with the tax compliance and citizenship renunciation processes.

[375] The third disadvantage identified by the Plaintiffs is that the Impugned Provisions undermine a fundamental aspect of membership in Canadian society by taking away the ability of affected individuals to choose not to comply with another state's laws, thereby exposing these people to the extraterritorial enforcement of the American tax compliance and reporting regime.

[376] The Plaintiffs contend that prior to the enactment of the Impugned Provisions, U.S. persons resident in Canada could simply choose not to comply with American tax reporting requirements. According to the Plaintiffs, a privilege that is enjoyed by all Canadians is that as long as they remain in Canada, this country will not force them to comply with American tax reporting requirements. The Impugned Provisions take this privilege away, forcing affected individuals to comply with American tax laws, whether or not they wish to do so.

[377] According to the Plaintiffs, this denies them the equal protection of the law, undermining their access to a fundamental social institution and a basic aspect of full membership in Canadian society: *Law*, above at para. 74.

[378] Finally, the Plaintiffs submit that the disadvantages that are imposed on U.S. persons by the Impugned Provisions are arbitrary, as they do not correspond to the capacities, needs or circumstances of these individuals. It is evident from the affidavits of several of the Plaintiffs' witnesses that at least some individuals affected by the Impugned Provisions have little, if any, connection to the United States apart from having been born there. Some such individuals view

themselves as being “accidental Americans”, and some were not even aware that they were in fact American citizens until they started looking into the matter.

[379] The Plaintiffs thus conclude that the Impugned Provisions draw a distinction based on national origin - an enumerated ground - and citizenship - an analogous ground. This distinction creates a disadvantage for affected individuals in that their banking information is being disclosed to the United States, thereby invading their privacy. The disclosure of this information carries various financial responsibilities with it, and it creates stress and other consequences that are not suffered by non-U.S. persons.

[380] According to the Plaintiffs, this is a completely arbitrary exercise of Parliament’s power over affected individuals. It further makes people in the position of the Plaintiffs feel that they are less worthy in the eyes of the Canadian government solely because they were born in the United States, thereby violating their equality rights under section 15 of the *Charter*.

B. *The Defendants’ Arguments*

[381] The Defendants submit that section 15 of the *Charter* is not engaged in this case, as the Impugned Provisions do not draw a distinction based on an enumerated or analogous ground. In the alternative, if the Court were to conclude that the Impugned Provisions do indeed draw a distinction on an enumerated or analogous ground, the Defendants contend that any such distinction is not discriminatory in nature.

[382] According to the Defendants, the distinctions drawn by the Impugned Provisions are based on whether people (including corporations and other legal entities) are “U.S. persons”, as defined in the legislation.

[383] The Defendants submit that the definition of "U.S. person" is intended to identify persons who are subject to American tax laws. While U.S. citizens living in Canada are "U.S. persons", they are only a part of this larger group. "U.S. persons" also includes corporations and other legal entities that are subject to U.S. tax laws, as well as non-U.S. citizens who are subject to American tax laws because they are resident in the United States, even if they do not originally come from that country.

[384] The Defendants say that the Plaintiffs' argument based on national origin "is even further removed than citizenship from the distinctions drawn by the Impugned Provisions". The Defendants note that someone who originally came from the United States may no longer be an American citizen, nor fall into any of the other categories on which the Impugned Provisions draw distinctions. As a result, these individuals may not be subject to the Impugned Provisions at all, even though they are originally from the United States. Conversely, the Defendants note that someone who originally came from a country other than the United States may nevertheless be subject to the Impugned Provisions if they have other U.S. person indicia.

[385] The Defendants further contend that even if I were to find that section 15 is engaged on the facts of this case, any distinction that is drawn by the Impugned Provisions is not discriminatory in nature, as there is no arbitrary disadvantage suffered by the claimant group. To the contrary, the Defendants say that the Impugned Provisions are targeted at U.S. persons because they are the individuals who are potentially subject to taxation on their worldwide income under American law. It would be nonsensical, the Defendants say, to apply the Impugned Provisions to both U.S. persons and non-U.S. persons so as to avoid any distinction being drawn between the two groups.

[386] The fact that the Impugned Provisions do not impose an arbitrary disadvantage on U.S. persons is confirmed, the Defendants say, by reference to other provisions of the *Income Tax Act*.

[387] For example, Part XIX of the Act implements the international Common Reporting Standard, imposing reporting requirements similar to those imposed by the Impugned Provisions on persons who are subject to the tax regimes of countries with which Canada has treaties governing the exchange of tax information: *Income Tax Ac*t, sections 270-281. The adoption of the CRS by the international community demonstrates a general acceptance of the necessity for, and appropriateness of, the international exchange of tax information.

[388] Indeed, the Defendants argue that the *Income Tax Act* as a whole requires the gathering of information of the sort covered by the Impugned Provisions, and the sharing of this information with other countries where the information is relevant to the tax laws of those other jurisdictions. Canadian citizens and non-citizens alike are thus subject to having their banking information gathered and potentially shared with foreign taxation authorities if they are subject to the tax laws of another country.

[389] As a result, the Defendants submit that U.S. persons face no greater disadvantage as a result of the overall scheme of tax information sharing contemplated by the *Income Tax Act* than does anyone else with accounts at Canadian financial institutions who may be subject of the taxation regime of one of Canada's treaty partners.

[390] According to the Defendants, the Impugned Provisions and Part XIX of the *Income Tax Act* are targeted legislative schemes that correspond to the circumstances of the different groups of individuals and entities to which the legislative provisions are addressed. Affected individuals

and entities are those whose banking information is relevant to the tax laws of jurisdictions with which Canada has information sharing agreements, and their tax information is gathered and shared only with the jurisdictions to which the information is relevant. Any distinction drawn by the Impugned Provisions between U.S. persons and non-U.S. persons is thus not a discriminatory one.

[391] While acknowledging that the Impugned Provisions may affect the financial interests of some individuals who had previously neglected their tax obligations under American law, the Defendants contend that this is not a result of the Impugned Provisions themselves. It is, rather, the consequence of being "U.S. persons" who are subject to American tax laws, the consequences of which may be felt regardless of the Impugned Provisions.

[392] Insofar as the Plaintiffs' sovereignty argument is concerned, the Defendants argue that sovereignty is not an individual right, but is rather a right that inures to the benefit of the state itself. Where sovereignty does come into play in this case is in Canada's decision that while it is prepared to extend some assistance to the United States in collecting tax information, it has exercised its sovereignty to refuse to assist the United States in collecting tax debts owed to the American government by Canadian citizens.

[393] Finally, the Defendants argue that the effect of the Impugned Provisions in no way perpetuates any arbitrary disadvantage faced by individuals because of their membership in an enumerated or analogous group: *Quebec (Attorney General) v. A.*, above at para. 331, Abella J., dissenting. According to the Defendants, the ability to claim immunity from the laws of a democratic state of which one is a citizen is not the kind of protection that section 15 of the *Charter* was ever intended to provide.

