Court File No. T-1510-14

IN THE FEDERAL COURT OF CANADA

BETWEEN:

STANLEY HOWARD TOMCHIN

PLAINTIFF

AND:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

CANADA BORDER SERVICES AGENCY OFFICERS LÉGER, HINDSON AND ROSALES, CHAN and OFFICERS JOHN DOE and

JANE DOE

DEFENDANTS

STATEMENT OF CLAIM

TO THE DEFENDANTS:

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

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

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

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

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

30 June 2014

ORIGINAL SIGNED BY
TAMSIN RAMSAY
REGISTRY OFFICER

Issued by: (*Registry Officer*)

Address of local office:

Courts Administration Service
P.O. Box 10065, 3rd Floor
701 West Georgia Street
Vancouver, B.C. V7Y 1B6

TO: The Minister of Citizenship and Immigration
Library Square
Suite 1600, 300 West Georgia Street
Vancouver, British Columbia V6B 6C9

The Attorney General of Canada
Att: Mr. Ed Burnet
900-840 Howe Street
Vancouver, British Columbia, V6Z 2S9

OFFICER Léger
Address unknown

OFFICER Hindson
Address unknown

OFFICER Rosales
Address unknown

OFFICER Chan
Address unknown

OFFICER John Doe
Address unknown

OFFICER Jane Doe
Address unknown

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the
day of JUN 30 2014 A.D. 20
Dated this day of JUN 30 2014 20

TAMSIN RAMSAY
REGISTRY OFFICER
AGENT DU GREFFE

I. OVERVIEW

1. The Plaintiff seeks damages for a breach of his s. 7 and s. 13 Charter rights to be free from self-incrimination, his s. 8 Charter right not to be subjected to an unreasonable search and seizure, and for permanent injunctive relief prohibiting the Defendants from sharing any information compelled from or seized from the Plaintiff with law enforcement agencies in Canada or abroad. On June 30, 2014, the Plaintiff also filed a related Notice of Constitutional Question.

2. The Plaintiff is a 68 year-old citizen of the United States and he has been a regular visitor to Canada for many years now, with strong communal ties to Vancouver, British Columbia. In October 2012, the Plaintiff was indicted in Queens County, New York State. That indictment alleged that the Plaintiff and others broke U.S. laws by offering on-line gaming services to U.S. bettors, and that the proceeds of these illicit gains were laundered. As of June 1, 2014, when the Plaintiff sought entry to Canada as a visitor, the Queens County District Attorney's Office had offered to resolve all charges against the Plaintiff by way of a conditional discharge following a plea to a single count which would be the equivalent of a summary conviction offence in Canada.

3. The Plaintiff's U.S. bail conditions allowed him to travel internationally, conditional on notice being given to the Queens County District Attorney's Office and the court. The Plaintiff gave the requisite notice that he would be travelling to Canada on June 1, 2014. On June 1, 2014, acting on "a tip", the Defendant's agents detained the Plaintiff when he sought entry to Canada at the Vancouver airport. Then, purportedly further to the aim of determining whether the Plaintiff was criminally inadmissible to Canada, but in truth for an ulterior purpose, the Defendants examined the Plaintiff numerous times over the course of the next 48 hours, asking him detailed questions about the outstanding U.S. criminal allegations and seizing and searching his personal property (and deprived him of counsel, despite his repeated requests for such). In doing so, the Defendants exercised their discretion to refuse to allow the Plaintiff to voluntarily withdraw his application to enter Canada as is authorized by Canadian law. Then, contrary to ss. 7, 8 and 13 of the Charter,

the Defendants shared the Plaintiff's compelled testimony and information acquired through their search of the Plaintiff with both the Queens County District Attorney's Office and the New York Police Department. The Plaintiff alleges that this information was sent to bolster the Queens County District Attorney's tenuous case against the Plaintiff and in an attempt to provide the District Attorney leverage in their ongoing plea negotiations with the Plaintiff.

II. RELIEF SOUGHT

4. The Plaintiff claims and is entitled to damages pursuant to s. 24 (1) of the *Charter of Rights and Freedoms* (the "*Charter*") for breach by the Defendants of his rights under ss. 7, 8 and 13 of the *Charter*.

5. The Plaintiff also seeks the following permanent injunctive relief:

   a. An Order prohibiting the Canada Border Services Agency (the "CBSA") from disclosing information compelled from the Plaintiff pursuant to the CBSA's compulsion powers under s. 16(1) of the *Immigration and Refugee Protection Act* (the "*IRPA*") with any law enforcement authority in Canada, or abroad, including the Queens County District Attorney in New York State and the New York Police Department (the "NYPD");

   b. An Order requiring the CBSA to disclose to the Plaintiff's counsel the extent to which their investigation of the Plaintiff was commenced as a result of information received from foreign law enforcement agencies, including the Queens County District Attorney and the NYPD, and what information compelled or evidence seized from the Plaintiff has already been shared with these law enforcement authorities;

   c. An Order prohibiting the CBSA from disclosing to any law enforcement authority in Canada, or abroad, including the Queens County District Attorney in New York State and the NYPD, any evidence or information acquired as a result of the CBSA's

search of the Plaintiff and his personal property, including but not limited to, his luggage, his iphone or his ipad;

d. Costs on a solicitor/own client basis.