C. *Analysis*

[394] Subsection 15(1) of the *Charter* is aimed at preventing the drawing of discriminatory distinctions that impact adversely on members of groups identified by reference to the grounds enumerated in section 15, or to analogous grounds: *R. v. Kapp*, 2008 SCC 41 at para 25, [2008] 2 S.C.R. 483.

[395] "National origin" is one of the grounds enumerated in section 15, whereas the Supreme Court held in *Andrews*, above, that "citizenship" is an analogous ground.

[396] As the Supreme Court subsequently observed in *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769, "once a ground is found to be analogous, it is permanently enrolled as analogous for other cases": at para. 41, citing *Corbiere*, above at para. 8. See also *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para. 118, [2000] 2 S.C.R. 1120.

(1) The Law Governing Section 15 Claims

[397] While the statement from *R. v. Kapp* cited above appears to be a simple proposition, it is nevertheless fair to say that the Supreme Court's section 15 jurisprudence has been something of an ever-evolving work-in-progress.

[398] The work started with the Supreme Court's decision in *Andrews*, above. There, the Court defined 'discrimination' as being "a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group": *Andrews*, above at 174, McIntyre J., dissenting in part. To be discriminatory, any such distinction must have the effect of imposing burdens, obligations, or disadvantages on an individual or group that are not imposed upon

others, or must withhold or limits access to opportunities, benefits, and advantages available to other members of society: *Andrews*, above at 174, McIntyre J., dissenting in part.

[399] It was, moreover, in *Andrews* that the Supreme Court first articulated its commitment to the principle of substantive, rather than formal, equality.

[400] "Formal equality" requires that everyone, regardless of their individual circumstances, be treated in an identical fashion. In contrast, "substantive equality" recognizes that in some circumstances it is necessary to treat different individuals differently, in order that true equality may be realized. In this regard, "substantive equality" is based upon the concept that "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, above at 171, McIntyre J., dissenting in part.

[401] As Professor William Black and Justice Lynn Smith explained in "The Equality Rights" in Gérald Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, Ontario: LexisNexis, 2005), the term 'substantive equality' "indicates that one must take account of the outcomes of a challenged law or activity and of the social and economic context in which a claim of inequality arises": at 969. In assessing that context, a Court must look beyond the law being challenged and "identify[…] external conditions of inequality that affect those outcomes": Black & Smith, above at 969. In other words, "[s]ubstantive equality requires attention to the 'harm' caused by unequal treatment": Black & Smith, above at 969.

[402] In *Law*, above, the Supreme Court articulated a four-part test for courts to use in identifying discriminatory distinctions, emphasizing the notion of human dignity as being the underlying value animating the discrimination analysis.

[403] Indeed, as the Supreme Court subsequently observed in *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, the central lesson of *Law* was the need for a contextual inquiry in order to establish whether a statutory distinction conflicts with the purpose of subsection 15(1) of the *Charter*, such that "a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity": at para. 25.

[404] In *R. v. Kapp*, above, the Supreme Court recognized that difficulties had arisen in using human dignity as a legal test. The Court observed that although human dignity is an essential value underlying the subsection 15(1) equality guarantee, "human dignity is an abstract and subjective notion that … cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be": *R. v. Kapp*, above at para. 22 [emphasis in the original].

[405] The Supreme Court further observed that the section 15 analysis "more usefully focusses on the factors that identify impact amounting to discrimination", recognizing that the "perpetuation of disadvantage and stereotyping" are the "primary indicators of discrimination": *R. v. Kapp*, above at para. 23. Thus, the Court held that the "central concern" of section 15 is "combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping": *R. v. Kapp*, above at para. 24.

[406] For the purposes of a section 15 *Charter* analysis, "disadvantage … connotes vulnerability, prejudice and negative social characterization": *R. v. Kapp*, above at para. 55. In determining whether a government action imposes disadvantage on the basis of "stereotyping", regard should be had to, amongst other things, the "degree of correspondence between the differential treatment and the claimant group's reality": *R. v. Kapp*, above at paras. 19, 23.

[407] "Prejudice" has been described by the Supreme Court as "the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member". While "stereotyping", like prejudice, "is a disadvantaging attitude", it is an attitude "that attributes characteristics to members of a group regardless of their actual capacities": all quotes from *Quebec v. A.*, above at para. 326, Abella J., dissenting, but not on this point.

[408] Since *R. v. Kapp*, the Supreme Court has reminded us of the importance of looking beyond the impugned government action in a section 15 analysis, and of the need to examine the larger social, political and legal context of the legislative distinction in issue: see *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at paras. 193-194, [2009] 1 S.C.R. 222.

[409] Coming full circle, the Supreme Court has returned to the *Andrews* articulation of the section 15 test, as reformulated in *R. v. Kapp*, above. That is, in cases such as *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, *Quebec v. A*, above, and *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522 (*Centrale des syndicats*), the Court has reiterated that "[a]t the end of the day there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?":

Quebec v. A., above at para. 325, Abella J., dissenting, citing *Withler*, above at para. 2 [emphasis added in *Quebec v. A.*].

[410] The majority in *Centrale des syndicats* held that a two-step approach is to be used in assessing a section 15 claim. The Court must ask itself whether the law in issue draws a distinction, either on its face or in its impact, based on an enumerated or analogous ground. If the answer to this question is "yes", then the Court must determine whether the law imposes a burden or denies a benefit in a way that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including "historical" disadvantage: *Centrale des syndicats*, above at para. 22, citing *Quebec v. A.*, above at paras. 323-24, 327, Abella J., dissenting; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras. 19-20, [2015] 2 S.C.R. 548.

[411] In *Quebec v. A.*, above, Justice Abella reminded us that "the main consideration must be *the impact* of the law on the individual or the group concerned": at para. 319, dissenting, citing *Andrews*, above at 165 [emphasis added in *Quebec v. A.*]. She also observed that the purpose of section 15 was "to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available": *Quebec v. A.*, above at para. 319.

[412] While prejudice and stereotyping are thus two of the indicia that may help identify discriminatory conduct, they are not, however, discrete elements of the test that a claimant is required to satisfy: *Quebec v. A.*, above at para. 325, Abella J., dissenting. Requiring that there be prejudice or stereotyping would "likely have the unfortunate effect of blinding us to other ways in which individuals and groups, that have suffered serious and long-standing disadvantage, can be discriminated against". There may well be cases that do not involve either prejudice or

stereotyping, but which "do involve oppression or unfair dominance of one group by another, or involve a denial to one group of goods that seem basic or necessary for full participation in Canadian society": both quotes from *Quebec v. A.*, above at para. 325, Abella J., dissenting, citing Sophia Moreau, *"R. v. Kapp*: New Directions for Section 15*"* (2008-2009), 40 Ottawa L. Rev. 283 at 292.

[413] Caution must thus be exercised to avoid improperly focusing on whether a discriminatory attitude or conduct motivated the enactment of the Impugned Provisions. The Court's focus should instead be on whether the legislation has a discriminatory *impact* on affected individuals. As a consequence, it is not necessary that claimants prove that a distinction perpetuates negative attitudes about them: *Quebec v. A.*, above at paras. 327-330, Abella J., dissenting; *Centrale des syndicats*, above at para. 35.

[414] That said, the Supreme Court held in *Quebec v. A.*, above, that "where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered": *Withler*, above at para. 38.

[415] Ultimately, though, the question for determination remains "whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group": *Quebec v. A.*, above at para. 331, Abella J., dissenting. As a consequence, "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory": *Quebec v. A.*, above at para. 332, Abella J., dissenting.

(2) Do the Impugned Provisions Draw a Distinction between U.S. Persons and non-U.S. Persons Based on their Citizenship or National Origin?

[416] The first question to be determined is thus whether the Impugned Provisions draw a distinction between U.S. persons and non-U.S. persons based on their citizenship or their national origin.

[417] As the Supreme Court observed in *Alliance du personnel*, above, the first step of the subsection 15(1) analysis is neither "a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases". Its purpose is, rather, to ensure that subsection 15(1) of the *Charter* is accessible to those whom it was designed to protect. Consequently, "[t]he 'distinction' stage of the analysis should only bar claims that are not 'intended to be prohibited by the *Charter*' because they are not based on enumerated or analogous grounds". In other words, the purpose of the first step in the inquiry is to exclude claims that have "nothing to do with substantive equality". The focus at this stage is thus on the grounds for the distinction: all quotes from *Alliance du personnel*, above at para. 26.

[418] The Defendants contend that the distinctions drawn by the Impugned Provisions are based on whether a person is a "U.S. person", as defined in the legislation. The definition of "U.S. person" is intended to identify persons who are subject to American tax laws. While U.S. citizens living in Canada are "U.S. persons", as are those born in the United States, they are only a part of a larger group of natural and legal persons such as partnerships, corporations and trusts that are subject to American tax laws.

[419] I do not accept the Defendants' submission.

[420] The Defendants say that the Impugned Provisions treat U.S. persons differently, not because they are American citizens, but rather because they are subject to American tax laws. With respect, this confuses the *motive* for the adverse differential treatment in the Impugned Provisions with its *impact*.

[421] A review of the Impugned Provisions, in particular the definition section of the *Canada-U.S. IGA* as incorporated into the *Implementation Act*, identifies being an American citizen or having a U.S. place of birth as two of the criteria that will subject individuals to the reporting requirements of the legislation. The fact that these are not the only criteria that expose individuals to the requirements of the legislation, and that other non-American citizens and entities may be exposed to the reporting requirements of the legislation, does not take away from the fact that U.S. citizens resident in Canada and those individuals who were born in the United States will be exposed to consequences that are not imposed upon others in Canada who are not U.S. citizens or were not born in the United States. The difference in treatment between the two groups is based on the American birthplace or citizenship of the former group.

[422] Similarly, Annex I of the *Canada-U.S. IGA*, as incorporated into the *Implementation Act*, identifies the "U.S. person indicia" that will trigger reporting requirements on the part of Canadian financial institutions. These indicia include having American citizenship or an American place of birth, thereby exposing both American citizens and those who were born in the United States to adverse differential treatment because of their citizenship or their national origin.

[423] It is true that not everyone born in the United States will be subject to the reporting requirements of the Impugned Provisions. Those American-born individuals who have

renounced or relinquished their American citizenship may no longer have tax obligations *vis à vis* the country of their birth. That being said, a notation in a banking record that an individual was born in the United States will, at a minimum, be sufficient to trigger inquiries by Canadian financial institutions, and could also inhibit an individual's ability to open bank accounts at a new financial institution. It may also subject the individual to the reporting requirements of the Impugned Provisions if their financial institution is not satisfied that they are no longer American citizens. Individuals born in Canada will not be subjected to similar treatment.

[424] I am therefore satisfied that the Impugned Provisions draw a distinction between U.S. persons and non-U.S. persons based, at least in part, on their citizenship and/or their national origin.

[425] The next question, then, is whether any such distinction is discriminatory.

(3) Is any Distinction Drawn by the Impugned Provisions between U.S. Persons and non-U.S. Persons Discriminatory?

[426] Although I have found that the Impugned Provisions do indeed draw a distinction between U.S. Persons and non-U.S. Persons on the basis of their citizenship and/or their national origin, I am nevertheless satisfied that any such distinction is not discriminatory, as that term is understood in the jurisprudence.

[427] While suggesting that there might have been a time where American citizens in Canada may have been subject to what they refer to as a "Yankee-go-home sort of mentality", the Plaintiffs acknowledge that they are not placing much store in this. They have, moreover, not identified any evidence in the record to show that individuals with U.S. citizenship or an American place of birth have faced historical disadvantage, prejudice or stereotyping in Canada.

I am thus not persuaded that the Impugned Provisions impose burdens on a historically disadvantaged group.

[428] However, as was noted earlier, that is not the end of the inquiry. While the perpetuation of historical disadvantage can be an indicator of discrimination, the absence of any historical disadvantage faced by the claimant group does not necessarily mean that adverse differential treatment is not discriminatory. The focus must, instead, be on the discriminatory impact of the distinction: *Alliance du personnel*, above at para. 28; *Quebec v. A.*, at paras. 327, 330, Abella J., dissenting.

[429] It is true that in *Andrews*, above, the Supreme Court held that "non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated": at para. 5.

[430] That said, and focussing on the impact of the Impugned Provisions as I am required to do, at the end of the day, the effect of the Impugned Provisions is to compel U.S. persons in Canada to comply with their pre-existing obligations under American tax laws. The *Charter* does not require Canada to assist persons resident in this country in avoiding their obligations under duly-enacted laws of another democratic state, nor does it require this country to shelter those living in Canada from the reach of foreign laws. Indeed, as was noted earlier, insulating persons resident in this country from their obligations under duly-enacted laws of another democratic state is not a value that section 15 of the *Charter* was designed to foster.

[431] I am also not persuaded that the Impugned Provisions send the message that U.S. persons in Canada are less worthy of recognition as members of Canadian society. Nor am I persuaded

that they undermine the dignity of affected individuals. The affected individuals in this case are being treated differently because they were born in the United States or have American citizenship – the very things that potentially make them subject to U.S. tax laws.

[432] The situation in this case should be contrasted with cases where discrimination on the basis of citizenship or national origin has been found to have occurred.

[433] In *Andrews*, the legislation at issue prevented non-Canadian citizens (who were in all other respects qualified) from being called to the bar of British Columbia, thereby limiting their ability to work in their chosen field. As the Supreme Court of Canada observed in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, work is "one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society". A person's employment is thus "an essential component of his or her sense of identity, self-worth and emotional well-being": both quotes from *Reference Re Public Service Employee Relations Act (Alberta)*, above, at 368, Dickson C.J., dissenting, but not on this issue.

[434] As a consequence, the Supreme Court quite understandably concluded in *Andrews* that a rule that bars an entire class of persons from certain forms of employment for which they were otherwise qualified solely because they were not Canadian citizens violated the equality rights of that group.

[435] Similarly, in *Lavoie*, above, non-Canadian citizens were denied the opportunity to work in the Public Service of Canada, once again conveying the message that non-citizens are "less

capable or less worthy of recognition or value as human beings or as members of Canadian society": at para. 46; *Law*, above at para. 99.