III. STATEMENT OF FACTS

6. The Defendant Minister of Citizenship and Immigration is mandated with, *inter alia*, developing and implementing policies, programs and services that facilitate the arrival of people to, and their integration into, Canada in a way that maximizes their contribution to the country while protecting the health, safety and security of Canadians.

7. The Defendants Hindson, Léger, Rosales, Chan, John and Jane Doe are Canada Border Services Agency ("CBSA") officers or supervising officers who personally shared, or authorized to be shared, information they obtained from the Plaintiff's compelled testimony and/or pursuant to illegal searches of the Plaintiff's property (as detailed herein) with criminal law enforcement.

8. The Plaintiff is a citizen of the United States. He is 68 years old. In October 2012 he underwent a quintuple coronary bypass surgery. He also recently had skin cancer surgery. Over the course of approximately the last eight years, the Plaintiff has spent a considerable amount of his leisure time in Vancouver, B.C. He has friends in Vancouver and is a member of a Vancouver social and athletic club. The Plaintiff is an entrepreneur operating mainly in the area of licensed internet gaming and options, but also in real-estate development. He is also a generous philanthropist.

9. The Plaintiff was indicted in Queens County, New York State, in 2012 ("the Indictment"). The indictment alleges that the Plaintiff and others broke U.S. laws by offering on-line gaming services to U.S. bettors, and that the proceeds of these illicit gains were laundered.

10. After his arrest pursuant to the Indictment in October 2102, the Plaintiff was released from custody after a bond was posted on his behalf. Over time, given his complete compliance with his bail terms the Plaintiff's bail conditions were relaxed to allow him to travel

internationally, including to Israel, Spain, New Zealand and to Vancouver, where he has otherwise spent much of his leisure time, both before and after the Indictment. The Plaintiff has returned to Queens County and appeared in Court whenever directed by the Court to do so.

11. After vetting a voluminous amount of evidence disclosed a result of the Indictment, and after comprehensive discussions and negotiations with the Plaintiff's U.S. legal counsel, the Queens County District Attorney offered to resolve all allegations against the Plaintiff by way of a plea to a class B misdemeanor with a sentencing recommendation for a conditional discharge. It was explicitly contemplated that the plea would be based on a narrow set of facts that would constitute a straight summary conviction offence in Canada so as to ensure that the Plaintiff would remain admissible to Canada under the *IRPA*, following implementation of the agreed plea.

The Detention and Interrogation of the Plaintiff

12. On June 1, 2014, the Plaintiff arrived in Canada from the United States via the Vancouver International Airport ("YVR"). His travel to Canada on June 1, 2014, was in compliance with his U.S. bail conditions and, as per the Court's directives, the Plaintiff notified both the Court and the Queens District Attorney's Office of his plans. Upon arrival at YVR, the Plaintiff was detained and questioned by the Defendants who claimed to have reasonable grounds to suspect that the Plaintiff was criminally inadmissible to Canada. The Plaintiff was not permitted to voluntarily withdraw his application to enter Canada.

13. Upon detaining the Plaintiff, the Defendants proceeded to interrogate him for approximately two hours and refused to allow him to call his counsel after his initial call to counsel. At some point, the Plaintiff began to feel tightness in his chest and was taken to the Richmond General Hospital. After returning to the CBSA detention facility at YVR he again felt tightness in his chest and was again brought to Richmond General Hospital. Later on June 1, 2014, he was returned to the detention facility at YVR and then transported to the Vancouver city jail on Cordova Street where he was detained over night before being transported back to the detention facility at YVR on June 2, 2014.

14. On June 2, 2014, from approximately 2:00 p.m. to 4:30 p.m, the Plaintiff was again interrogated by the Defendants Hindson and Rosales, under the supervision of the Defendant Superintendent Léger. Counsel for the Plaintiff, Mr. Leggett, asked to be present during the interrogation but this request was denied by Superintendent Léger. Mr. Leggett also advised Superintendent Léger that it would be inappropriate and contrary to the Plaintiff's *Charter* rights for CBSA officers to ask the Plaintiff questions at the request of the Queens County District Attorney. Mr. Leggett reminded Superintendent Léger that the Plaintiff had a right to counsel and that this right was not extinguished by virtue of having met with counsel prior to his compelled interrogation earlier that day. Mr. Leggett reminded Superintendent Léger that at any stage of the interrogation the Plaintiff could exercise his right to counsel and that he could ask to speak with his counsel who was waiting on location at CBSA's YVR offices.

15. On June 3, 2014, counsel for the Plaintiff wrote a letter to the Defendants Hindson, Rosales and Léger, stating that the information provided to them by the Plaintiff under compulsion was statutorily authorized for immigration purposes only and could not be shared with law enforcement in Canada or abroad. In particular, the letter stated:

[...]

> It is our position that any information provided to CBSA by Mr. Tomchin was compelled and that it would be ultra vires the Immigration and Refugee Protection Act and the CBSA Act and contrary to Charter ss. 7, 11(c) and 13 for the CBSA to distribute any information provided to CBSA by Mr. Tomchin during CBSA's investigation to any law enforcement agency, wherever located, including of course to the Queens County District Attorney's office.
>
> We therefore ask that you:
>
> (1) undertake in writing by the end of the day today that the information will never be distributed to law enforcement anywhere, including in Canada and the United States, unless with Mr. Tomchin consent; and

(2) if you will not provide such an unqualified undertaking, we ask that, at minimum, you provide a time limited undertaking so as to permit counsel to apply to the Court for an injunction to restrain such distribution.