[436] In the non-employment context, I concluded in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, [2015] 2 F.C.R. 267 that denying funding for health care to certain individuals based on their citizenship or national origin put their lives at risk. It also sent the clear message that refugee claimants from certain countries were undesirable, and that their well-being, and indeed their very lives, were worth less than those of refugee claimants from other countries: at para. 835.

[437] A review of the non-expert affidavits filed by the Plaintiffs in this case discloses that much of the affiants' concern is with the reporting requirements of *FATCA*, and their unhappiness with the fact that the American government seeks to tax its non-resident citizens. This is, however, a policy choice made by the American government that is not open to challenge in this Court.

[438] That said, certain of the affiants do say that they feel betrayed by Canada, and that they are frustrated that the Canadian government is not protecting them from the enforcement of the U.S. tax regime. Ms. Nicholls also states that she feels like a "second-class citizen", as she does not have the same rights as her Canadian husband when it comes to investing and freedom in banking.

[439] While these individuals' frustration may be understandable, when viewed objectively, the decision of the Canadian government to share these individuals' banking information with the IRS because their American citizenship or national origin makes them subject to American tax

laws does not devalue their worth as individuals. Nor does it send the message that U.S. persons are less capable or less worthy of recognition as human beings or as members of Canadian society. It is thus not discriminatory.

(4) Conclusion with Respect to the Plaintiffs' Section 15 Claim

[440] For these reasons, I find that the Impugned Provisions do not reinforce, perpetuate or exacerbate disadvantage, nor do they violate the norm of substantive equality in subsection 15(1) of the *Charter*. I am also not persuaded that the Impugned Provisions involve the oppression or unfair dominance of one group by another, or a denial to one group of protections that are basic or necessary for full participation in Canadian society: *Quebec v. A.*, above at para. 325, Abella J., dissenting, citing Moreau, above at 292.

[441] This being the case, it is not necessary to consider whether a breach of section 15 can be justified by the Defendants under section 1 of the *Charter*.

XI. Conclusion

[442] Having failed to establish that the Impugned Provisions violate either section 8 or section 15 of the *Canadian Charter of Rights and Freedoms*, it follows that the Plaintiffs' action will be dismissed.

XII. Costs

[443] At the hearing of this action, the Plaintiffs advised that they would be seeking their costs regardless of the outcome of this case. The parties asked, however, for the opportunity to make submissions with respect to the issue of costs once I rendered my decision in this matter.

[444] In the event that the parties are unable to come to an agreement with respect to the question of costs, the Plaintiffs shall have 20 days in which to make submissions, not to exceed 10 pages in length, on the issue of costs. The Defendants will then have a further 20 days in which to make their submissions on the issue of costs, which submissions shall once again not exceed 10 pages in length.

JUDGMENT IN T-1736-14

THIS COURT'S JUDGMENT is that:

1. The action is dismissed; and

2. In the event that the parties are unable to come to an agreement with respect to the question of costs, the Plaintiffs shall have 20 days in which to make submissions, not to exceed 10 pages in length, on the issue of costs. The Defendants will then have a further 20 days in which to make their submissions on the issue of costs, which submissions shall once again not exceed 10 pages in length.

"Anne L. Mactavish"
Judge

Appendix

Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act, S.C. 2014, c. 20, s. 99

An Act to implement the Canada–United States Enhanced Tax Information Exchange Agreement

[Enacted by section 99 of chapter 20 of the Statutes of Canada, 2014, in force on assent June 19, 2014.]

Short title

1 This Act may be cited as the *Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act*.

Definition of *Agreement*

2 In this Act, ***Agreement*** means the Agreement between the Government of Canada and the Government of the United States of America set out in the schedule, as amended from time to time.

Agreement approved

3 The Agreement is approved and has the force of law in Canada during the period that the Agreement, by its terms, is in force.

Loi de mise en oeuvre de l'Accord Canada–États-Unis pour un meilleur échange de renseignements fiscaux, L.C. 2014, ch. 20, art. 99

Loi mettant en oeuvre l'Accord Canada–États-Unis pour un meilleur échange de renseignements fiscaux

[Édictée par l'article 99 du chapitre 20 des Lois du Canada (2014), en vigueur à la sanction le 19 juin 2014.]

Titre abrégé

1 *Loi de mise en oeuvre de l'Accord Canada–États-Unis pour un meilleur échange de renseignements fiscaux*.

Définition de *Accord*

2 Pour l'application de la présente loi, Accord s'entend de l'accord entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique, dont le texte figure à l'annexe, avec ses modifications successives.

Approbation

3 L'Accord est approuvé et a force de loi au Canada pendant la durée de validité prévue par son dispositif.

Inconsistent laws — general rule

4(1) Subject to subsection (2), in the event of any inconsistency between the provisions of this Act or the Agreement and the provisions of any other law (other than Part XVIII of the *Income Tax Act*), the provisions of this Act and the Agreement prevail to the extent of the inconsistency.

Incompatibilité — principe

4(1) Sous réserve du paragraphe (2), les dispositions de la présente loi et de l'Accord l'emportent sur les dispositions incompatibles de toute autre loi, à l'exception de la partie XVIII de *la Loi de l'impôt sur le revenu*.

Inconsistent laws — exception

(2) In the event of any inconsistency between the provisions of the Agreement and the provisions of the *Income Tax Conventions Interpretation Act*, the provisions of that Act prevail to the extent of the inconsistency.

Incompatibilité — exception

(2) Les dispositions de la *Loi sur l'interprétation des conventions en matière d'impôts sur le revenu* l'emportent sur les dispositions incompatibles de l'Accord.

Regulations

5 The Minister of National Revenue may make any regulations that are necessary for carrying out the Agreement or for giving effect to any of its provisions.

Règlements

5 Le ministre du Revenu national peut prendre les règlements nécessaires à l'exécution de tout ou partie de l'Accord.

Entry into force of Agreement

***6(1)** The Minister of Finance must cause a notice of the day on which the Agreement enters into force to be published in the *Canada Gazette* within 60 days after that day.

Entrée en vigueur de l'Accord

***6(1)** Le ministre des Finances fait publier dans la *Gazette du Canada* un avis de la date d'entrée en vigueur de l'Accord dans les soixante jours suivant cette date.

Amending instrument

(2) The Minister of Finance must cause a notice of the day on which any instrument amending the Agreement enters into force to be published, together with a copy of the instrument, in the *Canada Gazette* within 60 days after that day.

Texte modificatif

(2) Le ministre des Finances fait publier dans la *Gazette du Canada* un avis de la date d'entrée en vigueur de tout texte modifiant l'Accord, ainsi qu'une copie du texte, dans les soixante jours suivant cette date.

Termination

(3) The Minister of Finance must cause a notice of the day on which the Agreement is terminated to be published in the Canada Gazette within 60 days after that day.

*[Note: Agreement in force June 27, 2014, see Canada Gazette Part I, Volume 148, page 2234.]

Schedule

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 Canada and the United States of America with Respect to Taxes on Income and on Capital

[Agreement text not produced]

Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.)

[. . .]

PART XVIII

Enhanced International Information Reporting

Definitions

263 (1) The following definitions apply in this Part.

agreement has the same meaning as in section 2 of the *Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act*. (accord)

Dénonciation

(3) Le ministre des Finances fait publier dans la *Gazette du Canada* un avis de la date de cessation d'effet de l'Accord dans les soixante jours suivant cette date.

*[Note : Accord en vigueur le 27 juin 2014, voir *Gazette du Canada* Partie I, volume 148, page 2234.]

Annexe

Accord entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique en vue d'améliorer l'observation fiscale à l'échelle internationale au moyen d'un meilleur échange de renseignements en vertu de la Convention entre le Canada et les États-Unis d'Amérique en matière d'impôts sur le revenu et sur la fortune

[Énoncés de l'accord ne sont pas reproduits]

Loi de l'impôt sur le revenu, L.R.C. (1985), ch. 1 (5e suppl.)

[. . .]

PARTIE XVIII

Processus élargi de déclaration de renseignements

Définitions

263 (1) Les définitions qui suivent s'appliquent à la présente partie.

accord S'entend au sens de l'article 2 de la *Loi de mise en oeuvre de l'Accord Canada–États-Unis pour un meilleur échange de renseignements fiscaux.* (agreement)

electronic filing means using electronic media in a manner specified by the Minister. (*transmission électronique*)

compte déclarable américain Compte financier qui, selon l'accord, doit être considéré comme un compte déclarable américain. (U.S. reportable account)

listed financial institution means a financial institution that is

institution financière canadienne non déclarante Toute institution financière canadienne ou autre entité résidant au Canada qui, selon le cas :

(a) an authorized foreign bank within the meaning of section 2 of the Bank Act in respect of its business in Canada, or a bank to which that Act applies;

a) est visée à l'une des sous-sections C, D et G à J de la section III de l'annexe II de l'accord;

(b) a cooperative credit society, a savings and credit union or a caisse populaire regulated by a provincial Act;

b) démontre de façon adéquate qu'elle est visée à l'une des sous-sections A, B, E et F de la section III de l'annexe II de l'accord;

(c) an association regulated by the *Cooperative Credit Associations Act;*

c) remplit les conditions nécessaires pour être un bénéficiaire effectif exempté selon les dispositions applicables des Treasury Regulations des États-Unis en vigueur à la date de la signature de l'accord;

(d) a central cooperative credit society, as defined in section 2 of the *Cooperative Credit Associations Act*, or a credit union central or a federation of credit unions or caisses populaires that is regulated by a provincial Act other than one enacted by the legislature of Quebec;

d) démontre de façon adéquate qu'elle remplit les conditions nécessaires pour être une IFE réputée conforme, au sens donné au terme deemed-compliant FFI dans les dispositions applicables des Treasury Regulations des États-Unis en vigueur à la date de la signature de l'accord. (non-reporting Canadian financial institution)

(e) a financial services cooperative regulated by *An Act respecting financial services cooperatives*, R.S.Q., c. C-67.3, or *An Act respecting the Mouvement Desjardins*, S.Q. 2000, c. 77;

institution financière particulière Institution financière qui est, selon le cas :

(f) a life company or a foreign life company to which the *Insurance Companies Act* applies or a life insurance company regulated by a provincial Act;

a) une banque régie par la *Loi sur les banques* ou une banque étrangère autorisée, au sens de l'article 2 de cette loi, dans le cadre des activités que cette dernière exerce au Canada;

(g) a company to which the *Trust and Loan Companies Act* applies;

b) une coopérative de crédit, une caisse d'épargne et de crédit ou une caisse populaire régie par une loi provinciale;

(h) a trust company regulated by a provincial Act;

c) une association régie par la *Loi sur les associations coopératives de crédit*;

(i) a loan company regulated by a provincial Act;

d) une coopérative de crédit centrale, au sens de l'article 2 de la Loi sur les associations coopératives de crédit, ou une centrale de caisses de crédit ou une fédération de caisses de crédit ou de caisses populaires régie par une loi provinciale autre qu'une loi édictée par la législature du Québec;

(j) an entity authorized under provincial legislation to engage in the business of dealing in securities or any other financial instruments, or to provide portfolio management, investment advising, fund administration, or fund management, services;

e) une coopérative de services financiers régie par la *Loi sur les coopératives de services financiers*, L.R.Q., ch. C-67.3, ou la *Loi sur le Mouvement Desjardins*, L.Q. 2000, ch. 77;

(k) an entity that is represented or promoted to the public as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund or similar investment vehicle that is established to invest or trade in financial assets and that is managed by an entity referred to in paragraph (j);

f) une société d'assurance-vie ou une société d'assurance-vie étrangère régie par la *Loi sur les sociétés d'assurances* ou une société d'assurance-vie régie par une loi provinciale;

(l) an entity that is a clearing house or clearing agency; or

(m) a department or an agent of Her Majesty in right of Canada or of a province that is engaged in the business of accepting deposit liabilities. (*institution financière particulière*)

non-reporting Canadian financial institution means any Canadian financial institution or other entity resident in Canada that

(a) is described in any of paragraphs C, D and G to J of section III of Annex II to the agreement;

(b) makes a reasonable determination that it is described in any of paragraphs A, B, E and F of section III of Annex II to the agreement;

(c) qualifies as an exempt beneficial owner under relevant U.S. Treasury Regulations in effect on the date of signature of the agreement; or

g) une société régie par la *Loi sur les sociétés de fiducie et de prêt*;

h) une société de fiducie régie par une loi provinciale;

i) une société de prêt régie par une loi provinciale;

j) une entité autorisée en vertu de la législation provinciale à se livrer au commerce des valeurs mobilières ou d'autres instruments financiers ou à fournir des services de gestion de portefeuille, de conseils en placement, d'administration de fonds ou de gestion de fonds;

k) une entité qui est présentée au public comme étant un mécanisme de placement collectif, un fonds commun de placement, un fonds négocié en bourse, un fonds de capital-investissement, un fonds spéculatif, un fonds de capital-risque, un fonds de rachat d'entreprise par effet de levier ou un mécanisme de placement similaire qui est établi pour faire des investissements dans des actifs financiers, ou le commerce de tels actifs, et qui est géré par une entité visée à l'alinéa j);

l) une entité qui est une chambre ou une agence de compensation;

(d) makes a reasonable determination that it qualifies as a deemed-compliant FFI under relevant U.S. Treasury Regulations in effect on the date of signature of the agreement. (*institution financière canadienne non déclarante*)

m) un ministère ou un mandataire de Sa Majesté du chef du Canada ou d'une province qui se livre à l'acceptation de dépôts. (*listed financial institution*)

U.S. reportable account means a financial account that, under the agreement, is to be treated as a U.S. reportable account. (*compte déclarable américain*)

transmission électronique La transmission de documents par voie électronique selon les modalités établies par le ministre. (*electronic filing*)

Financial institution

(2) For the purposes of this Part, ***Canadian financial institution*** and ***reporting Canadian financial institution*** each have the meaning that would be assigned by the agreement, and the definition ***non-reporting Canadian financial institution*** in subsection (1) has the meaning that would be assigned by that subsection, if the definition ***Financial Institution*** in subparagraph 1(g) of Article 1 of the agreement were read as follows:

> g) The term ***Financial Institution*** means any Entity that is a Custodial Institution, a Depository Institution, an Investment Entity or a Specified Insurance Company, and that is a listed financial institution within the meaning of Part XVIII of the *Income Tax Act*.