[...]

The Frustration of the IRB Release Order

16. On June 3, 2014, the Defendants sought the Plaintiff's continued detention at his 48-hour detention review hearing before Member Cook of the Immigration Division of the Immigration and Refugee Board. The CBSA hearings officer told Board Member Cook that it was the CBSA's position that the Plaintiff should be detained while CBSA sought out and reviewed "the evidence" underlying the allegations in the Indictment in an effort to determine whether the Plaintiff was criminally inadmissible to Canada. Member Cook rejected the Defendant's request for an order continuing detention, and ordered the Plaintiff released on the following conditions: that he post a $100,000 cash deposit, that he report to CBSA weekly, that he provide CBSA with his Vancouver address, and that he fully cooperate with CBSA's investigation into his admissibility.

17. The Plaintiff made arrangements to have the cash deposit available at approximately 5 p.m. on June 3, 2014, which would have been approximately an hour after Member Cook issued his release order. The Plaintiff was however told by the Defendant, CBSA hearings officer Chan, that the CBSA could not process his release at that time and that the Plaintiff would have to spend another night in jail.

18. Later that evening, at about 5:30 p.m., Ms. Tamara Duncan, who along with Mr. Leggett, had represented the Plaintiff at the 48-hour detention review, received a text message from Mr. Ed Burnet, counsel at the Department of Justice. Ms. Duncan returned his call at approximate 7:00 p.m. that evening and was told that the CBSA would be applying to judicially review Member Cook's order releasing the Plaintiff and that to that end the Department of Justice would be seeking an emergency stay of his release order at the Federal Court as soon as possible.

19. On June 4, 2014, the Plaintiff was transported from the North Fraser jail to the CBSA jail at 300 West Georgia. At about 8:00 a.m., Mr. Leggett attempted to deposit a bank draft in

the amount of $100,000 drawn from the Plaintiff's CIBC bank account and made out to the Receiver General for Canada with CBSA at 700-300 West Georgia Street. Officer Hindson of the CBSA refused to accept the deposit claiming that he suspected that the money might be illegally obtained. Initially, Officer Hindson told Mr. Leggett that this suspicion was based on the U.S. Indictment. Later, Mr. Leggett drew Officer Hindson's attention to the fact that he understood there to be no reference to Canada let alone a Canadian bank account in the U.S. Indictment. At this point, Officer Hindson said that the evidence was from another source and not the U.S. indictment. This source was purportedly a U.S. civil forfeiture claim. Officer Hindson did not disclose this claim, nor was this claim disclosed at the 48-hour detention review the previous day.

20. Given Officer Hindson's refusal to accept the Plaintiff's cash deposit, counsel for Plaintiff attempted to find an alternative source of funds. The Plaintiff's friend, long-time Vancouver resident, Leslie Sallay, agreed to post the deposit. Mr. Sallay then attempted to deposit the funds (a CIBC bank draft in the amount of $100,000 made out to the Receiver General for Canada) with CBSA. Again, CBSA Officer Hindson refused to accept the deposit. Officer Hindson claimed that CBSA needed to further investigate the provenance of the funds, despite the fact that Mr. Sallay is a successful real-estate developer in Vancouver and that there was absolutely no reason to believe that his funds were in any way tainted.

21. Indeed, on June 4, 2014, Mr. Sallay was interrogated by Officer Hindson in the presence of Mr. Leggett for approximately two hours. Officer Hindson asked Mr. Sallay to provide six months of bank statements, which Mr. Sallay provided immediately by calling his banker and asking that she fax the information directly to CBSA. Officer Hindson also asked for corporate records evidencing Mr. Sallay's directorship of the company from which the $100,000 bank draft to the Receiver General for Canada was drawn. Mr. Sallay immediately called his wife and asked her to send those documents to CBSA, which she did. Mr. Leggett's assistant also conducted an online corporate search for these documents, and forwarded them to CBSA. Officer Hindson nonetheless advised that he would have to conduct further inquiries into the funds being offered by Mr. Sallay before he could accept them.

22. As it was becoming abundantly clear that CBSA was attempting to frustrate Member Cook's order to release the Plaintiff until the hearing of the CBSA's interim stay application in this Honourable Court, at around 2:00 p.m. on the afternoon of June 4, 2014, counsel for the Plaintiff attempted to schedule an emergency interlocutory hearing before Member Cook to clarify the terms of his release order. Mr. Leggett was informed by the Registrar's office of the Immigration Division that a written application for an emergency hearing needed to made to the Registrar. At around 3:00 p.m. that same afternoon, Mr. Leggett hand-delivered to the Immigration Division and to CBSA hearings officer, Ms. Becky Chan, a letter seeking an emergency hearing. At around 3:30 p.m., Mr. Leggett was informed by the Registrar that the Minister needed sufficient notice to respond to the application and that the emergency hearing could not be held that day. As a result, the Plaintiff remained in jail the night of June 4, 2014.