Institution financière

(2) Pour l'application de la présente partie, les termes ***institution financière canadienne*** et ***institution financière canadienne déclarante*** ont le sens qui leur serait donné dans l'accord et le terme ***institution financière canadienne non déclarante***, au paragraphe (1), a le sens qui lui serait donné par ce paragraphe si la définition de ***institution financière***, à l'alinéa 1g) de l'article 1 de l'accord, avait le libellé suivant :

> g) Le terme ***institution financière*** désigne une entité — établissement de garde de valeurs, établissement de dépôt, entité d'investissement ou compagnie d'assurance particulière — qui est une institution financière particulière au sens de la partie XVIII de la *Loi de l'impôt sur le revenu*.

Financial account

(3) For the purposes of this Part, the agreement is to be read as if the definition ***Financial Account*** in subparagraph 1(s) of Article 1 of the agreement included the following subparagraph after subparagraph (1):

> (1.1) an account that is a client name account maintained by a person or entity that is authorized under provincial legislation to engage in the business of dealing in securities or any other financial instruments, or to provide portfolio management or investment advising services.

Compte financier

(3) Pour l'application de la présente partie, l'accord s'applique comme si le sous-alinéa ci-après figurait après le sous-alinéa (1) de la définition de ***compte financier***, à l'alinéa 1s) de l'article 1 de l'accord :

> (1.1) un compte qui est un compte de nom de client tenu par une personne ou une entité qui est autorisée en vertu de la législation provinciale à se livrer au commerce des valeurs mobilières ou d'autres instruments financiers ou à fournir des services de gestion de portefeuille ou de conseils en placement;

Identification number

(4) For the purposes of this Part, a reference in the agreement to "Canadian TIN" or "taxpayer identification number" is to be read as including a reference to Social Insurance Number.

Numéro d'identification

(4) Pour l'application de la présente partie, les mentions « NIF canadien » et « numéro d'identification fiscal » figurant dans l'accord valent également mention du numéro d'assurance sociale.

Term defined in agreement

(5) In this Part, a term has the meaning that is defined in, or assigned by, the agreement unless the term is defined in this Part.

Terminologie

(5) Pour l'application de la présente partie, les termes qui n'y sont pas définis s'entendent au sens de l'accord.

Amending instrument

(6) No person shall be liable for a failure to comply with a duty or obligation imposed by this Act that results from an amendment to the agreement unless at the date of the alleged failure,

Texte modificatif

(6) Nul n'encourt de responsabilité pour ne pas s'être conformé à une obligation imposée par la présente loi qui découle d'une modification apportée à l'accord, sauf si, à la date du prétendu manquement, selon le cas :

(a) the text of the instrument that effected the amendment had been published in the *Canada Gazette*; or

(b) reasonable steps had been taken to bring the purport of the amendment to the notice of those persons likely to be affected by it

a) le texte de la modification avait été publié dans la *Gazette du Canada*;

b) des mesures raisonnables avaient été prises pour que les intéressés soient informés de la teneur de la modification.

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.] 2014, c. 20, s. 101

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification voir les lois et règlements modificatifs appropriés.] 2014, ch. 20, art. 101

Designation of account

264 (1) Subject to subsection (2), a reporting Canadian financial institution may designate a financial account to not be a U.S. reportable account for a calendar year if the account is

(a) a preexisting individual account described in paragraph A of section II of Annex I to the agreement

(b) a new individual account described in paragraph A of section III of Annex I to the agreement;

(c) a preexisting entity account described in paragraph A of section IV of Annex I to the agreement; or

(d) a new entity account described in paragraph A of section V of Annex I to the agreement.

Désignation de comptes

264 (1) Sous réserve du paragraphe (2), les comptes financiers ci-après peuvent être désignés par une institution financière canadienne déclarante comme n'étant pas des comptes déclarables américains pour une année civile :

a) les comptes de particuliers préexistants visés à la sous-section A de la section II de l'annexe I de l'accord;

b) les nouveaux comptes de particuliers visés à la sous-section A de la section III de l'annexe I de l'accord;

c) les comptes d'entités préexistants visés à la sous-section A de la section IV de l'annexe I de l'accord;

d) les nouveaux comptes d'entités visés à la sous-section A de la section V de l'annexe I de l'accord.

U.S. reportable account

(2) A reporting Canadian financial institution may not designate a financial account for a calendar year unless the account is part of a clearly identifiable group of accounts all of which are designated for the year.

Applicable rules

(3) The rules in paragraph C of section VI of Annex I to the agreement apply in determining whether a financial account is described in any of paragraphs (1)(a) to (d).

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.] 2014, c. 20, s. 101

Identification obligation — financial accounts

265 (1) Every reporting Canadian financial institution shall establish, maintain and document the due diligence procedures set out in subsections (2) and (3).

Due diligence — general

(2) Every reporting Canadian financial institution shall have the following due diligence procedures:

(a) for preexisting individual accounts that are lower value accounts, other than accounts described in paragraph A of section II of Annex I to the agreement, the procedures described in paragraphs B and C of that section, subject to paragraph F of that section;

Compte déclarable américain

(2) Une institution financière canadienne déclarante ne peut désigner un compte financier pour une année civile que s'il fait partie d'un groupe de comptes clairement identifiable qui sont tous désignés pour l'année.

Règles applicables

(3) Les règles énoncées à la sous-section C de la section VI de l'annexe I de l'accord s'appliquent pour déterminer si un compte financier est visé à l'un des alinéas (1)a) à d).

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification voir les lois et règlements modificatifs appropriés.] 2014, ch. 20, art. 101

Obligation d'identification — comptes financiers

265 (1) Toute institution financière canadienne déclarante est tenue d'établir, de tenir à jour et de documenter les procédures de diligence raisonnable visées aux paragraphes (2) et (3).

Diligence raisonnable — généralités

(2) Toute institution financière canadienne déclarante est tenue de se doter des procédures de diligence raisonnable suivantes :

a) s'agissant de comptes de particuliers préexistants qui sont des comptes de faible valeur, à l'exception des comptes visés à la sous-section A de la section II de l'annexe I de l'accord, les procédures exposées aux sous-sections B et C de cette section, sous réserve de la sous-section F de cette section;

(b) for preexisting individual accounts that are high value accounts, other than accounts described in paragraph A of section II of Annex I to the agreement, the procedures described in paragraphs D and E of that section, subject to paragraph F of that section;

b) s'agissant de comptes de particuliers préexistants qui sont des comptes de valeur élevée, à l'exception des comptes visés à la sous-section A de la section II de l'annexe I de l'accord, les procédures exposées aux sous-sections D et E de cette section, sous réserve de la sous-section F de cette section;

(c) for new individual accounts, other than accounts described in paragraph A of section III of Annex I to the agreement, the procedures described in paragraph B of section III of Annex I to the agreement;

c) s'agissant de nouveaux comptes de particuliers, à l'exception des comptes visés à la sous-section A de la section III de l'annexe I de l'accord, les procédures exposées à la sous-section B de cette section;

(d) for preexisting entity accounts, other than accounts described in paragraph A of section IV of Annex I to the agreement, the procedures described in paragraphs D and E of that section; and

d) s'agissant de comptes d'entités préexistants, à l'exception des comptes visés à la sous-section A de la section IV de l'annexe I de l'accord, les procédures exposées aux sous-sections D et E de cette section;

(e) for new entity accounts, other than accounts described in paragraph A of section V of Annex I to the agreement, the procedures described in paragraphs B to E of that section.

e) s'agissant de nouveaux comptes d'entités, à l'exception des comptes visés à la sous-section A de la section V de l'annexe I de l'accord, les procédures exposées aux sous-sections B à E de cette section.