23. The Defendant's emergency stay application was heard by this Honourable Court at 1:00 p.m. on June 5, 2014. After hearing submissions from both parties, Justice Mosley dismissed the Minister's stay application on the grounds that there were no serious issues to be tried, the Minister would not suffer irreparable harm if the stay was denied and that the balance of conveniences favoured the Plaintiff. Nonetheless, despite this Honourable Court's ruling that the IRB release order was justified and reasonable, the Plaintiff remained in jail the night of June 5, 2014, because the CBSA had refused to accept the cash deposits proffered by the Plaintiff and by Mr. Sallay.

24. On application by the Plaintiff, on June 6, 2014, a hearing which Member Cook characterized as a 7-day detention review, was held to clarify Member Cook's previous release order and to allow Mr. Sallay to act as a bondsperson for the Plaintiff. Prior to the commencement of the hearing, CBSA hearings officer Chan gave the Plaintiff's counsel a letter she had received from the Queens County District Attorney's office in which an assistant District Attorney from Queens County advised that the Plaintiff's court date at the Supreme Court of the State of New York had been brought forward from June 16, 2014 to June 10, 2014 and that the Plaintiff did not have to be present at that hearing. Hearings officer Chan also confirmed that the CBSA had received "the tip" about the Plaintiff two months earlier.

25. During the hearing before Member Cook on June 6, 2014, Mr. Sallay was examined by counsel for the Plaintiff and cross-examined by the hearings officer on behalf of the Minister. Member Cook then held that it was abundantly clear that Mr. Sallay was an appropriate bondsperson and that there was no evidence to suggest otherwise. Although he held that he did not have jurisdiction to review and make a finding with respect to the legitimacy of the source of the funds deposited by Mr. Sallay, and that the Minister had that jurisdiction (reviewable in the Federal Court), Member Cook tentatively set another hearing date for Monday, June 9, 2014 at 3:00 p.m. in the event that the Plaintiff had not been released. Member Cook said that at that time he would reconsider whether a cash deposit was even necessary in the circumstances. As a result, shortly after the conclusion of the June 6, 2014 hearing, the Minister confirmed that they were now satisfied that Mr. Sallay's funds were legitimate, accepted his cash deposit and released the Plaintiff from custody.

26. After the June 6, 2014 hearing, counsel for the Plaintiff, Mr. Leggett, and Mr. Sallay attended CBSA's 7th floor offices at 300 West Georgia Street in Vancouver. They were escorted to a room by CBSA Officer Hindson so that Mr. Sallay could be processed as a bondsman. While they were waiting for Officer Hindson's colleague to process Mr. Sallay, Officer Hindson and Mr. Leggett began discussing some administrative matters in relation to the Plaintiff's release that afternoon, such as taking possession of all his personal effects that had been seized by CBSA. At that time, Officer Hindson told Mr. Leggett that he had searched the Plaintiff's iphone and ipad, but that he stopped reviewing his emails once he noticed emails from one of the Plaintiff's lawyers.

27. At that point Mr. Leggett asked Officer Hindson if he had read the letter that his colleague David Martin had sent him and two of his colleagues on June 3, 2014 regarding sharing compelled evidence with law enforcement. He also told Officer Hindson that at the seven-day detention review hearing that had concluded about fifteen minutes prior, he had read into the record a portion of that letter. Mr. Leggett once again reiterated the Plaintiff's position that any evidence given to CBSA by the Plaintiff was compelled and that CBSA accordingly could not share such information with law enforcement here or abroad, including with the Queens County District Attorney.

28. In response, Officer Hindson said that he had not read the letter from Mr. Martin personally, but that he was aware of it. Officer Hindson advised Mr. Leggett that CBSA was not going to respond to the letter. Officer Hindson also told Mr. Leggett that while he acknowledged that the Plaintiff's statements to CBSA were compelled, that CBSA was nonetheless sharing information about the Plaintiff with the Queens County District Attorney. Officer Hindson told Mr. Leggett that it was the CBSA's position that it can share compelled statements with U.S. law enforcement and that the only issue that arose with respect to compelled testimony was a matter of evidentiary admissibility in U.S. criminal proceedings. Mr. Leggett told Mr. Hindson that this was not a constitutionally valid interpretation of the law.

29. On June 10, 2014 a hearing in the Plaintiff's U.S. matter was held in Queens County, New York (Indictment No. 2593-12) at which time the Queens County District Attorney's office acknowledged that it had received information about the Plaintiff from CBSA.

30. On June 11, 2014, counsel for the Plaintiff wrote the Defendant's counsel, the Department of Justice, to reiterate his position raised in his letter dated June 3, 2014, with respect to the extra-territorial disclosure of information compelled from the Plaintiff. On June 12, 2014, for the first time, the Department of Justice responded to these issues. Despite the evidence to the contrary, as detailed *infra.*, counsel for the Defendant took the position that all of the CBSA's actions were undertaken for valid Canadian immigration purposes, and for no other or improper purpose. The Defendant also took the position that there was no "absolute bar" on sharing compelled evidence with foreign criminal law enforcement agencies.

31. On June 19, 2014, the Plaintiff and his counsel met with a Minister's Delegate from CBSA who allowed the Plaintiff to voluntarily withdraw his application to enter Canada and thereby return to the U.S. without being referred to an admissibility hearing. On June 20, 2014, the Plaintiff departed Canada voluntarily for the U.S.

IV. LEGAL BASIS

A. The violations of the Plaintiff's right not to self-incriminate

(i) CBSA's Statutory Compulsion Powers

32. Pursuant to s. 16(1) and s. 18(1) of the *Immigration and Refugee Protection Act* ("IRPA") a foreign national making an application to enter Canada can be compelled to answer questions posed by CBSA officers aimed at determining whether they have a right to enter Canada or is or may become authorized to enter and remain in Canada:

> 16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.
>
> 18. (1) Every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may be authorized to enter and remain in Canada.

33. The following related provisions of the *IRPA* further anchor and contextualize the compulsion provisions found in subsections 16(1) and 18(1):

> s. 41. A person is inadmissible for failing to comply with this Act
>
> (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and
>
> [...]
>
> s. 127. No person shall knowingly
>
> (a) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
>
> [...]
>
> s. 128. A person who contravenes a provision of section 126 or 127 is guilty of an offence and liable

(a) on conviction on indictment, to a fine of not more than $100,000 or to imprisonment for a term of not more than five years, or to both; or

(b) on summary conviction, to a fine of not more than $50,000 or to imprisonment for a term of not more than two years, or to both.

34. The Plaintiff was compelled to answer questions posed to him by CBSA officers on June 1-2, 2014. The Plaintiff's counsel has requested a transcript of the interrogation from CBSA hearings officer, Ms. Chan, but has yet to receive a copy.

35. The CBSA has not kept the information compelled from the Plaintiff confidential and used it for only the purposes of administering the *IRPA*. To the contrary, the CBSA has disclosed evidence compelled from the Plaintiff to U.S. criminal law enforcement, namely the NYPD and the Queens County District Attorney's Office, the agencies currently prosecuting the Plaintiff.

(ii) The Right Against Self-Incrimination in Canada

36. In Canada, statutory powers of compulsion are premised on the guarantee of subsequent use and derivative use immunity, and on the availability of constitutional exemptions. Each of these protections is grounded in the right against self-incrimination, a right that is enshrined in sections 7, 11(c) and 13 of the *Charter of Rights and Freedoms.* See *S.(R.J.)* 1 S.C.R. 451 (subpoena powers in criminal proceedings), *Branch v. British Columbia Securities Commission* [1995] 2 S.C.R. 3 (examinations by securities regulators), *In the matter of an application under s. 83.28 of the Criminal Code (Re),* 2004 SCC 2 SCR 248, 2004 SCC 43 (judicial examinations in terrorism cases), *Phillips v. Nova Scotia* [1995] S.C.J. 36 (Public Inquires Act compulsion powers), *R. v. Jarvis,* [2002] 3 S.C.R. 757, 2002 SCC 73 (examinations by Revenue Canada).

37. Accordingly, in stark contrast to the governing law in the United States of America, where an individual can invoke the Fifth Amendment and refuse to testify when doing so might incriminate them, in Canada, individuals may be compelled to give evidence and are exposed to the risk of self-incrimination, but in return the state offers protection against the

subsequent use of this evidence in domestic criminal and quasi-criminal proceedings. This social contract, which makes use and derivative use immunity a condition precedent to compulsion, was perhaps best described by Justice Iacobucci in *R. v. S.(R.J.), supra* at 534, as follows:

> Thus, as soon as one accepts that the Canadian solution is to couple compellability with protection in the form of evidentiary immunity, one is left to conclude that Canada is willing to permit a unique balancing of individual and societal interests. As recognized in *Seaboyer, supra*, "[t]he principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns" (p. 603). I agree with the following statement by La Forest J. in *Thomson Newspapers, supra*, at p. 541:
>
> A right to prevent the subsequent use of compelled self-incriminating testimony protects the individual from being "conscripted against himself" without simultaneously denying an investigator's access to relevant information. It strikes a just and proper balance between the interests of the individual and the state.

38. In the immigration context, these principles have been applied in a case where compulsion in equivalent administrative proceedings was resisted on the basis that the information being sought was potentially incriminating in parallel domestic criminal proceedings. In a decision that pre-dated the *RJS* trilogy, the Federal Court of Appeal in *Seth v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 540 determined that the Applicant's *Charter* rights would not be violated by compulsion in immigration proceedings because he would be afforded use and derivative use immunity in the related domestic Canadian criminal proceedings. The legal question that arises in the case at bar involves the propriety of compulsion when that compulsion is in aid of or is potentially incriminating in a foreign criminal proceeding.

(iii) Compulsion for Ultra Vires Purposes is Strictly Prohibited

39. The Supreme Court of Canada has cautioned that statutory compulsion powers must not be used for *ultra vires* purposes and that constitutional exemptions from compulsion will be granted in such objectionable circumstances. And, as Justices Sopinka and Iaccobucci for the majority, noted in *Branch, supra.* at para 8, in determining whether the true purpose for

compulsion is motivated by *ultra vires* objectives, it is not enough for the compelling state agency to simply observe that their actions are authorized by law:

> In applying this test, the Court must first determine the predominant purpose for which the evidence is sought. To qualify as a valid public purpose, compelled testimony in a criminal prosecution or prosecution under a provincial statute must be for the purpose of obtaining evidence in furtherance of that prosecution. In *S. (R.J.),* Sopinka J. suggested some guidelines for determining whether this is the predominant purpose. In other proceedings, discerning the purpose is more complex. Where evidence is sought for the purpose of an inquiry, we must first look to the statute under which the inquiry is authorized. The fact that the purpose of inquiries under the statute may be for legitimate public purposes is not determinative. The terms of reference may reveal an inadmissible purpose notwithstanding that the statute did not so intend: see *Starr v. Houlden,* [1990] 1 S.C.R. 1366. Indeed, even if the terms of reference authorize an inquiry for a legitimate purpose in some circumstances, the object of compelling a particular witness may still be for the purpose of obtaining incriminating evidence.