Due diligence — no designation

(3) If a reporting Canadian financial institution does not designate a financial account under subsection 264(1) for a calendar year, the institution shall have the following due diligence procedures with respect to the account:

Diligence raisonnable — comptes non désignés

(3) L'institution financière canadienne déclarante qui ne désigne pas un compte financier en application du paragraphe 264(1) pour une année civile est tenue de se doter des procédures de diligence raisonnable ci-après à l'égard du compte :

(a) if the account is a preexisting individual account described in paragraph A of section II of Annex I to the agreement, the procedures described in paragraphs B and C of that section, subject to paragraph F of that section;

a) s'agissant d'un compte de particulier préexistant visé à la sous-section A de la section II de l'annexe I de l'accord, les procédures exposées aux sous-sections B et C de cette section, sous réserve de la sous-section F de cette section;

(b) if the account is a new individual account described in paragraph A of section III of Annex I to the agreement, the procedures described in paragraph B of section III of Annex I to the agreement;

b) s'agissant d'un nouveau compte de particulier visé à la sous-section A de la section III de l'annexe I de l'accord, les procédures exposées à la sous-section B de cette section;

(c) if the account is a preexisting entity account described in paragraph A of section IV of Annex I to the agreement, the procedures described in paragraphs D and E of that section; and

c) s'agissant d'un compte d'entité préexistant visé à la sous-section A de la section IV de l'annexe I de l'accord, les procédures exposées aux sous-sections D et E de cette section;

(d) if the account is a new entity account described in paragraph A of section V of Annex I to the agreement, the procedures described in paragraphs B to E of that section.

d) s'agissant d'un nouveau compte d'entité visé à la sous-section A de la section V de l'annexe I de l'accord, les procédures exposées aux sous-sections B à E de cette section.

Rules and definitions

(4) For the purposes of subsections (2) and (3), subparagraphs B(1) to (3) of section I, and section VI, of Annex I to the agreement apply except that

Règles et définitions

(4) Les paragraphes 1 à 3 de la sous-section B de la section I de l'annexe I de l'accord ainsi que la section VI de cette annexe s'appliquent dans le cadre des paragraphes (2) et (3). Toutefois :

(a) in applying paragraph C of that section VI, an account balance that has a negative value is deemed to be nil; and

a) pour l'application de la sous-section C de cette section VI, le compte dont le solde est négatif est réputé avoir un solde nul;

(b) the definition NFFE in subparagraph B(2) of that section VI is to be read as follows:

b) la définition de EENF au paragraphe 2 de la sous-section B de cette section VI est réputée avoir le libellé suivant :

2 NFFE

An ***NFFE*** means any Non-U.S. Entity that is not an FFI as defined in relevant U.S. Treasury Regulations or is an Entity described in subparagraph B(4)(j) of this section, and also includes any Non-U.S. Entity

2 EENF

Le terme ***EENF*** (entité étrangère non financière) désigne toute entité non américaine qui n'est pas une IFE, au sens donné au terme *FFI* dans les *Treasury Regulations* des États-Unis, ou qui est une entité visée à l'alinéa 4j) de la sous-section B de la présente section. Il comprend toute entité non américaine qui, selon le cas :

a) that is resident in Canada and is not a listed financial institution within the meaning of Part XVIII of the *Income Tax Act*; or

a) réside au Canada et n'est pas une institution financière particulière au sens de la partie XVIII de la *Loi de l'impôt sur le revenu*;

b) that is resident in a Partner Jurisdiction other than Canada and is not a Financial Institution.

b) réside dans une juridiction partenaire autre que le Canada et n'est pas une institution financière.

U.S. indicia

(5) For the purposes of paragraphs (2)(a) and (b), subparagraph (2)(c)(ii), paragraph (3)(a) and subparagraph (3)(b)(ii), subparagraph B(3) of section II of Annex I to the agreement is to be read as follows:

Indices américains

(5) Pour l'application des alinéas (2)a) et b), du sous-alinéa (2)c)(ii), de l'alinéa (3)a) et du sous-alinéa (3)b)(ii), le paragraphe 3 de la sous-section B de la section II de l'annexe I de l'accord est réputé avoir le libellé suivant :

3 If any of the U.S indicia listed in subparagraph B(1) of this section are discovered in the electronic search, or if there is a change in circumstances that results in one or more U.S. indicia being associated with the account, then the Reporting Canadian Financial Institution must seek to obtain or review the information described in the portion of subparagraph B(4) of this section that is relevant in the circumstances and must treat the account as a U.S. Reportable Account unless one of the exceptions in subparagraph B(4) applies with respect to that account.

3 Si l'examen des données par voie électronique révèle la présence de l'un quelconque des indices américains énumérés au paragraphe 1 de la sous-section B de la présente section ou s'il se produit un changement de circonstances ayant pour conséquence qu'un ou plusieurs indices américains sont associés au compte, l'institution financière canadienne déclarante doit examiner ou tenter d'obtenir les renseignements visés dans la partie du paragraphe 4 de la sous-section B de la présente section qui s'applique dans les circonstances et doit considérer le compte comme un compte déclarable américain, à moins que l'une des exceptions figurant à ce paragraphe 4 s'applique à ce compte.

Financial institution

(6) For the purpose of applying the procedures referred to in paragraphs (2)(d) and (e) and (3)(c) and (d) to a financial account of an account holder that is resident in Canada, the definition *Financial Institution* in subparagraph 1(g) of Article 1 of the agreement is to be read as follows:

g) The term ***Financial Institution*** means any Entity that is a Custodial Institution, a Depository Institution, an Investment Entity or a Specified Insurance Company, and that is a listed financial institution within the meaning of Part XVIII of the *Income Tax Act*.

Institution financière

(6) Pour l'application des procédures mentionnées aux alinéas (2)d) et e) et (3)c) et d) au compte financier d'un titulaire de compte qui réside au Canada, la définition de *institution financière*, à l'alinéa 1g) de l'article 1 de l'accord, est réputée avoir le libellé suivant :

g) Le terme ***institution financière*** désigne une entité — établissement de garde de valeurs, établissement de dépôt, entité d'investissement ou compagnie d'assurance particulière — qui est une institution financière particulière au sens de la partie XVIII de la *Loi de l'impôt sur le revenu*.