40. In the case at bar, it is now clear that the predominant purpose of CBSA's investigation of the Plaintiff was to bolster the Queens County District Attorney's tenuous case against the Plaintiff. Were there genuine immigration concerns about whether the Plaintiff was inadmissible to Canada or whether his presence in Canada posed some threat to the safety of the Canadian public, CBSA officials could simply have permitted him to withdraw his application to enter Canada. To the contrary, in pursuit of an *ultra vires* purpose the CBSA Defendants questioned the Plaintiff at length about outstanding U.S. allegations and then shared this compelled information with U.S. law enforcement. It is not enough for CBSA to declare, *post facto,* that all measures were taken for valid immigration purposes. As the Supreme Court mandates in *Branch,* a fulsome analysis must be undertaken to determine whether the CBSA's real purpose was an *ultra vires* purpose.

41. The type of analysis mandated by *Branch, supra.,* is very much akin to the one that this Honourable Court has engaged in numerous times when determining the validity of *IRPA* deportation where what has come to be described as "disguised extradition" is alleged. Historically, the common law abuse of process doctrine has been invoked to ensure that persons deported to face criminal charges in a foreign state are dealt with under the *Extradition Act* and that they benefit from the protections afforded to them under that act,

and to ensure that they are not simply summarily deported on the basis of an informal request by a foreign state. Accordingly, proceedings will be stayed as an abuse of process where there has been an ulterior motive to utilize deportation proceedings in lieu of extradition proceedings on the part of the foreign state or a deliberate flouting of domestic or international law. The English law prevailing in cases in which it is alleged that deportation proceedings are being used as a means of achieving extradition purposes was best summarized in *Regina v. Governor of Brixton Prison, Ex parte Soblen* [1962] 3 All E.R. 641 at 661 (C.A.), where Lord Denning M.R. instructed that a Court must go behind the face of what the Government claims is the true purpose of its actions:

> How are we to decide between these two principles? It seems to me that it depends on the purpose with which the act is done. If it was for an authorized purpose, it was lawful. If it was done professedly for an authorized purpose, but in fact for a different purpose with an ulterior object, then it was unlawful. If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America, because they had asked for him, then it would be unlawful; but if his purpose was to deport him to his own country because he considered his presence here to be not conducive to the public good, then his action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of power or not? The courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or no. [Emphasis added.]

42. In Canada, the jurisprudence has developed along similar lines. In *Moore v. Canada (Minister of Manpower and Immigration)* (1968), D.L.R. (2d) 273, the Supreme Court of Canada faced the issue of deportation as disguised extradition. While the Court found that Moore's deportation was motivated by valid immigration concerns, in so doing, however, Chief Justice Cartwright was careful to note, at page 844:

> I wish to guard myself against being supposed to say that if the facts were found to be as suggested by Mr. Chernos [counsel for the appellant] the Courts would be powerless to intervene and to declare that an act having the appearance of being done under the authority of the *Immigration Act* and in accordance with its provisions is *ultra vires* because in reality done for a purpose other than that specified by the Statute.

43. Similarly, in *Halm v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 547 at para. 21 (T.D.), Mr. Justice Rothstein (as he then was) quoted from *Shepherd v. Canada (Minister of Employment and Immigration)* (1989), 52 C.C.C. (3d) 386 at 396-397 (C.A.), which affirms that in cases where an *ultra vires* purpose is alleged (disguised extradition in that case) "it is open to the courts to inquire whether the purpose of the government was lawful or otherwise." See also: *Kindler v. Minister of Employment and Immigration et al.* (1985), 47 C.R. (3d) 225 at 234 (Fed.Ct.) More recently, in *U.S. v. Tollman* (2006), 212 C.C.C. (3d) 511 (Ont.S.C.J.) and in *Poland v. Bartoszewicz* 2012 ONSC 250 at para.19, Canadian courts have confirmed that "where the executive uses a proceeding, e.g. deportation, for a purpose for which it is not intended, *e.g.* extradition, this conduct is a violation of the rule of law and constitutes an abuse of process." In both *Tollman* [2006] O.J. No. 5588 at paras.20-26, and *Bartoszewitz,* (Disclosure Ruling, December 16, 2010, unreported), the Superior Courts conducting extradition proceedings tainted by a prior abuse of the *IRPA* assumed their inherent and *Charter* s. 7 jurisdiction to order the CBSA to disclose documents necessary to assess the CBSA's true purpose. Ongoing cases in both this Court, *Tursunbayev v. Minister of Public Safety and Emergency Preparedness* 2012 FC 532, and in the B.C. Supreme Court, *U.S. v. Rogan* [2014] B.C.J. No. 1130, and disclosure orders by these Courts, offer further illustrations of these principles.

44. It is thus clear that Canadian courts have historically embraced and have robustly exercised their power to protect their processes from abuse of the broad powers given immigration officials. Actions taken pursuant to the *IRPA*, if they were done professedly for an authorized purpose, but in fact for a different purpose with an ulterior object, are unlawful. The unlawful exercise of power by Canadian immigration authorities, at the behest of, or to assist, a foreign state, is a *prima facie* abuse of process. Echoing the language used by the Ontario Court of Appeal in *Bartoszewicz* where the executive uses a proceeding, e.g. CBSA's powers of compulsion under the *IRPA*, for a purpose which it is not intended, e.g. assisting U.S. prosecutors, this conduct is a violation of the rule of law and constitutes both an abuse of process and a violation of the *Charter*.

(iv) The Problem of the Extra-territorial dissemination of Compelled Evidence

45. As Justice Cory explained in *Phillips v. Nova Scotia, supra.* at paragraph 86, even if compulsion proceedings are undertaken solely for valid administrative purposes, and not for impermissible *ultra vires* purposes, a constitutional exemption from compulsion may be granted in circumstances where the effects of the compulsion are so prejudicial as to be prohibitive:

> The second stage of the analysis requires the court to balance the rights of the individual accused against the interests of the state in receiving the compelled testimony in a way which ensures that all the requirements of the Charter are upheld. The result of the balancing will depend upon the circumstances of each case. The reasons in *Branch*, at p. 16, provided some guidelines to this end:
>
> - If it is shown that the only prejudice is the possible subsequent derivative use of the testimony then the compulsion to testify will occasion no prejudice for that witness. The witness will be protected against such use.
> - Further, if the witness can show any other significant prejudice that may arise from the testimony such that his right to a fair trial will be jeopardized, then the witness should not be compellable.

46. The Plaintiff alleges that in the case at bar the CBSA was acting for an *ultra vires* purposes when they interrogated him about the U.S. Indictment and then shared his evidence with U.S. law enforcement. Alternatively, however, the Plaintiff alleges that even if the Defendant was able to marshal some evidence to prove that they were motivated by valid immigration purposes when exercising their compulsion powers, they nonetheless violated his *Charter* right to be free from self-incrimination when they shared this compelled evidence with U.S. law enforcement. The extra-territorial dissemination of this compelled evidence to the Queens County District Attorneys who are currently prosecuting the Plaintiff leaves him in a position where he has been compelled without the guarantee of use and derivative use immunity and has thus been compelled in violation of the social contract struck by the Supreme Court of Canada in *S.(R.J.), supra.* This is precisely the type of "significant prejudice" that the social contract was designed to guard against.

47. The dissemination of compelled evidence by Canadian officials to a foreign state where it might subsequently be used against the person compelled in a criminal prosecution, clearly

engages the *Charter.* In *Burns and Rafay v. United States* [2001] 1 S.C.R. 283 at para. 76, *Suresh* [2002] S.C.J. 3, at para. 3 and *Khadr* [2010] S.C.J. 3 at paras. 19-21, the Supreme Court of Canada has held that the Charter is clearly engaged when there is a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected, even where that effect is one that is primarily imposed by a foreign state. Thus it is clear that CBSA's compulsion of the Plaintiff without assurances that the information compelled will not be shared with U.S. criminal law enforcement attracts Charter scrutiny.

(v) The Analogous Principles Developed in the Securities Act Compulsion Context Regarding Extra-Territorial Dissemination

48. While the *Branch, Phillips and R.J.S.* trilogy did not deal with the extra-territorial dissemination of compelled information, the issue has been addressed both legislatively and by the courts in the context of compulsion by securities regulators. In this respect, following *Branch, supra,* Ontario, Nova Scotia, and Newfoundland have amended their respective Securities Acts to ensure that evidence compelled during Commission investigations will not be improperly disseminated to foreign authorities for use in criminal prosecutions. Accordingly, in those provinces, <u>all</u> information gathered during a securities investigation is held in strict confidence. If securities regulators wish to disclose information compelled during the course of an investigation to a third-party, a hearing is held to determine whether such dissemination would be in the public interest. The compelled party is generally given notice and standing to object, and the entire process is subject to judicial review. Most importantly however, compelled testimony can <u>never</u> be disclosed to criminal law enforcement agencies, domestic <u>or foreign</u>, without the express consent of the compelled party. See for example, section 17(7)(b) of the Ontario *Securities Act,* R.S.O. 1990, c.S.5.

49. In *A. v. Ontario Securities Commission* [2006] O.J. No. 1768 (S.C.J.), counsel for the Ontario Securities Commission readily acknowledged that the *Charter of Rights and Freedoms* applies when an examination order is issued and that there was a risk that the compelled individual's right to be free from self-incrimination would be breached if his testimony was subsequently disclosed to U.S. prosecutors, but argued that the *Ontario*

Securities Act contained appropriate safeguards. Justice Campbell agreed, noting that sections 16-18 of the *Ontario Securities Act* provided protective mechanisms that would ensure that compelled evidence was not shared with the SEC without a full hearing on notice to Mr. A pursuant to section 17 of the Act, at which time the effect of the dissemination of this compelled evidence could be fully canvassed.