Dealer accounts

(7) Subsection (8) applies to a reporting Canadian financial institution in respect of a client name account maintained by the institution if

(a) property recorded in the account is also recorded in a financial account (in this subsection and subsection (8) referred to as the "related account") maintained by a financial institution (in this subsection and subsection (8) referred to as the "dealer") that is authorized under provincial legislation to engage in the business of dealing in securities or any other financial instrument, or to provide portfolio management or investment advising services; and

(b) the dealer has advised the institution whether the related account is a U.S. reportable account.

However, subsection (8) does not apply if it can reasonably be concluded by the institution that the dealer has failed to comply with its obligations under this section.

Comptes de courtiers

(7) Le paragraphe (8) s'applique à une institution financière canadienne déclarante relativement à un compte de nom de client qu'elle tient si, à la fois :

a) les biens portés au compte sont également portés à un compte financier (appelé « compte connexe » au présent paragraphe et au paragraphe (8)) tenu par une institution financière (appelée « courtier » à ces mêmes paragraphes) qui est autorisée en vertu de la législation provinciale à se livrer au commerce des valeurs mobilières ou d'autres instruments financiers ou à fournir des services de gestion de portefeuille ou de conseils en placement;

b) le courtier a fait savoir à l'institution financière si le compte connexe est un compte déclarable américain.

Toutefois, le paragraphe (8) ne s'applique pas si l'institution financière peut raisonnablement conclure que le courtier ne s'est pas conformé aux obligations qui lui sont imposées en vertu du présent article.

Dealer accounts

(8) If this subsection applies to a reporting Canadian financial institution in respect of a client name account,

(a) subsections (1) to (4) do not apply to the institution in respect of the account; and

Comptes de courtiers

(8) En cas d'application du présent paragraphe à une institution financière canadienne déclarante relativement à un compte de nom de client :

a) les paragraphes (1) à (4) ne s'appliquent pas à l'institution financière relativement au compte;

(b) the institution shall rely on the determination of the dealer in respect of the related account in determining whether the account is a U.S. reportable account.

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.] 2014, c. 20, s. 101 2016, c. 12, s. 70

Reporting — U.S. reportable accounts

266 (1) Every reporting Canadian financial institution shall file with the Minister, before May 2 of each calendar year, an information return in prescribed form relating to each U.S. reportable account maintained by the institution at any time during the immediately preceding calendar year and after June 29, 2014.

Reporting — nonparticipating financial institutions

(2) Every reporting Canadian financial institution shall file with the Minister, before May 2 of each calendar year, an information return in prescribed form relating to payments, to a nonparticipating financial institution that is the holder of a financial account maintained by the reporting Canadian financial institution, during the immediately preceding calendar year if the immediately preceding year is 2015 or 2016.

Filing of return

(3) An information return required under subsection (1) or (2) shall be filed by way of electronic filing.

b) l'institution financière se fie à la détermination faite par le courtier relativement au compte connexe pour déterminer si ce compte est un compte déclarable américain.

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification voir les lois et règlements modificatifs appropriés.] 2014, ch. 20, art. 101 2016, ch. 12, art. 70

Déclaration — comptes déclarables américains

266 (1) Toute institution financière canadienne déclarante est tenue de présenter au ministre, avant le 2 mai de chaque année civile, une déclaration de renseignements sur le formulaire prescrit concernant chaque compte déclarable américain tenu par elle au cours de l'année civile précédente et après le 29 juin 2014.

Déclaration — institutions financières non participantes

(2) Toute institution financière canadienne déclarante est tenue de présenter au ministre, avant le 2 mai de chaque année civile, une déclaration de renseignements sur le formulaire prescrit concernant les paiements faits au cours de l'année civile précédente — 2015 ou 2016 — à une institution financière non participante qui est titulaire d'un compte financier tenu par l'institution financière canadienne déclarante.

Production

(3) La production des déclarations de renseignements visées aux paragraphes (1) et (2) se fait par transmission électronique.

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.] 2014, c. 20, s. 101

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification voir les lois et règlements modificatifs appropriés.] 2014, ch. 20, art. 101

Record keeping

267 (1) Every reporting Canadian financial institution shall keep, at the institution's place of business or at such other place as may be designated by the Minister, records that the institution obtains or creates for the purpose of complying with this Part, including self-certifications and records of documentary evidence.

Tenue de registres

267 (1) L'institution financière canadienne déclarante doit tenir, à son lieu d'affaires ou à tout autre lieu désigné par le ministre, les registres qu'elle obtient ou crée pour se conformer à la présente partie, notamment les autocertifications et les preuves documentaires.

Form of records

(2) Every reporting Canadian financial institution required by this Part to keep records that does so electronically shall retain them in an electronically readable format for the retention period referred to in subsection (3).

Forme des registres

(2) L'institution financière canadienne déclarante qui tient des registres, comme l'en oblige la présente partie, par voie électronique doit les conserver sous une forme électronique intelligible pendant la période mentionnée au paragraphe (3).

Retention of records

(3) Every reporting Canadian financial institution that is required to keep, obtain, or create records under this Part shall retain those records for a period of at least six years following

(a) in the case of a self-certification, the last day on which a related financial account is open; and

(b) in any other case, the end of the last calendar year in respect of which the record is relevant.

Période minimale de conservation

(3) L'institution financière canadienne déclarante qui tient, obtient ou crée des registres, comme l'en oblige la présente partie, doit les conserver pendant une période minimale de six ans suivant :

a) dans le cas d'une autocertification, le dernier jour où un compte financier connexe est ouvert;

b) dans les autres cas, la fin de la dernière année civile à laquelle le registre se rapporte.

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.] 2014, c. 20, s. 101

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification voir les lois et règlements modificatifs appropriés.] 2014, ch. 20, art. 101

Anti-avoidance

268 If a person enters into an arrangement or engages in a practice, the primary purpose of which can reasonably be considered to be to avoid an obligation under this Part, the person is subject to the obligation as if the person had not entered into the arrangement or engaged in the practice

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.] 2014, c. 20, s. 101

Anti-évitement

268 La personne qui conclut une entente ou qui se livre à une pratique dont il est raisonnable de considérer que l'objet principal consiste à éviter une obligation prévue par la présente partie est assujettie à l'obligation comme si elle n'avait pas conclu l'entente ou ne s'était pas livrée à la pratique.

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification voir les lois et règlements modificatifs appropriés.] 2014, ch. 20, art. 101

Deemed-compliant FFI

269 If a Canadian financial institution makes a reasonable determination that it is to be treated as a deemed-compliant FFI under Annex II to the agreement, this Part applies to the institution, with such modifications as the circumstances require, to the extent that the agreement imposes due diligence and reporting obligations on the institution.

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.] 2014, c. 20, s. 101

IFE réputée conforme

269 Si une institution financière canadienne démontre de façon adéquate qu'elle doit être traitée comme une IFE réputée conforme en vertu de l'annexe II de l'accord, la présente partie s'applique à elle, avec les modifications nécessaires, dans la mesure où l'accord lui impose des obligations de diligence raisonnable et de déclaration.

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification voir les lois et règlements modificatifs appropriés.] 2014, ch. 20, art. 101

FEDERAL COURT

SOLICITORS OF RECORD

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