50. Similarly, in *Re Black* (2008), 31 O.S.C.B 10397 (Sec.Com.), the Ontario Securities Commission was faced with an application by persons charged criminally in the U.S. who sought the disclosure of the testimony of witnesses examined in a related OSC investigation. The Applicants contended that they needed this evidence in order to make full answer and defence in their U.S. criminal trial. Relying on the submissions of Commission counsel, the Commission recognized the difference between the regime for protection against self-incrimination in Canada and the U.S., and also recognized that there was a risk that if it made the Order requested the compelled evidence could "fall into the hands of the U.S. Attorney and could potentially be used to prosecute [the compelled parties]." The Commission held, at paragraphs 220-221, that the presumption was in favoring confidentiality and that disclosure orders under subsection 17 (1) of the Act will be appropriate only in the "most unusual circumstances" where the public interest in disclosure clearly outweighs the confidentiality protections provided in the Act. In *Re Black, supra.,* the Commission also noted that any section 17(1) order made by the Commission would not have any extra-territorial effect and would not restrain U.S. prosecutors from using this evidence against the compelled party, and as such that the disclosure of compelled evidence "would be appropriate where the Commission or an Ontario court could exercise control over the use and derivative use in order to ensure that the witnesses' rights against self-incrimination would be protected."

(vi) This Honourable Court's Assessment of this particular Problem to Date

51. The issue of the use of the product of compulsion in immigration proceedings, has never been fully litigated but it has been raised before this Honourable Court. In *Khalife v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 1542, Justice Kelen found it unnecessary to determine whether the compulsion of the applicant in

circumstances where his testimony could be shared with foreign criminal law enforcement agencies was a *Charter* violation because the issue was premature in that case.

52. The compulsion provisions of the *IRPA* can only be constitutionally valid if such compelled testimony is combined with use and derivative use immunity. It would be an unconstitutional application of the *IRPA* to allow CBSA to share information compelled from the Plaintiff with criminal law enforcement in Canada or abroad where it might be used against him in proceedings where his liberty interests are at stake. This is not a speculative proposition in this case given that CBSA has compelled evidence from the Plaintiff that pertains to the allegations in the Indictment and then shared that compelled evidence with the NYPD and the Queens County District Attorney responsible for prosecuting the Indictment.

53. CBSA has shared the Plaintiff's compelled testimony with the NYPD and the Queens County District Attorney in violation of ss. 7 and 13 of the Charter, and has assisted Queens County District Attorney to violate the Applicant's U.S. Constitutional rights under the Fifth Amendment (protection against self-incrimination), the Sixth Amendment (right to counsel) and the Fourth Amendment (unreasonable search and seizure) for the explicit purpose of building a case against Mr. Tomchin on the eve of his trial. This type of conduct is exactly what the *Charter* and the principles of use and derivative use immunity were designed to prohibit.

B. The violation of the right to be free from unreasonable search and seizure

54. Charter s. 8 protects the Plaintiff against unreasonable search and seizure. The purpose of Charter s.8 is to prevent unjustified searches. This can only be accomplished by a requirement of prior authorization. Prior authorization, where feasible, is a precondition for a valid search and seizure. As such, to be reasonable under *Charter* s.8, a search must be:

i. authorized by law,
ii. the law must be reasonable, and
iii. the search must be conducted in a reasonable manner.
Hunter et al. v. Southam Inc. [1984] 2 S.C.R. 145

55. To be "authorized by law" the search or seizure must be:

- Be authorized by a specific statutory or common law rule;
- Be carried out in accordance with the procedural and substantive requirements of the law, and
- Not exceed its scope as to area and objects of search under the law.

R. v. Caslake, [1998] 1 S.C.R. 51 para. 10

56. As the British Columbia Court of Appeal held in *R. v. Nagle* 2012 BCCA 373, at para. 81, the border is not a *Charter*-free zone. The Defendant's agents do not have unlimited powers of search and seizure, and the CBSA's enforcement powers as prescribed by the *IRPA* and the *Customs Act* can only be exercised in furtherance of the lawful discharge of the CBSA's statutory mandate. In the case at bar, the CBSA was clearly acting *ultra vires* this mandate in conducting searches for the purpose of assisting U.S. law enforcement. Accordingly, the search of the Plaintiff's luggage, his phone and computer were not authorized by law and the search was not conducted in a reasonable matter having due regard to the circumstances of this case.

R. v. Nagle 2012 BCCA 373, at para. 81

C. Charter Damages

57. Charter s. 24(1) includes the remedy of constitutional damages for breach of Charter rights. Such a remedy appropriate and just in the circumstances of this case as 1) the Plaintiff's Charter rights have been breached (notwithstanding that the Defendants were put on notice that sharing information with law enforcement would be violative of the Charter) 2) compensation would vindicate those rights and 3) deter future breaches.

Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28

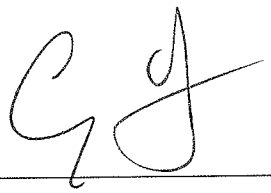
D. Costs

58. As the Defendants have acted contrary to the *Charter* and for *ultra vires* purposes, even in the face of specific warning and notice, solicitor and own client costs should be awarded.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

The Plaintiff proposes that this action be tried at Vancouver, British Columbia.

Dated: June 30, 2014



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